IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 27 OF 2010

(From original conviction and sentence in Criminal Case No. 27 of 2009 of the Senior Principal Magistrate's Court at Naivasha – P. M. Mulwa, PM)

SOLOMON MUIRURI KUNGU…….....……APPELLANT

VERSUS

REPUBLIC…….....……...RESPONDENT

JUDGMENT

Solomon Muiruri Kungu, the Appellant herein, was charged with the offence of defilement contrary to **Section 8(1) (4) of the Sexual Offences Act, No. 3 of 2006 (SOA)**. It was alleged that on 3/1/2009 at S[...] village, in Nyandarua District, he defiled S.N.M., a girl aged 13 years old. After a full trial, the court found him guilty of an offence of indecent act on a child contrary to **Section 11(1) of the Sexual Offences Act**. He was convicted of that offence and sentenced to 10 years imprisonment.

Being aggrieved by both the conviction and sentence, he filed this appeal based on grounds in the memorandum of appeal and further grounds found in his submissions. They are as follows;

(1) The Magistrate erred in convicting him on an alternative offence which was not supported by any evidence.

(2) The prosecution failed to prove its case beyond any reasonable doubt;

(3) That his defence was not considered.

(4) That the court failed to conduct a proper voire dire inquiry.

(5) That the medical report was not considered;

(6) That the sentence is excessive and harsh

It is the Appellant's case that whereas the complainant **(PW1)** alleged that he was involved in a sexual activity with her, the doctor who examined her found that her private parts were intact and not interfered with and there was no evidence of sexual activity; that the prosecution failed to explain the delay in taking the complainant to hospital; that the Magistrate failed to comply with **Section 19(1) of the Oaths and Statutory Declarations Act** by conducting a *voire dire* on the child, to satisfy itself that the child was intelligent enough and understood the meaning of oath; that his defence was not considered at all and that the sentence is harsh.

Mr. Omwega, counsel appearing for the State opposed the appeal. He submitted that PW1 a minor, testified on oath and her evidence was supported by that of PW2, who found PW1 and the appellant in the bush. The court invoked **Section 186 of Sexual Offences Act** based on the evidence on record.

As respects complying with Section 19 of the Oaths and Statutory Declarations Act, counsel submitted that the complainant was not a child of tender age to be subjected to the inquiry.

Briefly stated, the facts of this case are that on 3rd January, 2009 the complainant, PW1 , in company of PW2 and PW6 went to fetch water. The appellant whom they knew as a neighbour told the complainant that he had a message for her from her aunt and she went where he was. According to PW1, the appellant took the complainant to the bush, removed her inner pants and told her he wanted to make her his wife, made her lie down, removed his penis and inserted it in her vagina and she felt a lot of pain. The two girls she had been with at the river, PW2 and PW6 went back to look for PW1 and found her in the bush where they saw they had seen the appellant. They went home and informed PW5 about what had happened and she informed the complainant's mother PW4 on phone and took the complainant to hospital. They also reported at the police station.

Dr. Margaret Wainaina (PW3), produced the P3 form which had been filled by Dr. Watiti on 6th January, 2009. The complainant's age was assessed as 13 years old, her labia majora and minora were normal, the hymen was intact and no penetration was found. There was some discharge on the labia majora and minora. The same doctor also examined the Appellant and found no injuries on her. The complainant's mother, PW4 was not at home when the incident occurred.

The appellant made his defence on oath. He said that he had slept on 3/1/2009 and was woken up at about 2.00 p.m. when it was alleged he had defiled PW1. He denied having been arrested at 5.00 p.m. when he was alleged to have committed the offence. In cross examination, he claimed to have been at Tulaga with his driver and conductor at the time of the incident. He also said that he knew the complainant, PW2 and 6 and that he had denied PW1 from fetching water from their tap.

It is common ground that the appellant was known to PW1, 2 and 6 as a neighbour. They were not strangers to each other.

PW1 was very clear in her evidence that the appellant claimed to have been going to give her a message from her aunt and that is why she went where he was. PW2 and 6 corroborated the complainant's evidence that the appellant went off with the complainant. Both PW2 and 6 later found the complainant in the bush where the appellant had been and she immediately informed them what had been done to her. Although the doctor found no evidence of sexual activity on the complainant, she noted a discharge on her labia majora and minora.

PW5 who received the report from the complainant, PW2 and 6, took the complainant to the doctor at Njabini. PW5 said that the doctor at Njambini noted that the complainant had male sperms. In the treatment card from Njambini Health Centre, **(Exh.1(b)**, it was noted that complainant had a filthy discharge on the labia majora. For the offence of defilement to be seen committed, there had to be act of penetration, which may be partial or complete insertion of the genital organ of a person into the genital organ of another person. From the evidence on record, the evidence did not support an offence of defilement. However, from PW1's evidence, the applicant's genitals came into contact with her genitalia and that is confirmed by the presence of what was referred to as the filthy discharge in the complainant's vagina. There was ample evidence to prove an offence of an indecent act on the complainant and the trial magistrate arrived at the correct finding that the appellant committed an indecent act on the complainant. Section 186 of the Criminal Procedure Act was properly invoked.

The appellant alleged that his defence was not considered. It was his defence that he did not commit the offence and said that on 3rd January, 2009 at about 6.00 p.m. he was at Tulaga with his driver and conductor. PW1 , 2 and 6 placed the appellant at the scene of crime, they were neighbours and he agreed that they had no grudge between them before. He however, recalled having denied the girls from fetching water from their tap but PW2 denied that the appellant has a water tap. The trial court observed, that

PW1, 2 and 6 had been categorical in their evidence, they knew the appellant since they were neighbours. The court went further to warn itself that the witnesses were children, but the court was satisfied that they told the truth having had occasion to see them testify. I find that the court properly warned and directed itself and this court has no reason to interfere with those findings of the trial court, which had the opportunity to see the demeanor of the witness.

As regards the allegation made by the appellant that the Magistrate did not conduct a *voire dire* examination on PW1, 2 and 6, that was not necessary because that only applies to children of tender age. Section 19 of the Oaths and Statutory Declarations Act allows the court to receive evidence of a child of tender years even if not given on oath if the court is satisfied that the child possesses sufficient intelligence to justify the reception of that evidence. PW1 is a child of 13 years of age, PW2 is 14 years old, PW6's age was not disclosed but she claimed to be a farmer which means she is mature in age. They did not require the *voire dire* examination.

Having re-evaluated and analysed the evidence on record, I find that the trial court arrived at the correct decision and I find no good grounds adduced to interfere with the conviction. Likewise, this court cannot interfere with the sentence because the appellant was given the minimum sentence under **Section 11(1) of the Sexual Offence Act**. In the result, I find that the appeal lacks merit and is hereby dismissed.

DATED and DELIVERED this 10th day of June, 2011.

R. P. V. WENDOH
JUDGE

PRESENT:
In person - Appellant
Mr. Omutelema for Respondent
Kennedy – Court Clerk