REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL NO. 31 of 2009

DAVID NJOROGE WAINAINA…….. APPELLANT

-VERSUS-

REPUBLIC……..RESPONDENT

JUDGMENT

(From original convictions and sentence by Senior Resident Magistrate's court at Kilgoris criminal case no. 779 of 2007

The appellant, **David Njoroge Wainania** was charged before the Senior Resident magistrate's court at Kilgoris with the offence of Indecent Act with a child contrary to section 11(1) of the Sexual Offences Act. It was alleged that on 3rd December, 2007 at about 8.p.m in Kilgoris Township within Transmara District of Rift valley province, he unlawfully and indecently assaulted **E.J**, a boy under the age of 18 years by touching his private parts namely the anus. He pleaded not guilty to the charge.

Briefly stated the prosecution case was that on the material day, the appellant found the complainant (PW1) at home lighting fire outside the house at about 8 p.m. The appellant then asked him to accompany him to a place they usually met in a bush next to the river. Once they got to the place, the appellant asked the complainant to remove his long trouser and when he resisted he promised to buy him a **"Ndazi".** He then undressed and the appellant proceeded to sodomise him whilst on the ground. The complainant testified that, it was not the first time the appellant had sodomised him. He had done so on three previous occasions in the cementry, slaughter house and in the bush near their home. Whilst in the act , the complainant's mother (PW2) walked on to them and she was shocked . The appellant on seeing the complainant's mother disappeared. The mother took the complainant to Kilgoris police station and reported the incident. The complainant and his mother knew the appellant very well as he was neighbour within Kilgoris Township. As the complainant was taken to hospital for treatment, two police officers accompanied the complainant's mother to go and arrest the appellant. They found the appellant sleeping in his house and he was arrested and taken to the police station. The complainant was examined by **Dr. Philip Masaulo** medical superintendent at Transmara District hospital. His examination revealed no physical injuries in the genitalia of the anus. There was no presence of discharge or blood stains. He formed the opinion that there was no conclusive medical evidence of the alleged offence. It was therefore a case which was inconclusive in medical terms.

Despite the foregoing, the appellant was nonetheless charged. In his unsworn statement of defence, the appellant stated that he did not commit the offence charged. The charge was a frame up due to differences between himself and the complainants' mother. The appellant called his father as a witness. He merely

corroborated what the appellant had said in his defence.

Having evaluated and analyzed the evidence for both the prosecution as well as the defence, the learned magistrate was persuaded that the prosecution had proved its case against the appellant. She accordingly convicted him and sentenced him to ten (10) years imprisonment.

Aggrieved by the conviction and sentence aforesaid, the appellant lodged the instant appeal. He faulted the learned magistrate on the grounds that, the prosecution case, against him was not proved beyond reasonable doubt, the trial magistrate overly relied and placed undue importance to the prosecution case, his defence was not adequately considered and sentence imposed was overly harsh and excessive in the circumstances.

At the hearing of the appeal before me on 24th November, 2010, the appellant elected to canvass it by way of written submissions. I have carefully read and considered them.

On his part, **Mr. Gitonga,** learned state counsel in opposing the appeal submitted that there was sufficient evidence form PW1 and PW2 to connect the appellant with the crime. Infact PW2 found the appellant lying on the back of the complainant. The contradictions alluded to by the appellant did not go to the root of the complaint and the credible evidence of prosecution witnesses which was direct. Ten years imprisonment was the minimum sentence provided for by the law.

This superior court being the first appellate court has a duty to revisit the entire proceedings in the trial court afresh, analyse it, evaluate it and come to its own conclusion, of course always bearing in mind that it did not have the advantage of hearing the witnesses or seeing their demeanor and therefore giving allowance for the same. See **Okeno.v. Republic (1972)E.A.32.**

In this case only three witnesses testified for the prosecution namely, the complainant, the complainant's mother and the medical Doctor. In view of what came out in the testimony of the complainant under cross-examination and the inconclusive nature of the medical evidence, there was need for additional independent and corroborative evidence. Such evidence would have been procured through the investigating officer as well as those police officers who took the complainant to hospital and those who participated in the arrest of the appellant. In the absence of such evidence there was little left for the learned magistrate to go by in order to find a conviction.

The crime was allegedly committed at night, 8 p.m to be precise. According to the complainant ***"…. I saw the accused person very well when he called me as I lit the fire. He is known to me as Njoroge Wainaina and he is a neighobur at K.N, when he fucked me he removed his trouser unto the thighs and he was wearing a pant inside. He then told me to lie down as he moved his panty. I never saw his pennies(sic).*** However under cross-examination by the appellant he categorically statedthat ***"….my mother told me to say to recall on 3rd December, 2007 the person David Wainaina told me to go to the nearby bush that I should say you took me next to the bush and told me to remove clothes and that you fucked me and you found us . All I have said is what my mother told me to come and say. Other things she said to me are that if you ask me why I never told anyone I should say you always bought me a soda and mandazi. My mother also told me to say that your parents have been telling me to forego the case to be given Kshs. 500/- but that I should not because you allegedly hurt me. All I have said is what my mother told me to say……."*** Clearly this is a witness who had been coached to say what he said. His evidence should have been disregarded totally.

The complainant stated that thereafter he went to hospital and was treated that very night which was on 3rd December, 2007. He was examined and found not to have been infected. He then went home. While PW3 the medical superintendent at Transmara district hospital stated that on 13th December, 2007 he examined a boy aged about 12 years, he was sent to hospital under escort of one Agnes. The allegation was that the boy was sodomised by a person known to him on 23rd December, 2007. He further stated that there were no physical injuries noted on the genital or the anus, there was no presence of either discharge nor blood stains and concluded that there was no conclusive medical evidence of the alleged

offence. PW2 confirmed the complainant's evidence that they went to the hospital on the material day. Given the contradictory evidence on this issue, it is obvious that someone somewhere is not being candid with the court. Considering the defence advanced by the appellant, this discrepancy is material.

PW2 also stated that the appellant was in union with the complainant from the back. The appellant had removed his penis and was fucking the complainant from the back. She also told the court that she saw the appellant well yet it was at 8.00 pm and she was 10 metres away. At 8.00 p.m there must have been darkness yet the witness did not tell the court what enabled her to see them. In other words what was the source of light she used to see the appellant and his penis at that distance and considering also it was in a bush.

Further it is apparent that the evidence is at variance with the charge sheet. Whereas in the charge sheet the appellant is charged with indecent Act and the indecent act complained of is that the appellant touched the complainant's private parts namely the anus, the evidence led talks of sodomy. Sexually assaulting the complainant through the anus is not the same thing as touching his anus. What did the appellant touch it with?

When asked by the appellant whether she had reported to anybody or the village elders the incident, the complainant's mother denied doing so. She stated that there were village elders but she could not report to them before he caught the appellant in the act. Nor did she scram at the scene to alert people of this act for the appellant to be arrested. This behavior perhaps confirms the appellant's fears that PW2 was trying to cook up the case against him.

The evidence of the clinical officer is telling. His opinion was that medically speaking he could not confirm whether the complainant had been sodomised. A doubt was thereby created which ought to have been resolved in favour of the appellant.

The foregoing is sufficient to dispose off this appeal. The appeal is allowed, conviction quashed and sentence imposed set aside. The appellant should be set at liberty forthwith unless otherwise lawfully held.

Judgment dated, **signed** and **delivered** at Kisii this 17th January, 2010.

ASIKE-MAKHANDIA
JUDGE