**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO 91 OF 2010**

**JAMES OMBUKE KINYANYA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G E M E N T**

James Ombuke Kinyanya was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act, no 3 of 2006 (SOA). It was alleged that on 19/6/09, at M[...] Farm in Naivasha District, he did cause his penis to penetrate the vagina of N.A., a child of 9 years. In the alternative the appellant was charged with the offence of indecent act on a child, contrary to section 11(1) of the Sexual Offence Act. After a full trial the court found the appellant guilty of the main charge and convicted him. He was sentenced to 20 years imprisonment.

The appellant was aggrieved by both conviction and sentence and filed this appeal. The appeal was based on the supplementary notice of appeal which was filed by Gekonga Advocate. The grounds can be condensed as follows :-

1. **That the prosecution failed to prove its case beyond reasonable doubt.**

2. **The trial court failed to consider the medical evidence adduced by Pw4.**

3 **The conviction was based on uncorroborated and unsworn evidence of PW1.**

4. **The prosecution case was full of inconsistencies.**

5. **The sentence meted upon the appellant was excessive in the circumstances.**

6. **The magistrate failed to consider the defence case.**

Briefly stated, the prosecution evidence adduced before the trial court was that the complainant, a child of 9 years, was called by the appellant who her neighbour, into his house . She was carrying a child which the appellant told her to put down. He asked her to remove her clothes, he removed his trouser and lay her on the ground and penetrated her with his fingers . She reported the matter to her mother, PW3 . PW3 recalled that she was preparing to take her children to hospital and the complainant was supposed to help. Pw2 left the children outside as she dressed. She heard as if somebody was being strangled , she called out PW1 but instead, the appellant replied that the children were eating. The complainant came out of the appellant's house and as they walked to

the bus stage PW3 noticed that the complainant was walking with difficulty and on questioning her she explained that the appellant had done to her things. Her husband took PW1 to hospital the next day. The complainant was examined by Dr Gichana who found the hymen to have been absent and that a penetrating object thinner than a penis may have been used to break the complainants virginity .

Mr Gekonga urged grounds 1 to 4 of the appeal together. It was counsel's submission that the prosecution did not prove its case beyond any reasonable doubt as both the main charge and alternative charge did not tally with the evidence on record; That the minor complainant testified that the appellant penetrated her using his finger and the doctor also found that the penetration was by something thinner than a penis but the court concluded that there was defilement. Counsel also submitted that the proceedings proceeded in error because the prosecution evidence was taken by Mr Njuki SRM, who was transferred and Mr Mulwa SRM, took over and section 200 CPC was complied with. The matter was later placed before Mrs Wamae SPM who took the defence evidence without complying with section 200 of the CPC.

The appellant also urged that the evidence of the complainant who was only 9 years, a child of tender years, required corroboration. Counsel submitted that the evidence was unsworn and that court had noticed that the complainant had been hesitant to answer some questions and the same should have been corroborated . Counsel relied on the authorities of ***ONSERIO VERSUS REPUBLIC (198) KLR 618,*** where the court held that the evidence of a child of tender years required corroboration. In ***KINYUA VRS REPUBLIC (2002) KLR 256*** the Court held that uncorroborated evidence of a minor was unsafe and the court needs to direct itself of that fact.

Mr Omwega counsel for the state conceded the appeal but asked for a retrial .Counsel submitted that section 179(1) CPC allows the court to make a finding on a lesser offence where a person is charged with a more serious offence. He submitted that even if the offence of defilement cannot stand, an offence of indecent assault can and that the court can convict on an offence with which the person was not initially charged with . He submitted that the evidence discloses an offence of indecent act.

As regards the question of corroboration, counsel submitted that section 124 of the Evidence Act provides that once the court is satisfied that the child is telling the truth, there was no need for corroboration .

The prosecution evidence was taken by Mr Njuki (SRM) and he placed the appellant on his defence. On 11/12/09 Mulwa (SRM) took over the matter and complied with section 200(3) of the Criminal Procedure Code. The appellant confirmed that he wanted the case to proceed from where the previous magistrate had left it. The case was put off to allow for typing of proceedings and on 10/2/2009 when the matter came up for hearing, Wamae (SPM) took over the hearing and took the defence. When Ms Wamae took over the proceedings, she did not inform the appellant of his rights under section 200(3) of the CPC. That renders the proceedings herein irregular and therefore a mistrial and the conviction is hereby quashed and sentence set aside

Having found as above,the question then is, whether the court can order a retrial? For the court to do so it has to be established whether there is ample evidence on record that may result in a conviction and whether there has been no delay and whether a retrial will prejudice the defence. To do that I must consider the evidence that was adduced before the trial court.

It was the appellants contention that the conviction was founded on an uncorroborated evidence of the child. The decision of ***ONSERIO VRS REPUBLIC*** was made in 1985.
Section 124 of the Evidence Act as amended by Act 3 of 2006, provides that once the court is satisfied that the child is telling the truth there is no need for corroboration. In this case however,

the complainants evidence is corroborated by Pw3's evidence who saw her leave the appellants house, she then noticed the complaint walk with difficulty and on persuading the complainant, she disclosed what the appellant had done to her. Further the Doctors evidence does corroborate the complainants testimony that the appellant penetrated her private parts using his fingers. The appellant admits in his defence that he was at home and the complainant went to his house. The appellant had the opportunity to commit the offence.

The evidence on record does not support an offence of defilement it does however , support the offence of indecent act, the appellant was charged with an offence of indecent act in the alternative to defilement. Under section 2 of the Sexual Offence Act, "indecent act" means an unlawful intentional act which causes :-

**(a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another but does not include an act that causes penetration.**

**(b) exposure or display of any pornographic material to any person against his will or her will"**

Under the same section 2**, 'penetration'** is defined as

**"the partial or complete insertion of the genital organs of a person into the genital organs of another person"**

PW1 said that the appellant used his fingers on her. It does not amount to penetration. Section 179(1) of the CPC allows the court to convict on a charge where some of the particulars prove a minor offence. The section reads as follows:-

"**When a person is charged with an offence consisting of several particulars, a combination of some only for which constitutes a complete minor offence, and the combination is proved but the remaining particular are not proved, he may be convicted of the minor offence although he was not charged with it."**

Some of the particulars of indecent act have been proved and a conviction can be founded .

It was the appellants contention that the complainant's evidence was not corroborated. The decisions that were relied upon were made before the amendment to section 124 of the Evidence Act. Ordinarily, corroboration will be required as regards evidence adduced by children but there is an exception to evidence adduced in sexual offences. The proviso to Section 124 reads as hereunder:-

**"provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the alleged victim is telling the truth." the court is satisfied that**

There is no requirement that PW1's evidence be corroborated. It is sufficient for the trial court to be satisfied that the complainant is telling the truth and make such record.

I have found above that there is ample evidence on record that can found a conviction for an offence of indecent act.

The appellant was arrested on 22/6/09, the case was heard and determined on 22/2/2010 when the appellant was convicted . The offence with which the appellant was charged is a very serious one and I find that the appellant will not suffer any prejudice if a retrial is ordered. I hereby order a retrial before a court of competent jurisdiction other than that of TWM Wamae (SPM) . This matter be retried before Pm's Court Naivasha and the same be given priority . Mention before that court on 22/ 06/2011.
Orders accordingly.

**DATED AND DELIVERED THIS 13th DAY OF JUNE 2010.**

**R P V WENDOH**
**JUDGE**

**PRESENT**
Mr Gekonge for appellant
Nyakundi for state
CC: Kennedy Oguma