REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL APPEAL NO. 32 OF 2009
(Appeal against both conviction and sentence of the Senior Resident Magistrate's Court at Butere in Criminal Case No. 889 of 2007 [B. O. OCHIENG ESQ., SRM])

JOHN BAKHOYA ARUNGA …….....
…….. APPELLANT

VERSUS

REPUBLIC …….....
…….... RESPONDENT

JUDGEMENT

1. **JOHN BAKHOYA ARUNGAALALA** was charged with the offence of defilement contrary to **S.8 1)** as read with **S.8 (2)** of the Sexual Offences Act, No. 3 of 2006. It was alleged that on 10.5.2007 in Butere District within Western Province he unlawfully had carnal knowledge of M.K.S., a girl aged ten (10) years. In the alternative, he faced the charge of an indecent act with a child contrary to **S.11 (1)** of the Sexual Offences Act, No. 3 of 2007 in that he allegedly touched the thighs and buttocks of M.K.S. aforesaid. He denied the charge and the evidence tendered against him was as follows;
2. According to PW1, M.K.S., on the material day at 2 p.m. she had gone to collect firewood when the Appellant whom she had previously known, accosted her, pulled her into seclusion, removed her clothes and his own clothes and threatened to kill her if she screamed. He then defiled her and left her in pain. PW1 because of fear was unable to tell PW2, C.O what had happened to her but because she was crying and in pain, the next day, PW2, examined her and that is when PW1 told her that she had been defiled.
3. **PW3, J.M.O**, an uncle to PW1 was asked by PW2 to take PW1 to hospital at Khwisero and on 15.5.2007, **PW5, Oliver Mabaso**, a Clinical Officer, re-examined her before filling in the P3 form (Exh.1). The child had been examined earlier and in the P3 form it was recorded that she had bruises in the genital area and although her hymen was intact, she had a sexually transmitted disease indicative of sexual contact.
4. **PW4, P.C. Philip** received the initial report on 12.5.2007 from PW1 and PW3 and referred them to Khwisero Health Centre. He investigated the case and re-arrested the Appellant before arraigning him in court.
5. In his defence, the Appellant stated that on 10.5.2007, he had attended a soccer match and on 13.5.2007, he was arrested and charged on a fabricated case.
6. In his judgment, the learned Senior Resident Magistrate found that the charge had been proved beyond reasonable doubt and convicted the Appellant before sentencing him to serve twenty (20) years in prison although he was alive to the fact that the sentence ought to have been imprisonment for life.
7. In the appeal, Mr. Owinyi for the Appellant has faulted the decision on conviction because in the Appellant's view, the complainant lacked credibility and she should not have been believed. Further, that the contradictions in evidence coupled with lack of corroboration, should have led to the conclusion that the charge was fabricated.
8. It is also the Appellant's case that his defence was never considered and yet it was indicative of the fact that he never encountered the complainant on the material date.
9. I note that the Appeal is opposed and the learned Senior Principal State Counsel supports the conviction and sentence.

10.Having carefully read the evidence on record, I should note as follows;
11.Firstly, from the evidence of PW1, PW2, PW3 and PW5, PW1 had some sexual contact on the material day because the vaginal bruises and the signs of sexually transmitted disease could only have been the result of such contact. The fact that her hymen was intact could not be the basis that she never had such contact as reasonably is indicative of sexual contact. However as I understand it, penetration is a crucial aspect of the offence of defilement. S.8 (1) of the Sexual Offences Act provides as follows;
"S.8 (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."

12.In his evidence, PW5 partly stated as follows;
"there was no penetration but there was bruises over the labia…….. it means he was trying to penetrate."
13.The above evidence was consistent with that of PW1 who only said that she felt pain in her private parts during her ordeal but never once stated that there was penetration during the sexual encounter.
14.The above being the case, whether it was the Appellant or someone else who had sexual contact with PW1, the crucial ingredient in the offence of defilement could not have been proved in this case and the main count could not be the basis for a conviction.
15.Having so said, there is still the alternative count to be addressed. An "indecent act" is defined in ***S.11 (1)*** of the Sexual Offences Act, No. 3 of 2006 as;
"Sec.11 (1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less that ten years."
16.In the instant case, the fact of contact between the penis and the complainant's sexual organ and where there is clearly no penetration but only bruising of the labia can and should lead to the conclusion that an indecent act was committed as opposed to defilement which must have penetration as the most crucial aspect thereof.
17.If PW1 suffered the indecent act and all evidence points to that fact, is the Appellant the culprit? I have no doubt that he was the one who grabbed the ten year old and attempted to penetrate her but failed to so. Her evidence to that end was hardly challenged. She knew the Appellant before the incident and after overcoming her fears, she informed PW2 and PW3 of her ordeal. She repeated the same to PW4. I am unable to fault the issue of identification of the Appellant.
18.Regarding other issues that came in evidence such as the fate of her clothes which had blood, PW1 clearly stated that PW2 told her to remove them and she never produced them because none asked her to do so. That fact alone cannot be used to discredit PW1's evidence.
19.In the end, the alternative charge of an indecent act contrary to ***S.11 (1)*** of the Sexual Offences Act was proved and while acquitting the Appellant of the charge of defilement, I will convict him of the proved charge.
20.The above being the case, I will reduce the Appellant's sentence to ten (10) years as is the law under ***S.11 (1)*** aforesaid. The sentence of twenty (20) years imprisonment is set aside.
21.Orders accordingly.
Delivered, dated and signed at Kakamega this 13th day of October, 2010.

ISAAC LENAOLA
J U D G E