REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA

AT KITALE.

CRIMINAL APPEAL NO. 4 OF 2007

(From original conviction and sentence in Criminal Case No. 4434 of 2005 before the AG. Chief Magistrate – W.A. JUMA at Kitale)

ERICK WEPUKHULU...APPELLANT

VERSUS

REPUBLIC...RESPONDENT.

J U D G M E N T.

1. The appellant was charged with the offence of defilement of a girl contrary to the provisions of section 145 (1) of the Penal Code. The particulars of the offence stated that on the diverse dates between the month of June, 2005 and 9th day of September, 2005, at K[particulars withheld] in Trans Nzoia District within the Rift Valley Province unlawfully had a carnal knowledge of **E.N**, a girl under the age of 16 years. The appellant also face an alternative charge of indecent assault of a female contrary to the provisions of section of 144 (1) of the Penal Code and the particulars of the offence stated that on the diverse dates between the month of June, 2005 and 9th day of September, 2005 at K[....] in Trans Nzoia district within the Rift Valley province unlawfully and indecently assaulted **E.N**, a girl under the age of 5 years by touching her private parts. The appellant pleaded not guilty and after the trial he was convicted and sentenced to twenty years imprisonment. He is now dissatisfied with the conviction and sentence. He filed a petition of appeal and also relied on written submissions which tends to include further grounds of appeal. The decision of the trial magistrate is faulted for failure to consider that there were discrepancies regarding the person who made the first report. Those discrepancies should have been resolved by finding the appellant not guilty. The quality and quantity of evidence by the prosecution witnesses was also challenged especially the credibility of the evidence of the complainant who was a minor child. Lastly, the appellant argued that he produced a letter to show that he was working in Nakuru at Suwerwa farm when this offence allegedly took place but the trial court failed to take that letter into consideration.

2. This appeal was opposed Miss Bartoo, the learned state counsel submitted that the complainant was able to identify the appellant who was well known to her as a neighbour and used to be popularly referred to as Fundi. The complainant explained to court in detail what had happened and she had also told the doctor and her mother. That evidence was consistence and the prosecution discharged the burden of proof to the required standards that is the conviction and sentence is safe and should be sustained. This being a first appeal, this court is mandated to reconsider and re-evaluate the evidence before the trial court and arrive at its own independent determination on whether or not to uphold the conviction. In so doing, this

court should bear in mind that it never saw or heard the witnesses and give due allowance for that. See the case of ***Njoroge vs. Republic [1987] KLR 19.*** I now wish to set out, albeit briefly the evidence before the trial court which led to the conviction and sentence of the appellant.

3. The trial court conducted a voire dire examination of E. N (PW2) a minor aged 5 years. After the court was satisfied that PW5 was confident and knew the duty of speaking the truth she was sworn. She testified that before the court she only knew her mother and the accused person. She told the court that the accused person used to come home when PW2 was alone in the kitchen. He would pretend to be repairing the door and then pull her, remove her clothes and lie on her. She said and I quote

"He then spat on his hand and rubbed on his thing of urinating and then inserts it in my thing of urinating. He injured me down upto the chest. I felt pain. He was then twisting his waist. I did not cry. When he finished he went and told me not to tell mother. He did this on two occasions I did not tell him not to do it. I could face upwards as he did this. My mother had gone to Bungoma. I did not tell my mother. When my mother was bathing me she saw pus then took me to Kephis hospital and the doctor said I had been spoilt. I told the doctor that the fundi was the one sleeping on me in the kitchen. Fundi is Wepukhulu the accused."

4. Chrisantus Masinde (PW3), a clinical officer attached at Kitale District Hospital examined the complainant on 26th September, 2005. He filled the P3 which was produced as an exhibit. Upon examination of the complainant, he found the complainant was walking with difficulties. She had a broken hymen but no injuries on the vulva and there was no discharge. In his opinion, the complainant was defiled. The complainant's mother G.C (PW1) testified that she had left her house and when she returned on 9th August, 2005 her maid who disappeared informed her that the complainant was sick and she had taken her to the prison hospital. On 5th September, 2005 when PW1 was bathing the complainant she found that her stomach was swollen and she was omitting pus which was in her pants. She took the complainant for treatment at top station clinic and was referred to Dr. Usagi who informed her that the child had been defiled and she should report the matter to the police. She reported the matter at the Kitale Police station and the complainant recorded a statement how she was defiled by a neighbour popularly known as fundi who she identified as the appellant in this case. The complainant statement was recorded by PC. Lilian Wekesa (PW4) on 23rd September, 2009. She escorted the complainant to Kitale District Hospital. She also examined the complainant and was found she was emitting an odious from her private parts. The private parts also looked wide for a child of five years and it was obvious the complainant was engaging in sexual intercourse. She recorded the statement from the complainant and organized to have the appellant arrested. He was arrested and taken also to Kitale District Hospital. He was examined and she produced the P3 form in respect of the appellant. Nothing was noted on the P3 form except that he was HIV negative.

5. Put on his defence the appellant gave an unsworn statement of defence and denied having committed the offence. He gave an alibi that between 16th may, 2005 and 14th September, 2005 he was working at Suwerwa Flowers in Nakuru and therefore he was not within the Trans Nzoia County where this offence happened. The appellant also relied on the evidence of John Gitonga Wachira who confirmed that from 16th May, 2005 to 14th September, 2005 he was working with the appellant at Suwerwa Flowers at Nakuru. They were sharing the same house until the 13th September, 2005 when the appellant requested for leave and left Nakuru. During cross-examination DW2 told the court that they met with the appellant while in prison and did not know their neighbours while they shared their house in Nakuru. The appellant also made submissions that there was discrepancies regarding the person who file the complaint. It is not clear whether the complainant's mother is G. N or G. C. He also submitted that the investigating officer did not visit the scene of crime and the medical treatment record of the complainant at Kephis clinic was not produced.

6. Having set out a brief summary of this case, I find the learned trial magistrate duly conducted a voire dire examination of the complainant and was satisfied that she possessed sufficient knowledge to testify. The testimony of the complainant is candid. She was able to identify the appellant who was known to her as a Fundi. The evidence of the complainant regarding the defilement was confirmed by PW3. The complainant was a child of tender age. The court of appeal has set out principles to guide the court when taking the evidence of a child of tender age. In the case of ***PETER KIRIGA KIUNE CRIMINAL APPEAL NO. 77 OF 1982 (unreported) the Court of Appeal*** held as follows:-

"Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voire dire examination, whether the child understands the nature of an oath in which even his sworn evidence may be received. If the court is not so satisfied his unsworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth: in the later event an accused person shall not be liable to be convicted on such evidence in support thereof implicating him (section 19, Oaths and Statutory Declarations Act, Cap 15. The Evidence Act (section 124, Cap 80.)"

7. This appellant has challenged the inconsistencies regarding the names of the mother of the complainant. I do not see this discrepancy as material. It does not affect the weight of the evidence. The charge was one of defilement of a minor. It matters not whether the matter was reported by G.C a Saboat woman or G.N a Luhya woman. G.C testified and said she is the mother of the complainant. The other issue raised in the appeal is regarding the defence by the appellant. I have considered the unsworn statement of defence which alluded to an alibi. This was supported by evidence of DW2 who upon cross-examination revealed that he met the appellant while they were in prison and did not know the names of the neighbours from where he said they were living together with the appellant. I do not find this evidence credible taken with the prosecution's evidence especially the complainant whom the learned trail court found a truthful witness.

8. The complainant could not recall the date when she was defiled. The evidence of PW1 states that it was 9th September, 2005 when she learnt from a maid who disappeared that the complainant was sick. The complainant was able to identify the person who was defiling her as the appellant. Under the provisions of the Evidence Act section 124, it is proviso thereto provides that:-

"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 court is satisfied that the alleged victim is telling the truth."

This provision of the law has taken into account the fact that sexual offences ordinarily take place in privacy and if the court believes the evidence of the complainant it can go ahead and convict an accused person based on the so evidence of the complainant. As stated above the trial court stated that the complainant was truthful and she did not see the possibility that the child was told what to tell the court. In the upshort I did not find any merit in this appeal. The decision of this trial court is hereby upheld and the appeal is hereby dismissed.

Judgment read and signed on 16th December, 2010.

MARTHA KOOME.

JUDGE.