REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 174 OF 2015

NICHOLAS KURGAT...................................APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(Being an appeal against the judgment and sentence of the

Hon. G. Adhiambo,Senior Resident Magistrate in Kapsabet

Criminal Case No. 2343 of 2014 on 17th December, 2015)

JUDGMENT

The appellant herein Nicholas Kurgat, has filed an appeal listing 9 grounds against the Judgment and sentence of the Honourable G. Adhiambo, Senior Resident Magistrate, in Kapsabet Criminal Case No. 2343 of 2014. When the appeal came up for hearing on 23rd March, 2017, it was opposed by the state. In summary, counsel for the appellant submitted that the complainant gave contradictory evidence e.g. on whether she had an underwear or not, whether she first told M C alone or in company of G and G. Also, that the doctor confirmed that he could not tell whether there was sexual assault or any form of indecent assault. Further, that there were no medical chits prepared by the Doctor. He also challenged the evidence of the Doctor on the issue of tiny perforation and also that of PW3, 4 and 5 as hearsay. He asked that the conviction be set aside and accused be acquitted.

On her part, counsel for the state, Ms. Kegehi submitted that the prosecution gave a corroborated case and that the issue of identification does not arise as the complainant knew the accused well and the incident had taken place during the day. Also that the issue of penetration was proved as testified to by PW1. That the incident was in March-April 2014 while the P3 form was filled on 20th July, 2014, and so the Doctor could not establish the cause of the penetration.

I have considered the submissions made by both sides in this matter. It is clear from the evidence on record that the prosecution based its case on the evidence of the minor complainant, N J, 6. That sometimes in March-April 2014, during school holidays, the appellant, a neighbour called her to his house and gave her 50/= allegedly for being at position 3 in school. That he then called her again into the house, removed her skirt (she had no under pants), his own trousers, smeared oil in her private parts before proceeding to defile her. That she then went home but did not tell her mother, G C, PW3. But that she told one G who told her other friends M C and M C. It appears it is these other 3 minor who later told their teachers in the month of July 2014, leading to the mother being summoned to school and being told

of this issue.

For the prosecution to prove its case against the accused beyond any reasonable doubt as required by the law, it was incumbent upon the prosecution to prove the following: -

(i) That the minor complainant (PW1) was indeed defiled or indecently assaulted.

(ii) That, if at all, it was the appellant who defiled or indecently assaulted PW1.

A number of issues came up during trial which are in my view, material in answering these 2 questions. First, the prosecution relied on the sole evidence of the minor (PW1) on the act of defilement. As a general rule, Section 124 of the Evidence Act, Cap 80, stipulates that an accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him. The exception to this rule is that:

> **"in a criminal case involving a sexual offence, where 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 I the proceedings, the court is satisfied that the alleged victim is telling the truth".**

In this particular case, as already stated above, only PW1 gave evidence as to witnessing what the appellant did to her. All the other witnesses who gave evidence gave hearsay evidence of what PW1 told them or what other witnesses told them. There is no doubt in my mind that PW1 knew the appellant well as they were neighbours. She was however only 6 years old. This incident is alleged to have taken place between March-April 2014 but only came up in July 2014. Why did the child keep quiet all this long without telling her mother or teachers about the incident? Second, on the P3 form, it is alleged that the assault had taken place on diverse dates. In court however, the child maintained that it only happened once. Third, the mother of the child in her evidence, PW3 testified that when she was summoned to school, she confessed that the child had been complaining of stomach pains, which had been treated. How come the mother failed to notice the pains in the child's private parts all this time, only noticing and treating the stomach pains?

I have carefully perused the proceedings and judgment of the lower court with regard to the proviso to Section 124 of the Evidence Act, Cap 80. Nowhere in the proceedings has the learned magistrate made a finding that the minor witness (PW1) was truthful, and proceeded to record her reasons for such determination. In effect therefore the requirements of Section 124 of the Evidence Act where not followed.

Another important piece of evidence relied on by the prosecution is the P3 form (Exh-3), produced by PW6, Paul Sanga, a Clinical Officer. In this document, the clinical officer did not make any positive finding on the offences of defilement or of indecent assault. In his evidence in court, the same witness gave evidence that he could not ascertain the cause of the tiny perforation noted in the child's hymen. In effect therefore, the medical evidence and opinion of this witness (PW6) did not in any way corroborate the evidence of PW1.

In criminal cases, it is incumbent upon the prosecution to prove the guilt of the accused and the Standard required is one beyond any reasonable doubt. And in case of any doubt, it is the accused to benefit from the same. In this case, considering all the circumstances, especially the uncorroborated evidence of the minor (6), I am not convinced that the prosecution quite met this standard. I am convinced by the defence submissions that in the circumstances, it was not safe to convict the appellant based on the evidence given by the prosecution. I accordingly find that this appeal has merit, quash the conviction of the appellant and set aside the sentence of the Hon. Learned Senior Resident Magistrate (Hon. G. Adhiambo). The appellant to be released forthwith unless lawfully held.

DATED, SIGNED and **DELIVERED** at **ELDORET,** this 20th day of July, 2017.

D.O. OGEMBO

JUDGE

Judgment read out in open court in the presence of: -

Mr. Mathai for the Appellant,

2. The Appellant &

3. Ms. Asiyo for the State.

D.O. OGEMBO

JUDGE