REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.146 OF 2012

(An Appeal arising out of the conviction and sentence of Hon. T. Ngugi – PM delivered on 6th May 2011 in Makadara CMC. CR. Case No.813 of 2010)

CHARLES BUSUTU KAVULAVU..……..APPELLANT

VERSUS

REPUBLIC…….....RESPONDENT

JUDGMENT

The Appellant, Charles Busutu Kavulavu was charged with **attempted defilement of a child** contrary to **Section 9(1**) and **(2)** of the **Sexual Offences Act**. The particulars of the offence were that on 22nd February 2010, at Mathare Mlango Kubwa in Nairobi County, the Appellant intentionally attempted to cause his penis to penetrate the vagina of M I, a child aged six (6) years. He was alternatively charged with the **offence of committing an indecent act with a child** contrary to **Section 11(1)** of the **Sexual Offence Act**. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, the Appellant was convicted of the alternative charge of **committing an indecent act with a child** contrary to **Section 11(1)** of the **Sexual Offence Act**. He was sentenced to serve ten (10) years imprisonment. He was aggrieved by his conviction and sentence. He has filed an appeal to this court challenging the same.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of prosecution's evidence that did not establish his guilt to the required standard of proof beyond any reasonable doubt. He took issue with the fact that the trial court had relied on contradictory and uncorroborated evidence to convict him. He was of the view that the evidence adduced by the prosecution witnesses was weak and insufficient to connect him with the crime. He was finally aggrieved that his defence had not been considered before the trial court reached the verdict to convict him.

At the hearing of the appeal, the Appellant presented to the court written submission in support of his appeal. He further made oral submission in support of his appeal. The Appellant's argument can be summarized thus: it was his case that he had a dispute with the father of the complainant over some money that they had been given by the late Hon. Kirima. The dispute was in relation to how the money was to be distributed. An argument ensued resulting in the sum of Kshs.30,000/- being taken from his possession by one Ochieng. He went to the police and reported the incident. While at the police station, he was confronted by the father of the complainant and falsely accused of having defiled the complainant. He submitted that he had not committed the crime. He stated that the charge was fabricated against him to

cover up the issue of how the money was spent. He explained that Ochieng was not called as the prosecution to testify in the case. Neither was one Mama Mercy called. It was his case that there were gaps in the prosecution's case which raised reasonable doubt as to his guilt. He urged the court to allow his appeal.

Ms. Nyaucho for the State opposed the appeal. She submitted that the prosecution had established the alternative charge of **committing an indecent act with a child** to the required standard of proof beyond any reasonable doubt. She stated that on the material day of the incident, the mother of the complainant left the complainant then, aged six (6) years, at home as she went to look for food. The Appellant went to the house, found the complainant, removed her trousers and her underpants. He also removed his trousers and defiled the complainant. The complainant screamed. The Appellant attempted to run away. He was caught by members of the public who found the Appellant without his trousers. He was taken to Muthaiga Police Station where he was arrested. The complainant was seen by two doctors who gave conflicting information on whether there was penetration or not. This led to the finding of the alternative charge. Ms. Nyaucho submitted that the evidence adduced by the prosecution established that the Appellant had indeed defiled the complainant. However, due to lack of medical corroboration, the Appellant was convicted of the alternative charge of committing an indecent act with a child. She urged the court to dismiss the appeal.

This court, as the first appellate court, is required to look at the evidence adduced before the trial court afresh before arriving at its independent determination whether or not to uphold the conviction of the Appellant. In doing so, this court must be mindful of the fact that it neither saw nor heard the witnesses as they testified and therefore must give due allowance in that regard (See **Okeno –vs- Republic [1972] EA 32**). In the present appeal, the main issue for determination is whether the prosecution adduced sufficient evidence to secure the conviction of the Appellant on the charge of **committing an indecent act with a child** contrary to **Section 11(1)** of the **Sexual Offences Act**.

Having carefully evaluated the facts of this case, it was clear to this court that indeed the prosecution established to the required standard of proof beyond any reasonable doubt the charge of committing an indecent act with a child. There are three ingredients that the prosecution was required to establish for the Appellant to be convicted of the charge. The first one is the indecent act. The second is the age of the victim and the third is the identity of the perpetrator. Under **Section 2(1)** of the **Sexual Offences Act**, **indecent act** is defined as:

> ***"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 or her will."***

In the present appeal, the complainant, a 6 year old girl at the time of the incident testified that on the material day of 22nd February 2010, her mother left her at home as she went to fetch food. She was alone in the house with her younger brother. The Appellant went to the house and enticed the complainant that he would buy her sweets. He then removed her trouser and her underpants before he removed his trousers and inserted his penis in her vagina. From the testimony of PW2 A A (the mother of the complainant) and PW5 T A, a member of the locational development committee at Mathare 4A, it was apparent that before the Appellant completed penetration, the complainant raised alarm alerting members of the public who came to the complainant's rescue.

They surrounded the house before they flashed out the Appellant. The Appellant was half dressed. He was not wearing his trousers. He was escorted to Muthaiga Police Station where he was detained. Meanwhile the complainant was taken to Nairobi Women Hospital where she was examined by Dr. Muhombe who formed the opinion that she had been defiled. The medical report was produced in evidence on behalf of Dr. Muhombe by PW3 Dr. Adan Ruwan. The complainant was seen by the doctor on 24th February 2010. She was further seen by Dr. Z. Kamau at the police surgery on 22nd March 2010 who came with a contrary finding which was to the effect that the complainant had not been defiled. It

was this contradictory evidence that led to the trial court to convict the Appellant of the alternative charge instead of the main charge of defilement.

What is apparent from the above evidence by the prosecution witnesses is that the Appellant went into the house where the complainant was after her mother had gone to fetch food. From the testimony of the complainant, PW2 and PW5 it was clear that the Appellant had been caught literally in the act. He had undressed the complainant. He was half dressed. He had removed his trousers. This court has no doubt that the Appellant caused his genital organ to have contact with the genital organ of the complainant. Penetration did not occur because the Appellant was interrupted by the members of the public who saw what he was doing. The Appellant attributes his problems with the law with a grudge that allegedly existed between himself and the father of the complainant.

Having re-evaluated the defence that he put forward and the grounds of appeal that the Appellant argued, it was clear to this court that the Appellant did not displace the cogent and consistent evidence that was adduced by the prosecution witnesses which placed him in PW2's house at the particular time where he was found half naked. He had also undressed the complainant. The complainant was naked. There is no doubt in this court's mind that the Appellant had only one intention in his mind: he wanted to defile the complainant. The prosecution established that the complainant was 6 years old at the time of the sexual assault. This was confirmed by the medical reports that were produced into evidence. The intervention by members of the public saved the day. The witnesses called by the prosecution were sufficient to establish the charge brought against the Appellant. It was not necessary for any other witness to be called by the prosecution. If the Appellant felt that he needed particular witnesses to testify in the case, there is nothing in law that prevented him from calling the said witnesses to testify in his defence. This court holds that the prosecution did indeed prove to the required standard of proof beyond any reasonable doubt the charge of **committing indecent assault with a child** contrary to **Section 11(1)** of the **Sexual Offences Act** to the required standard of proof beyond any reasonable doubt. The Appellant was the perpetrator.

The upshot of the above reason is that the appeal lodged by the Appellant lacks merit and is hereby dismissed. The conviction and the sentence of the trial court is hereby upheld. It is so ordered.

DATED AT NAIROBI THIS 3RD DAY OF JUNE 2015

L. KIMARU

JUDGE