REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.235 OF 2011

(An Appeal arising out of the conviction and sentence of Hon. T. Ngugi – PM delivered on 6th July 2011 in Makadara CMC. CR. Case No.4123 of 2007)

STEPHEN MUNYAO MUTISO…..……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

JUDGMENT

The Appellant, Stephen Munyao Mutiso was charged with the offence of **defilement of a girl** contrary to **Section 8(1)(2)** of the **Sexual Offences Act**. The particulars of the offence were that on the 6th day of August 2007 at ***[particulars withheld]*** Embakasi within Nairobi Province, the Appellant committed an act which caused penetration with his male genital organs into female genital organs of L W M, a child aged 11 years. He was charged in the alternative with **indecent assault of a child** contrary to **Section 11(1)** of the **Sexual Offences Act.** The particulars were that the Appellant on the 6th day of August 2007 at ***[particulars withheld]*** Embakasi within Nairobi Province intentionally and unlawfully committed indecent act with L W M, a child aged 11 years by touching her private parts namely vagina. When arraigned in court, he pleaded not guilty. After the trial, the court convicted the Appellant of the alternative charge and sentenced him to ten (10) years imprisonment.

Dissatisfied with the conviction and sentence imposed by the trial court, he appealed. His petition of appeal was based on four (4) grounds. During the hearing of the appeal, the Appellant relied on his written submissions. He stated that the charge sheet was defective for not specifying the charge. He relied on **JTM Vs Republic H.C.C.R 206B of 2010**. He further submitted that his defence was overlooked by the trial court **(see Sentale Vs Uganda EA 63).** N who is an important witness was not called thus rendering the conviction unsafe. **(See Olivia Vs Republic [1965] EA 44).** Mr. Kabaka for State opposed the appeal. He submitted that the prosecution proved its case beyond reasonable doubt. He stated that the defect in the charge sheet was curable under **Section 382** of the **Criminal Procedure Code**. The Appellant's defence was not plausible that is why it was rejected. The case was properly established by the complainant and court believed she was truthful.

The background of the case is that on the 6th of December 2007, PW1 the complainant was sent by a house help N to buy milk. On her way back from the shop, she met the Appellant. He asked her if they had a spade at her house. The complainant told the Appellant to inquire from her mother. The Appellant then pulled her inside his employer's house which was about 10 meters away from the complainant's home. The gate and the door to the house were open. The Appellant placed her on the chair in the sitting

room. He removed the complainant's skirt and panties. The Appellant warned her not to scream. He blocked the complainant's mouth with a glass. The Appellant lay on her and defiled her from 2.00 p.m. to 4.00 p.m. The Appellant opened the door to the house and told her to go home. On the 7th day of December 2007, PW2 J W M, the mother of the complainant came back home from Gikomba where she works. She saw the Appellant's movement had changed. When PW2 inquired from the house girl N, she told her that the complainant had been limping the whole day. PW2 checked the complainant and saw scratch marks on her thighs. There was a discharge from the vagina. When PW2 asked the complainant about the scratch marks, she narrated the whole incident to PW2. PW2 confronted the Appellant but he denied it. The complainant showed PW2 the seat from where the Appellant defiled her. The Appellant's employer came to PW2's house and advised her to take the complainant to the hospital.

On the 8th of December 2007, PW2 took the complainant to Nairobi Women's Hospital where she was examined by PW4 Dr. Ketra Muhombe. After examination, PW4 noted that the complainant had bruises and scratch marks on her inner thighs as well as in the genitalia or vulva. She had a whitish discharge. The swab taken from the vulva showed few red blood cells though there was no spermatozoa. PW4's diagnosis was **indecent assault**. She gave the complainant the treatment required. On the 17th of August 2007, the complainant accompanied by PW2 went to Dr. Zephania Kamau who carried out another examination. He discovered that the complainant had haematoma around the urethra opening but no discharge. She had normal external genitalia and no injuries to vagina. The hymen was intact. PW3 completed and signed the P3 form. PW3 examined the Appellant on the 27th of August 2007. He discovered that he had no physical injuries. His genital organs were normal.

At Embakasi Police Station, PW5 PC Mike Cheruiyot was called by PC Linah who requested him to accompany her to Utawala to arrest the Appellant. They were both accompanied by the complainant and her father. The Appellant was found in his house. He was pointed out by the complainant. PW5 together with PC Linah arrested the Appellant. Meanwhile, PW6 PC Rhoda Gogo took over the investigations. She looked for the complainant. She recorded her statement.

On the 6th of August 2007, DW2 picked the Appellant to go check on his motor vehicle in the garage. The Appellant came back at around 4.00 p.m. with the mechanic in the motor vehicle to resume his work. DW2 left the house and came back at 8.00 p.m. The Appellant informed him that PW2 had been harassing him for defiling the complainant. DW2 went to PW2's house to confront her about the situation. When he came back home on the 8th of August 2007, the Appellant had been arrested. DW2 proceeded to Embakasi Police Station to process a bond for the Appellant. The Appellant gave sworn evidence. He stated that on the 8th of August 2007, he was in his house when PW2 together with police officers come to his house. He was arrested and taken to Embakasi Police Station. On the 9th of August 2007, he informed the police officers of the differences that existed between him and PW2. The grudge arose from getting her former house help M a job at Umoja. The police released him. Two weeks later, the police re-arrested him.

This court being the first appellate court, it has a duty to re-evaluate and re-consider the evidence, the submissions of both parties on record and come up with its own findings as stated by Court of Appeal in **Njoroge V Republic [1987] KLR 19**. The court has one issue for determination;

Whether the prosecution discharged its burden of proof in this case?

The first piece of evidence the court considered was identification. The complainant on 6th of August 2007 was sent to a kiosk to buy milk by N, their house help. On her way back, the complainant met the Appellant who inquired if she had a spade in her home. The Appellant pulled the complainant through an open gate to his house and sexually assaulted her. The complainant knew the Appellant. She had seen him in the neighborhood for some time when M (former house help) was still working for them. This proves that the complainant recognized the Appellant given that he sexually assaulted her for a period of more than two (2) hours. The Court of Appeal in **Anjononi & others V Republic (1976-80)1KLR 1566** stated that;

> ***"….recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."***

In this case, the complainant knew the Appellant as someone she had seen before when M was still working for them. She recognized him on the day of the incident.

The Appellant was charged with **indecent act of a child** contrary to **Section 11(1), 48** and **49** of the **Sexual Offences Act** as an alternative charge. The offence he was convicted of is clearly stated under **Section 11(1)** of the **Sexual Offences Act**. **Sections 48** and **49** of the **Sexual Offences Act** can be disregarded as its citation did not occasion into miscarriage of justice or prejudice the Appellant. **Section 382** of the **Criminal Procedure Code** provides that;

> "***Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this code, unless the error, omission or irregularity has occasioned a failure of justice."***

The irregularity is therefore curable under the above Section.

The defence adduced by the Appellant was incurable. DW2 testified that he left the house with the Appellant to go to a garage during that morning. He left the Appellant at the garage at 8.00 a.m. until 4.00 p.m. He was allegedly there. The Appellant was then dropped home by the mechanic in a motor vehicle. This alibi defence was displaced by the prosecution during cross-examination of DW2 when he stated that he was not with the Appellant from 8.00 a.m. to 4.00 p.m. Neither was he at his home. It was within that period that the complainant was sexually assaulted.

The court has no doubt that the prosecution proved its case beyond reasonable doubt. For that reason, the court dismisses the appeal and upholds the conviction and sentence of the Appellant. It is so ordered.

DATED AT NAIROBI THIS 4TH DAY OF JUNE 2015.

L. KIMARU

JUDGE