REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.70 OF 2012

(An Appeal arising out of the conviction and sentence of Hon. T. Ngugi- PM

delivered on 13th July 2012 in Makadara CM. CR. Case No.3508 of 2009)

JAMES WAWERU MWANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, James Waweru Mwangi, was charged with the offence of **defilement of a girl** contrary to **Section 8(1)** as read with **Section 8(4)** of the **Sexual Offences Act**. The particulars of the offence were that on 27th August 2009 at ***[particulars withheld]*** in Nairobi County, the Appellant intentionally and unlawfully committed an act which caused penetration with his penis into the vagina of C W N, a child aged 6 years. He was alternatively charged with committing **an indecent act with a child** contrary to **Section 11(1)** of the **Sexual Offences Act.** The particulars of the offence were that on the same day and in the same place, the Appellant intentionally touched the vagina of C W N, a child aged 6 years. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, he was convicted of the alternative charge of **committing an indecent act**. He was sentenced to serve ten (10) years imprisonment. He was aggrieved by his conviction and sentence. He has filed an appeal with this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He faulted the trial magistrate for relying on the evidence of a child of tender age contrary to the requirement of **Section 124** of the **Evidence Act.** He was aggrieved that he had been convicted on the basis of uncorroborated, unsatisfactory, incredible and flimsy evidence. He took issue with the fact that the trial magistrate failed to properly evaluate the evidence adduced in the trial before reaching the decision to convict him. He was aggrieved with the fact that his defence had not been taken into consideration before the trial magistrate reached the decision to convict him. In the premises therefore, the Appellant urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, the Appellant presented to the court written submission in support of his appeal. In the submission, the Appellant urged the court to allow his appeal since the prosecution had not adduced sufficient evidence to sustain his conviction on the charge of indecent assault. Ms. Nyauncho for the State opposed the appeal. She submitted that the evidence adduced by the prosecution witnesses

established to the required standard of proof that the Appellant committed the offence. She urged the court to dismiss the appeal.

The facts of this case, according to the prosecution witnesses are as follows: the complainant in this case was at the material time aged 7 years. She lived with her mother PW3 J W N at ***[particulars withheld]*** in Gikomba, Nairobi. She told the court that on the material day of the incident, she went looking for an elastic band to play with. She was with an older child called K. She went to the shop where the Appellant worked. She referred to the Appellant by his name James. It was her testimony that James chased away K and then requested her to enter his house so that they could have a meal together. While inside the house, the Appellant addressed her. He then removed his trousers halfway. It was not clear from her evidence whether the Appellant penetrated her or not. In one instance, the complainant said that the Appellant inserted his penis into her vagina. In another instance, she said that the Appellant took pepper and put it in her vagina. In another part of her evidence, she testified that the Appellant rubbed his penis on her vagina. During the entire incident, she told the court she felt pain. After the incident, she got up and let herself out of the house.

She reported the incident to her mother who took her, on the following day, to Nairobi Women Hospital. The P3 form which was filled by PW1 Dr. Zephaniah Kamau indicated that the complainant had not been defiled. The medical report prepared by Dr. Muhombe (produced on her behalf by PW4 Dr.Nziga) indicated that the complainant's hymen was intact. Her external genitalia was normal. From the medical evidence produced by the two doctors, it was clear that there was no penetration.

In her judgment, the trial court reached the finding that indeed defilement had not been proved. She however went ahead and made the following finding:

> ***"However it's clear there was intentional contact between the accused person genital organ namely penis and the complainant's organ namely vagina. The contact was unlawful since the complainant is a minor and incapable of giving consent. Her tender age is also apparent and cannot be mistaken for an adult female."***

On this finding, the trial court convicted the Appellant of the alternative charge of **committing an indecent act with a girl child** contrary to **Section 11(1)** of the **Sexual Offences Act.**

As the first appellate court, this court is mandated to re-evaluate and re-consider the evidence adduced before the trial court with a view to reaching its own independent determination whether or not to uphold the conviction of the Appellant. In doing so, this court is required to always keep in mind the fact that it neither saw nor heard the witnesses as they testified and therefore give due allowance in that regard **(see Njoroge –vs- Republic [1987] KLR 19)**. In the present appeal, it was clear that the trial magistrate relied solely on the evidence of the complainant, a child of young and tender years, to convict the Appellant.

On re-evaluation of the complainant's testimony, it was evident to this court that there was no basis upon which the trial court could have believed the testimony of the complainant. As stated earlier in this judgment, her testimony was contradictory and was not clear as to what really transpired on the day that she alleges that she was sexually assaulted. Her initial story, according to the evidence of her mother, was that she had been sexually assaulted by the Appellant. Acting on this information, her mother took her to hospital where it was confirmed, on medical examination, that she had indeed not been sexually assaulted. There was no corroborating evidence to suggest that the Appellant had even made an attempt to penetrate the complainant. She did not have any injury near or around her vagina. Her testimony in that regard was therefore incredible.

The complainant testified that she was accompanied by an older child by the name K. In the circumstances of this case, it was important that the said K be called to corroborate the testimony of the complainant. The failure by the prosecution to call the said K, rendered the evidence adduced by the complainant regarding the circumstances which led to her going to the house of the Appellant to be uncorroborated. Further, although in sexual offences the alleged victim can adduce uncorroborated evidence in accordance with the proviso of **Section 124** of the **Evidence Act**, it was imperative for the

trial magistrate to acknowledge that she had relied on the evidence of the complainant and that she was satisfied that the victim was telling the truth. In the present appeal, the trial court did not give any reasons why she believed the complainant was telling the truth, in the absence of any evidence which corroborated her testimony. This court was not persuaded that the evidence adduced by the complainant was sufficient to sustain the conviction of the Appellant. There was no other evidence which connected the Appellant to the crime.

In the premises therefore, the appeal filed by the Appellant is hereby allowed. His conviction on the alternative charge of **committing an indecent act** contrary to **Section 11(1)** of the **Sexual Offences Act** is quashed. The custodial sentence imposed on him is set aside. The Appellant is ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 10TH DAY OF JULY 2015

L. KIMARU

JUDGE