REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.108 OF 2014

(AN APPEAL ARISING OUT OF THE CONVICTION AND SENTENCE OF HON. E. MICHIEKA – AG.PM DELIVERED ON 13TH MARCH 2014 IN KIKUYU SPM.CR. CASE NO.884 OF 2012)

DAVID WIRONJA……APPELLANT

VERSUS

REPUBLIC…….....RESPONDENT

JUDGMENT

The Appellant, David Wironja was charged with **defilement** contrary to **Section 8** (**1) & (4)** of the **Sexual Offences Act**. The particulars of the offence were that in the month of June 2012 in Kiambu County of the Central region, the Appellant intentionally caused his penis to penetrate the vagina of J W a child aged five (5) years. He was alternatively charged with the offence of **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 month of June 2012 in Kiambu County of Central Region, the Appellant intentionally touched the vagina of J W, a girl aged five (5) years with his penis. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged on the alternative count of **committing an indecent act with a child**. He was sentenced to serve ten (10) years imprisonment. The Appellant was aggrieved by his conviction and sentence and has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. In summary, the Appellant was aggrieved that he was convicted on the basis of the evidence of the complainant which was not corroborated. He faulted the trial magistrate for convicting him yet the prosecution had not established its case to the required standard of proof beyond any reasonable doubt. He was aggrieved that the trial magistrate had not taken into consideration the fact that the medical evidence relied upon the prosecution revealed that the complainant was examined about six (6) months after the alleged incident. In the premises therefore, he 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, this court heard submission made by Mr. Gathaara on behalf of the Appellant and the response to the submission made by Ms. Wario on behalf of the State. Mr. Gathaara submitted that the charge sheet bore a different name than what the Appellant was referred by during trial. He submitted that the charge sheet was also not specific as regards the exact date the offence was committed. He submitted that the fact that the incident was reported six months later and for reason that the complainant's father did not testify during trial, raised doubt on the prosecution's case. According to counsel for the Appellant, the Appellant was framed with the offence due to differences between the

Appellant's mother and the complainant's mother. On her part, Ms. Wario submitted that under **Section 124** of the **Evidence Act**, the evidence of a child of tender years does not require corroboration. She submitted that the prosecution did not require medical evidence in order to prove that the Appellant committed an indecent act on the complainant. On the issue of the complainant's father not testifying in the case, Ms. Wario relied on the provisions of **Section 143** of the **Evidence Act**. She further submitted that the sentence was legal. In her opinion, the prosecution had proved its case to the required standard of proof beyond any reasonable doubt. She therefore urged the court to dismiss the appeal and confirm the sentence that was imposed by the trial court.

The facts of the case according to the prosecution are as follows: The complainant, PW1 J W was said to have been aged six years and six months (6 ½ years) old at the time of trial. This was according to the evidence of PW2 T N K, the complainant's mother. The complainant testified that on the material date of the incident, the Appellant had an object that had white and pink colours. She testified that the Appellant shook the object till it became soapy. He then shot it near the complainant's genital organ. The complainant testified that the Appellant then undressed her, removed his penis and inserted it in her genital organ. The complainant told the court that she was taken to the hospital by her father. The evidence of PW2 was that on 2nd December 2012 when she returned home from church, she heard other children telling the complainant to tell her something. She testified that one of the children told her that the complainant had told them that she had been defiled by **"Toti".** PW2 testified that they referred to the Appellant as **"Toti"**. When PW2 asked the complainant about the incident, the complainant confirmed that the Appellant had defiled her. PW2 testified that she took the complainant to Nairobi Women Hospital for medical examination. A report was made to Kikuyu Police Station. The police issued the complainant with a P3 form to be filled by a medical practitioner.

The complainant was seen by PW4 Dr. Shadrack Ngatia on 5th December 2012. He testified that he was informed that the complainant had been defiled on an unknown date in June 2012. He examined the complainant and noted that her external genitalia was normal. He also noted that her hymen had widened and she had a tear in her vagina which according to him could have been due to a previous sexual activity. He could not however ascertain his findings as the case had been reported late. PW4 filled the P3 form which was produced into evidence as ***prosecution's exhibit No. 2***. The case was investigated by PW3 PC Halima Tajir. After concluding her investigation, she concluded that indeed a case had been made for the Appellant to be charged with the offence for which he was convicted.

When the Appellant was put on his defence, he denied committing the offence. He testified that on 15th November 2012, he had gone to Kikuyu to visit his mother. He found his mother arguing with a lady over money. He testified that the lady told his mother that "**she will know that this is Kenya"** before she left. He testified that on 3rd December 2012 he was arrested and charged with the present offence. He attributed his tribulations to the differences between his mother with the said lady.

This being a first appeal, it is the duty of this court to re-evaluate and to reconsider the evidence adduced before the trial court before reaching its own independent determination whether or not to uphold the decision of the said court. 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 regard in that respect **(see Njoroge – vs- Republic (1987) KLR 19).** The issue for determination by this court is whether the prosecution proved its case on the charge brought against the Appellant of **committing an indecent act with a child** contrary to **Section 11 (1)** of the **Sexual Offences Act** to the required standard of proof beyond any reasonable doubt.

This court has re-evaluated the evidence and the submissions made by parties in this appeal. The trial magistrate acquitted the Appellant on the offence of **defilement**. According to the trial magistrate, the medical evidence produced by the prosecution did not corroborate the evidence of the complainant. She found that the prosecution did not discharge its burden of proving that the complainant was penetrated thus the offence of defilement was not proved to the required standard of proof beyond any reasonable doubt. In convicting the Appellant on the alternative count of committing an indecent act with a child, the trial magistrate stated as follows;

> *"**in respect of the alternative charge of indecent assault, the complainant's evidence was that the accused had put his thing in her vagina. This is not supported by medical evidence. She also stated that the accused took a pink and white thing shook it until it became soapy. The account given by the complainant would seem to suggest that the accused masturbated in her presence. This would explain the shaking that caused the pink thing to become soapy…. I am convinced that the accused carried himself inappropriately around the complainant in circumstances that would suggest that he acted indecently in the presence of the child complainant."***

He went on to state that;

> ***"Though the complainant was a child aged 6 years, her evidence in respect to what took place was consistent. It is not corroborated by any other evidence and I will warn myself of the danger of convicting the accused on the basis of the uncorroborated evidence of the complainant. However, it is unusual to find corroboration in cases of indecent acts as they are usually conducted in private."***

Here, it seems that the trial magistrate based his judgment on a theory by suggesting that the Appellant was masturbating. The complainant's evidence was that the Appellant shook the object until it became soapy. He then shot it into her genital organ. This aspect of the judgment goes against the principle set down in the case of **Okethi Okale & Others v. Republic [1965] EA 555** the court held, *inter alia*, that:

> ***"(i) in every criminal trial a conviction can only be based on the weight of the actual evidence adduced and it is dangerous and inadmissible for a trial judge to put forward a theory not canvassed in evidence or in counsel's speeches."***

Further, the particulars of the offence as per the charge sheet stated that the Appellant intentionally touched the vagina of J W, a girl aged five (5) years with his penis. Under the **Sexual Offences Act**, the meaning assigned to ***"indecent act"*** is;

> ***"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 photographic material to any person against his or her will."***

In this case the trial magistrate found that the prosecution had not proved its case against the Appellant on the charge of defilement. The trial magistrate's finding was that the testimony of the complainant suggested that the Appellant masturbated in the presence of the complainant. He stated that he was convinced that the Appellant carried himself inappropriately around the complainant in circumstances that would seem to suggest that he acted indecently in the presence of the child complainant. He proceeded to convict the Appellant on the alternative charge of committing an indecent act on a child. The finding of the trial magistrate would mean that there was no contact between the Appellant and the complainant. For the offence of indecent act to be established under the **Sexual Offences Act**, the trial court ought to have established that there was contact between the Appellant and the complainant. What the trial magistrate's found was that the Appellant carried himself inappropriately in the presence of the complainant. Thus, the offence of committing an indecent act as contemplated under the **Sexual Offences Act** was not established in this case.

The upshot of the above reasons is that the appeal lodged by the Appellant has merit and is hereby allowed. The Appellant's conviction is quashed. The sentenced imposed upon 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 4TH DAY OF NOVEMBER 2015

L. KIMARU

JUDGE