REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO.204 OF 2012

BETWEEN

BENARD OGAMBA ZACHARIA …………….………….. APPELLANT

AND

REPUBLIC ………………………………………………….. RESPONDENT

(Being an appeal from original conviction and sentence of the CM's Court at Kisii in Criminal case No.1438 of 2011– by Hon. A.C. Onginjo, CM, delivered on 8th August 2012).

JUDGMENT

1. The appellant herein Bernard Ogamba Zacharia, was charged with the offence of attempted defilement contrary to **Section 9 (2)** of the **Sexual Offences Act, Act No.3 of 2006**. The particulars were that on the 10th day of December 2011 at [particulars withheld] in Marani District within Kisii County, the appellant intentionally attempted to cause his penis to penetrate the vagina of E K O, a child aged 10 years.
2. The appellant was charged in the alternative with committing an indecent act with a child under the age of 13 years contrary to **Section 11 (1)** of the **Sexual Offences Act No.3 of 2006**. The particulars were that on the 10th day of December 2011 at [particulars withheld] in Marani District within Kisii intentionally did an indecent act to E K O a girl aged 10 years by rubbing his penis against her vagina.
3. The appellant pleaded not guilty to the charge. The case went to trial thereafter . The prosecution called 5 witnesses. PW1 was J O, the father of the complainant. Other witnesses were Number 632313 APC Wycliffe Oreng (PW2), Dennis Omurwa, a clinical officer at Kisii Level 5 Hospital who testified as PW3, E K O (PW4) and Number 79589 Cpl James Nzioka (PW5).
4. The facts and the evidence of this case are that on 10th December 2011 at about 3.00 p.m., PW4, a girl aged 10 years and a primary school pupil in class 4, was sent by her grandmother to go and fetch some chairs from the appellant's mother's home. The chairs were intended for use by the visitors who were visiting PW4's grandmother. As she carried the chairs, PW4 met the appellant at the latter's brother's house. The appellant then took out a 200/= note and gave it to PW4 and asked her to go and buy some local brew, but before she could get hold of the money, the appellant grabbed PW4 and pushed her into his brother's house and locked the house. The appellant then placed PW4 on a sofa seat and proceeded to remove PW4's underpant and skirt. The appellant also undressed by removing his trouser. The appellant then inserted his penis into PW4's vagina. During the ordeal, the appellant warned PW4 not to make any noise, otherwise he would cut her up since he was known for strangling and killing people. The appellant also warned PW4 that after killing her, he would bury her in the house and that if he did that, no one would

know that she had been killed and buried. After the ordeal, the appellant opened the door, took away the 200/= he had enticed PW4 with and then left.

5. PW4 went home and told her grandmother (the grandmother did not testify because she was reported to be sick and admitted in hospital). PW4 was taken to Omuraa Administration Police Post at Kegogi where the matter was reported. The report was received by PW2. PW2 in the company of a colleague known as Abdullahi Osman went and arrested the appellant and escorted him to Rioma police station thereafter PW4 was also escorted to Rioma police station. According to PW2, PW4 looked confused, mixed up and traumatized and as a result they did not interrogate her. PW4 also stated that when the appellant saw the police he ran away.
6. PW5, who was on general duties at Rioma police station on 11th December 2011 in the morning received PW4. PW5 assigned PW4's complaint to PC Kipyegon. PW4 was issued with a P3 form. The appellant was then charged, initially with the offence of defilement but after the P3 form was filled, the charges were amended to attempted defilement and indecent act with a child. PW5 completed the investigations and produced PW4's skirt as **P. Exhibit 3**, the P3 form and treatment notes as **P. Exhibits 1** and **2** respectively. PW5 also escorted PW4 to Kisii Level 5 Hospital for age assessment.
7. The P3 form was filled by Dennis Omurwa, PW3. According to PW3, the examination of PW4 revealed no physical injuries to her genital area, nor was any discharge or spermatozoa noted. PW3 also stated that the examination did not show any penetrating sexual assault. The P3 form was produced as **P. Exhibit 1**.
8. At the close of the prosecution case, the appellant was put on his defence. In his unsworn statement, the appellant stated that the case against him was a fabrication and that he did not commit the offence. He testified that on 8th December 2011, he went to Nyamira to the home of his aunt who had died in Kabarnet. He also attended the burial of his aunt on 9th December 2011 before going back to his own home. Before he got home, he was stopped by AP's who had 3 suspects with them. The AP's told the appellant that they were looking for him. They escorted him to the chief's camp and later to Rioma police station where he was placed in cells for 2 days before being taken to court to answer the charges preferred against him.
9. After carefully analyzing the evidence on record, the learned trial magistrate was satisfied that the prosecution had proved its case against the appellant beyond any reasonable doubt on the alternative charge of committing an indecent act with a child. The appellant was found guilty as charged, convicted and sentenced to serve 10 years imprisonment.
10. The appellant was aggrieved by the findings of the learned trial magistrate and has appealed to this court for reprieve. In his home-made petition of appeal the appellant complains that the sentence imposed upon him by the learned trial magistrate is excessive in the circumstances; that the prosecution did not prove the case against the appellant to the required standard and that the learned trial magistrate failed to comply with the provisions of **Section 24** of the **Evidence Act**. It appears to me that the appellant may have had **Section 124** of the **Evidence Act** in mind when he referred to **section 24**. **Section 124** of the **Evidence Act** provides as follows:-

> **"124. Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.**
>
> **Provided that where in a criminal case involving a sexual offence 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 in the proceedings, the court is satisfied that the alleged victim is telling the truth."**

11. This being a first appeal, this court is under a duty to reconsider and evaluate the evidence afresh with a view to reaching its own conclusions in the matter. In carrying out this duty, the court has to remember that it does not have the privilege of seeing and hearing the witnesses who testified during the trial so that if any issue on this appeal turns on a point of fact and demeanor of any of

the witnesses, this court must be extremely cautious in determining whether or not to overturn the findings of the learned trial magistrate. See generally **Arum –vs- Republic [2006] 2 EA 10 (CAK), Kibuako –vs- Uganda [2006] EA 140 (SCU)** and **Muthoko –vs- Republic [2008] KLR 297**.

12. I have now carefully reconsidered and evaluated the evidence afresh. I have also carefully weighed and considered the judgment of the learned trial magistrate in light of the submissions made by both the appellant and the prosecuting counsel. After the above analysis, the issues that arise for determination are whether:- **(a)** the prosecution proved its case beyond any reasonable doubt in view of the fact that the only evidence that tends to connect the appellant with the offence is that of PW4 and whether the evidence of the P3 form was necessary in the circumstances of this case.

13. In his written submissions dated 7th November 2013, the appellant contends that the evidence on record does not establish the offence of indecent act as defined by the Sexual Offences Act. Under **Section 2** of the **Sexual Offences Act**, an **"indecent act"** means an unlawful 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 phonographic material to any person against his or her will."*

14. The appellant contends therefore that he was wrongly found guilty of an indecent act when the evidence by PW3 does not support such finding. Finally, the appellant contends that even if the evidence in support of the charge against him was circumstantial, such evidence is so weak that it does not assist the prosecution's case.

15. In rebuttal to the appellant's submissions Mr. T. Imbali, prosecuting counsel for the respondent submitted that despite the cross examination by the appellant, PW4's evidence as to how the appellant committed the offence remained unshaken. Counsel further submitted that the issues raised by the appellant are misplaced because the offence of which the appellant was convicted was one of committing an indecent act and not one of defilement which would require corroboration by medical evidence from the P3 form. Concerning the provisions of **section 124** of the **Evidence Act**, counsel submitted that the evidence of PW4 is covered by the proviso to the section. On sentence, counsel submitted that the same is the minimum sentence provided under **Section 9 (1)** of the **Sexual Offences Act**. Counsel urged this court to find that the appeal lacks merit and to dismiss the same.

16. In reply, the appellant submitted as follows:- that the 200/= note allegedly given to PW4 by himself was never produced as an exhibit; that no eye witness came to court to support PW4's testimony and finally that PW4 came to court under arrest which suggests that the case against the appellant was a frame up.

17. After carefully reconsidering and evaluating the evidence afresh, I am of the considered view that this appeal, has no merit on conviction. In the first place, the evidence by PW4 to the effect that the appellant grabbed her as she made her way to her grandmother's home, took her into his brother's house and removed her underpants and skirt remained unchallenged all through the trial. The prosecution did not need to prove penetration for the offence of committing an indecent act. There is no doubt in my mind that the appellant's unlawful intentional act of removing the appellant's skirt and underpant caused his hand to get into contact with PW4's genital organ, namely her vagina. I have read through the testimony of PW4, and the witness strikes me as one who was truthful. I also find that during the voire dire examination, the trial court was satisfied that PW4 possessed sufficient intelligence to give her evidence on oath. Though PW4 was cross examined at length by the appellant, she remained steadfast in her answers to the questions put to her. I have no reason to doubt the testimony of PW4.

18. As regards sentence, the principles to be applied by an appellate court in deciding whether to interfere with the sentence imposed by a trial court are now well settled and these are that the appellate court will only interfere if the trial court took into account the wrong principles in meting out the sentence or if the sentence is manifestly excessive.

19. In the instant case, a person who is convicted of an offence contrary to **Section 11 (1)** of the **Sexual Offences Act** is liable to imprisonment for a term not exceeding five years or a fine not

exceeding fifty thousand shillings or to both. Having been convicted on the alternative count, the proper sentence that ought to have been imposed by the learned trial magistrate should have been in accordance with **Section 11A** of the **Sexual Offence Act**.

20. In the premises, I allow the appeal on sentence to the extent that I set aside the sentence of 10 years' imprisonment and substitute the same with five (5) years imprisonment. The appeal on conviction fails. R/A within 14 days explained.
21. It is so ordered.

Dated and delivered at Kisii this 6th day of February, 2014

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Present in person for the Appellant

Mr. P.O. Ochieng for the Respondent

Mr. Bibu - Court Clerk