REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 152 OF 2011

FELIX MBAABU……APPELLANT

VERSUS

REPUBLIC……..……. RESPONDENT

J U D G M E N T

The appellant FELIX MBAABU KIRIMI was charged in Senior Principal Magistrate's court at Nkubu with the offence of defilement contrary to Section 8(1)(4) of the Sexual Offences Act(No.3 of 2006). The particulars of the offence were that on the 5th day of July, 2007 [particulars withheld] in Meru Central District within Eastern Province committed an act which caused penetration with his genital organs in the genital organ of G K a child aged twelve years. The appellant faced an alternative charge of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act (No.3 of 2006). The particulars of the alternative charge were that on 5th July, 2007 at [particulars withheld] Meru Central district within Eastern Province did an act of indecency with G M a child aged twelve years by touching her private parts namely breasts and vagina.

The case was heard by the trial court (S.M.Githinji,SPM) who delivered his judgment on 24th October, 2010, in which the appellant was found guilty and convicted on the main charge of defilement. He was sentenced to 20 years imprisonment. Being aggrieved by both the conviction and sentence he preferred this appeal setting out 6 grounds of appeal being as follows:-

1. ***That the learned trial Magistrate erred in law and fact by convicting the appellant on uncorroborated evidence.***
2. ***That the learned trial Magistrate erred in law and facts in failing to consider that the prosecution had not proved their case beyond reasonable doubt.***
3. ***The learned trial Magistrate erred in law by failing to observe that some of the vital witnesses were not summoned by the prosecution.***
4. ***That learned trial Magistrate erred in law and fact by not taking into consideration of the delay by the complainant to making a first report could this matter have been truthful.***
5. ***The learned trial Magistrate erred in law and fact by failing to notice that this was a framed up case(charges meant to scorn their ill motivated goal through tailored evidence.***
6. ***The learned trial Magistrate erred in law and fact by failing to give due consideration to the appellant's defence.***

Briefly the facts of the case against the appellant were that he defiled his victim(PW2) on 5th July,2007 at 4.00p.[particulars withheld], after he had ordered her to go to his office. She claimed the appellant was

her school teacher. PW2 testified how the appellant punished standard 1, 2 and 3 pupils for speaking in Kimeru language and ordered her to go to his office for being a gossiper, where the appellant pushed her into the office, knocked her down on the floor, removed her pants, his trouser and lowered his underwear to the ankle and started defiling her. She tried to scream but he blocked her mouth with his hand.

PW3 went to wait for PW2, the complainant, along the road and on delaying she went back to check what was happening. PW2 was locked in the office and she peeped through the glass office window and saw PW2 laid on the table. PW4 after being informed by Boniface that the appellant had laid PW2 on the table he went and peeped through the window of staffroom and saw appellant laying on PW2 on a table. The appellant saw PW4 and shouted at them and ordered them to leave the place. PW5 testified that the appellant told them there was a child crying in the office and she went and peeped through the window and saw the appellant having lowered his pant to the ankle, removing PW2's pants and laid on her on the floor. PW1 mother to PW2 testified that PW2 went home crying with a swollen face and she told her she won't go back to school as the appellant was beating her. PW1 decided to go to school to see the headteacher and know what is wrong.

She went but did not find the head teacher but the appellant who told her that people were alleging he had sex with her daughter but he was only trying to see whether she could agree to have sex with him. PW1 testified that PW2 told her that after she had left her at the school on 6/7/2007 the appellant told her to go to his office, he beat her up, undressed her and penetrated her. On 7/7/2007,PW1 with her husband J M went to the appellant before whom the appellant admitted having defiled PW2, apologized and offered to give PW1 Kshs.2000/- to end the issue. PW6 a medical Officer from M G H produced P3 form as prosecution exhibit 1 and he stated that he examined PW2 on 24th July, 2007 a girl aged 12 years old and noted the hymen was absent.

The appellant gave sworn defence. He admitted on 5/7/2007 he was at the school on duty as the Deputy Headteacher. He stated that he was in-charge of discipline and he disciplined Class 1,2 and 3 for making noise. He denied having sex with PW2 but admitted that he disciplined her amongst other pupils of her class and she left for home. He stated that he did not hear anything odd and PW2 continued attending school till 16th July, 2007. He referred to the school register in support of his assertion. The appellant testified that on 16/7/2007 the Headteacher told him to report to A.E.O at Kanyakine. That on 17.7.2007 he was told he had beaten and defiled PW2. That parents of PW2 demanded for Kshs.50,000/- to which they lowered to Kshs.20,000/- which sum the appellant said he could not give. He was arrested on 26/7/2007. The appellant averred that he was framed due to being strict in discipline.

I have re-evaluated the evidence on record; I have also considered the appellant's submissions in support of this appeal and the submissions by the State Counsel in opposition of this appeal and relevant provisions of the law.

The appellant faults the trial court for failing to observe that vital witnesses were not summoned by the prosecution to give evidence as their evidence would not have supported the prosecution case. This court is alive of the fact that there is no particular number of witnesses who are required to proof of any fact unless the law requires**(see Benjamin Mbugua Gitau V R C.A Criminal Appeal NO.257 of 2009 at Eldoret).** It is important to note that the court relied on evidence of PW1 in which it is alleged the appellant offered cash upon being confronted on the issue by her and her husband Joseph Mwebia. PW1 testified that PW2's pant and dress were soiled with blood and the same were given to one Mama Njeri a Police Officer.

PW1 further averred that PW2 was given a 10 page exercise book which she also gave to the same Police Officer. PW4 and PW5 mentioned a pupil by the name B who told the class there was a child crying in the office and they could go and check what was happening. The Investigating Officer was required to appear and produce statement of PW1 to the police as requested by appellant's Counsel and court gave that order. The said prosecution witnesses such as police officers Bonface and Investigating Officer were not called yet their evidence was so vital to the prosecution case. In the case of ***Michael Omwenga Mokua V R*** **Criminal Appeal No. 6 of 2006,**the court stated that it is trite law that where the prosecution fails to call a material witness, it would be safe to assume that had he testified, his evidence would not

have supported the prosecution's case. I find that lack of evidence by the police officer, who received the exhibits, and investigating officer was such vital evidence and its absence in this case cast doubt to the prosecution case and the trial Magistrate ought to have given the appellant the benefit of doubt. I find merits in appellants ground No.1 of appeal.

The evidence given by PW1, PW2, PW3, PW4, PW5 and PW6 is inconsistent and contradictory. PW1 stated that her daughter PW2 was sexually assaulted by the appellant on 6/7/2007 yet PW2, PW3, PW4 and PW5 talks of sexual assault to have taken place on 5/7/2007. The P3 exhibit No.1 indicates the date of offence as 5/7/200. The P3 form was completed on 24/7/2007. Report to the police was made on 21/7/2007. Part B, of the P3 Form under approximate age of the injury shows not applicable (N/A) and probable type of weapon causing injury was not applicable (N/A). The degree of injury not disclosed. Section C shows hymen absent, laceration on labia mayora with whitish discharge, yet PW6 on being cross-examined he testified that he did not see any laceration of labia mayora. PW6 did not in his evidence indicate when PW2 lost her hymen. PW2 in her evidence stated that the appellant forced her to the ground, removed her pant, removed his trouser and lowered his underwear to the ankle. That he did not remove his shirt and the coat. PW3 contradicted PW2 by stating that PW2 was laid on a table and the appellant had no clothes. PW4 contradicted PW2 by stating that PW2 was laid on a table. PW5 contradicted PW3 and PW4 by stating appellant laid PW2 on the floor and not on the table. PW2 in her evidence stated that the office window had no curtain yet PW4 stated that they had to peep through a gap as the window had curtains.

PW1 evidence on the type and size of the exercise book purportedly given to PW2 by the appellant was that the exercise book was 10 pages yet PW3 said it was 120 pages and the two contradicted one another. PW2 testified that appellant was punishing class 1, 2 and 3 and each pupil got 2 strokes and that she was also beaten. PW3 testified that each pupil from class 1, 2 and 3 was given 3 strokes whereas PW4 testified that appellant called pupils for class 1, 2 and 3 and released them and was left with PW2. PW5 testified class 1, 2 and 3 were told to kneel down for making noise and the appellant released class 1 and 2 remaining with class 3 who the appellant beat but did not beat PW2 but instead told her to go and wait outside the staffroom. Incidentally in this case it is only PW4 who claimed the appellant saw them, shouted at them, and ordered them to leave the place.

On the appellant's evidence it should be noted that though the appellant gave sworn evidence he was not cross-examined at all. His evidence remained unchallenged by the prosecution. Had the trial magistrate given due weight to the several discrepancies in the witnesses testimonies as I have analyzed herein above and shortcoming in the investigations and failure by the prosecution to produce, all material evidence such as the blood stained underwear, complainant's dress, clothes, exercise books as exhibit mentioned by PW1 and PW3 rather than generally stating the shortcoming which were so serious and which this court do not find to have been negligible were just negligible, he would have found the appellants defence was not credible and would have found that the prosecution had not proven its case to the required standard. In view of the above I find appellants grounds of appeal No.2, 3 and 6 merited and allow the same.

As regards ground No.4 of the appeal, the complainant complained of sexual assault to have taken place on 5th July, 2007 yet the complaint was not made to police till 20th July, 2007, 15 days after the alleged offence.

PW2 went to the hospital on 20th July, 2007 for examination for she feared to be pregnant. PW1 stated she reported to the Chief on 20/7/2007 and added she suffered from mental problem and could not remember well. The delay by PW1 and PW2 to report the incident to police in time and by failing to preserve material and relevant evidence and avail the same such as blood stained pant and dress casts doubt to the occurrence of the incident and the benefit of doubt should go to the appellant.

In the circumstances I allow this appeal and quash the conviction and set aside the sentence of 20 years imprisonment. The appellant shall be set free unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MERU THIS 11TH DAY OF JUNE, 2014.

J. A. MAKAU

JUDGE

Delivered in open court in the presence of:

1. Mr. Mulochi for the respondent

2. Appellant in person

J. A. MAKAU

JUDGE