REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 46 OF 2012

PAUL NJERU IRERI …….....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(From original conviction and sentence in criminal case Number 3485 of 2008 in the Chief Magistrate's Court at Makadara – T. Murigi (MP) on 30th January 2013)

JUDGMENT

1. The appellant herein, **Paul Njeru Ireri** was convicted for the offence of indecent act with a child contrary **Section 11(1)** of the **Sexual Offences Act No. 3** of **2006** and sentenced to fifteen (15) years imprisonment. The brief particulars were that on the 1st day of September 2008 at Utawala in Embakasi within Nairobi, he intentionally and unlawfully committed an indecent act with M.N.K. (identity concealed on account of her being a minor) a child aged 7 years by touching her private parts, namely vagina.

2. The appellant being dissatisfied, filed an appeal against both conviction and sentence, based on three amended grounds of appeal.

3. In the first ground he complained that he was convicted on an incurably defective charge as provided under **Section 72(3)** of the old **Constitution** as read with **article 49(f) 1** of the new **Constitution** and **section 77(2)** of the old **Constitution** as read with **article 50(2) b,g,h,j** and **m** of the new constitution. In response Miss Ndombi argued that the question of the appellant's rights under **Article 49(1)(f)** of the **Constitution** being violated because he was held in custody for more than 24 hours, should have been raised at the trial court, since it is not possible to tell whether there was a weekend in between the 1st September 2008 when he was arrested and 4th September 2008 when he was taken to court.

4. I have considered the submissions of both parties on this ground together with the existing case law. The Court of Appeal addressed the question of violation of rights under **Section 72(3)** of the repealed Constitution in the case of **JULIUS KAMAU MBUGUA VS REPUBLIC CR. APPEAL No. 50 OF 2008**. The court reviewed a wide range of previous decisions on the issue of remedies available to accused persons who are taken to court later than provided for and stated that:

"Moreover, it was not shown that the alleged unlawful detention had any link or effect on

the trial process itself or that it caused trial related prejudice to the appellant which affected the validity of the trial. The alleged unlawful detention occurred long before the appellant was charged. The alleged unlawful detention does not exonerate the appellant from the serious crime he is alleged to have committed. The breach could logically give rise to a civil remedy – money compensation as stipulated in *Section 72 (6).* ***That is the appropriate remedy which the appellant should have sought in a different forum."***

The appellant's remedy for this grievance therefore lies elsewhere and cannot exonerate him from the charges before court.

5. In the second and third grounds the appellant contended that the trial magistrate relied on evidence that was contradictory, inconsistent and inconclusive. In the third ground the appellant urged that the court erred by acting upon a report made after consultation to base its conviction and sentence. He submitted that **PW1, PW2** and **PW3** had framed him.

6. Miss Ndombi submitted in rebuttal to the second ground that the evidence on record was not inconsistent or contradictory, since **PW1** told the court that the appellant, whom she referred to as Njeru, put his fingers in her vagina and anus. That her evidence was supported by **PW2**, her mother who noticed that she walked in a funny way and examined her. That both **PW4** Dr. Adan and **PW6** Dr. Kamau examined her and confirmed that her hymen was widened, and that there was redness of the vulva. Miss Ndombi further urged that there was no evidence of the appellant having been framed on record and that his defence was a mere denial. She therefore urged the court to dismiss his appeal.

7. To determine whether the prosecution evidence was contradictory, inconsistent and inconclusive as stated by the appellant or it flawed as argued by Miss Ndombi, I have set out the facts of the prosecution case in sum here below.

8. The complainant, (**PW1**) was a class three pupil at the time of giving testimony. Upon being subjected to **Voire dire** examination the trial court certified her intelligent enough to give evidence on oath. She therefore gave sworn testimony. She told the court that she was playing with one Kimutai at his house on the material day when he left to visit the toilet. At that time the appellant came in and asked for a drink of water.

9. That the appellant whom she knew as a young man who used to work at Mama Chemo's asked her to follow him behind a certain house. He assisted her to remove her biker and pant and touched her vagina and anus. The appellant told her that next time, he would urinate on her and warned her not to tell anyone or else he would kill her.

10. She however disclosed the incident. When the mother asked her why she was walking like a limping goat. She narrated what had happened, and took her mother to the house where the appellant committed the indecent act to upon her.

11. I note that the minor referred to the appellant by his names in her testimony and also told the court that the appellant used to come to her house for his building tools every day. She positively identified him in court. It is therefore evident that the minor and the appellant knew each other prior to this incident a fact which was not contended by the appellant.

12. The minor explained that twice on the material date the appellant instructed her to follow him behind the house and he led her to an unused house. On the first occasion he called her from the home of playmate called Kimtai and took her to the unused house where he pulled her dress up and told her to remove her pair of bikers and panties. He then inserted his fingers into her vagina and anal opening. On the second occasion he caller her from her home where she was with her grandfather. She was wearing a pair of trousers which he removed and repeated what he had done on the previous occasion.

13. In both instances the appellant who was alone with the minor threatened to kill her if she told anyone what had transpired and gave her a sweet to keep her silent. The matter came to light when **PW2,** the mother noticed that she was walking in an awkward manner and sought to know what was wrong. The minor narrated to her what had happened. **PW2** checked the minor's genitals and noted that the vagina appeared red and widened.

14. **PW2** and **PW3,** the father to the minor both stated that when **PW3** fetched the appellant following the minor's report, the minor confirmed that it was he who had indecently assaulted her. She took the parents to the unused building where the appellant lured her to perform the indecent acts. The medical evidence from **PW5** Dr. Adan Rilwan of Nairobi Womens' Hospital confirmed that the minor was examined on 2nd September 2008 and found to have hymenal that was widened for her age although it was intact. She had no bruises or tears but had a urinary tract infection for which she was treated.

15. **PW6** Dr. Kamau examined her on 5th September 2010 and noted redness of the vulva although there were no injuries to the external genitalia. He placed her age at 7 years at the time.

16. I re-assessed the evidence of the appellant in the context of all the evidence on record and keeping in mind that this being a criminal trial he was under no obligation to prove his innocence or to explain himself at all since the burden of proof rests unshiftingly upon the prosecution.

17. Looking at all the evidence on record however I find that there is nothing either by way of cross-examination or in the defence evidence that raises what could amount to a reasonable doubt, whose benefit might be accorded the appellant. The appellant's defence is a bare denial in light of the identification by a child who knew him and whose parents knew him. There is no question of mistaken identity and no apparent reason to believe that he was framed either. The appellant's second ground must therefore fail.

18. Having scrutinized and re-evaluated the evidence on record to draw my own conclusion and make my own findings keeping in mind that I did not see or hear the witnesses as they testified, I find that the appellant was positively identified.

19. For the foregoing reasons I find that the conviction entered against the appellant was well founded. The appeal is therefore not meritorious and is accordingly dismissed.

SIGNED DATED and **DELIVERED** in open court this **11th day** of **June 2014.**

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L. A. ACHODE

JUDGE