NO. 456/2014

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 178 OF 2012

JAMES MWANGI JIMMY.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(Being an appeal from the original conviction and sentence in Kajiado Principal Magistrate's Court Criminal Case No. 347'B' of 2012 by

Hon. P.A. Olengo PM on 21/11/2013)

J U D G M E N T

1. **James Mwangi Jimmy,** the appellant was charged with the offence of defilement contrary to **Section 8(1) (2) of the Sexual Offences Act No. 3 of 2006.**

Particulars of the offence being that on the **15th** day of **March 2012** at ***[particulars withheld]*** trading centre in **Loitoktok District** within **Kajiado County** in **Rift Valley Province** intentionally caused his penis to penetrate the vagina of **A N** a child aged **7 years**.

2. In the alternative charge the appellant is charged with the offence of committing an **Indecent Act** contrary to **Section 6(a) of the Sexual Offences Act No. 3 of 2006.**

3. He was tried, convicted and sentenced to **fifty (50) years** imprisonment.

4. Being dissatisfied by the conviction and sentence thereof in his amended grounds of appeal he states that:

i. The learned trial magistrate erred in both law and fact by holding that the offence as charged was proved beyond any reasonable doubt.
ii. The learned trial magistrate erred in both law and fact by entering a judgment based on contradictory and inconsistent evidence lacking credibility.
iii. The learned magistrate erred in law and fact when he failed to observe that the trial was not fair which was a violation of the constitutional rights of the appellant.
iv. The learned magistrate erred in law and fact by convicting on defective charges and rejecting the plausible defence put up.

5. The facts of the case were that on the **15th March 2012,** PW1 **A.N** a child was at home when the

appellant took her into his house. He removed his innerwear and used his genital organ that she described as **"Kadudu"** to penetrate her genital organ. In the meantime her sibling went in search for her and informed her mother, PW2, **A.M.** PW2 searched around and found her at the appellant's house. The child narrated what had befallen her. They reported the matter to the police and took the child to hospital for examination. PW4 **Dr. Stephen Mutiso** examined the child and found her labia bruised, hymen perforated and the lower part of the vaginal canal was bruised. Laboratory investigations revealed urinary tract infection.

6. The Doctor also examined the appellant. The physical appearance of the penis showed bruising near the urethral orifice. He also had the urinary tract infection. The appellant was charged.

7. In his defence the appellant stated that on the material date he passed by the market on his way home, having come from his place of work. He encountered people who arrested him. He called a witness DWI, his sister **Janet Muthoni** who stated that she heard a commotion and on checking she found it was the appellant who had been arrested.

8. This being the first appellate court, its duty is to subject evidence on record to a fresh review and scrutiny and come to its own conclusions bearing in mind, however, that it did not see nor hear witnesses testify. (***See Okeno versus Republic [1972] E.A. 32).***

9. It is alleged by the appellant that the court convicted him of the offence oblivious of the fact that the charge was defective. It has been held that a charge can only be fatally defective if it does not disclose the essential ingredients of the offence (**See Yosefa versus Uganda (1969), EA 236; Sigilai versus Republic (2004) 2 KLR 480).**

10. A person is deemed to have committed defilement when he commits an act that causes penetration with a child. The appellant was charged with an offence known in law. The particulars of the offence stated disclose the genital organ alleged to have been used. The act of penetration is disclosed. It was following the aforestated disclosure that the appellant was able to comprehend what he was being accused of. He followed proceedings and even tendered evidence in his defence. Therefore, the charge as drawn was not defective.

11. The complainant was stated to be a child aged 7 years old. A Child Health Card produced in evidence established that the child was born on the **10th June 2005.** In the **year 2012** she was **7 years old**. The Doctor who examined her also estimated her age as such. Her mother, PW2 also confirmed that the age of the complainant was **seven (7) years.** Proof of the age of the child was not in doubt.

12. The child (PW1) was examined by a medical officer PW4. He confirmed that indeed the child was defiled. She had sustained bruises on the labia and the hymen was perforated. He opined at page 2 of the P3 form that there was sexual assault with penetration.

It is argued by the appellant that there having been no bleeding there was no defilement. An act of penetration is committed when there is either partial or complete insertion of the genital organ of a person into the genital organ of another **(See Section 2 of the Sexual Offences, 2006).**

13. A person who inserts a penis partially into a vagina may not necessarily cause the victim to bleed. The allegation that defilement could not have occurred is therefore baseless. Bleeding was not a necessary ingredient.

14. The issue to be determined would therefore be whether the person who defiled the complainant was the appellant?

15. PW1 was a child of tender years. She was taken through voire dire examination by the learned trial magistrate who formed an opinion that:

> "***She did not understand the meaning of an oath but she was possessed of sufficient intelligence to understand the difference between saying the truth and falsehoods."***

On that basis he directed that she gives an unsworn statement. Thereafter she was not subjected to cross-examination.

16. In her testimony PW1 gave a succinct description of what transpired after she was taken to the accused person's house.

She stated thus:

> ***"He held me and took me to his house. He took me to bed. He removed my biker and touched my private part. He touched my "kadudu". Kadudu is where I use to urinate. He then inserted his "kadudu" into my Kadudu. His kadudu is what he used to urinate... I felt pain and I cried a bit."***

The child identified her private part to the court as she described how it happened.

17. Per the evidence of PW1, the act was committed inside the house of the appellant. Consequently there was no eye-witness to what transpired. However, in the process PW2 her mother returned home. On being told that the child (PW1) was nowhere to be seen she looked around. While near the house of the appellant she heard a familiar voice, her daughter's voice. The door to the house had been locked from inside. She informed PW3 **C M W** of what she heard. They called out, the appellant declined to open. They (PW2 and PW3) witnessed as the door was eventually opened and PW1 came out of the house. The child narrated what happened. The appellant was arrested and taken to the police station.

18. Evidence adduced by PW1 that she was found in the house of the appellant was corroborated by that of PW2 and PW3.

19. Both PW1 and the appellant were subjected to medical examination 12 hours after his arrest. The appellant's penis was bruised. But of most importance was the fact that both the complainant and the appellant had a similar infection, a urinary tract infection. This meant that one of them who had the infection transmitted on to the other. This was evidence that corroborated that of PW1 that the appellant's genital organ came into contact with hers following the penetration.

20. It is submitted that PW1's clothes should have been subjected to DNA sampling. In the past I have held that in rural areas like Loitoktok in the instant case, collecting DNA evidence for purposes of forensic examination is not easy since there are no experts available (**See Criminal Appeal No.118/2010, James Mulang'a Kisunza versus Republic).** Therefore, in such cases if there is evidence establishing the fact alleged as in the instant case then such evidence can be relied on to retain a verdict of guilt.

21. Having re-evaluated the evidence adduced at trial it is apparent that the trial magistrate carefully analysed evidence adduced. He considered the defence raised and gave reasons for disregarding it. In the premises he did not misdirect himself as alleged. I therefore confirm the conviction on the main charge. The trial magistrate conducted himself correctly by not making a finding on the alternative charge.

22. With regard to sentence imposed, **Section 8(2)** provides:

> **"A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."**

The provision of law is couched in mandatory terms. The court had no discretion of deviating

from the requirement of the law.

23. It is well settled in law that an appellate court will not interfere with the sentence of a trial court unless there has been a failure to exercise discretion...or where in principle an error was made by the trial court (**See Kamya Johnson Wavamuno versus Uganda, Criminal Appeal No. 16 of 2000).**

24. **Section 354 (3) (iii)** mandates this court to alter the nature of sentence if it is necessary.

25. An error having been made by the trial court I hereby correct it by setting aside the sentence imposed. I substitute it with **life imprisonment.**

26. It is so ordered.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **4TH** day of **DECEMBER, 2014.**

L.N. MUTENDE

JUDGE