IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO.21 OF 2011

PETER LONGE NJOGU…..……..……..APPELLANT

VERSUS

REPUBIC……..…….……..RESPONDENT

[An Appeal from original conviction and sentence in Nyahururu P.M.A.CR.C.NO.520 of 2008 by Hon C. K. Obara, Resident Magistrate dated 21st January, 2011]

JUDGMENT

The appellant was charged **with defilement of a girl**, under the age of fourteen years contrary to **section 8(1) (2)** of the **Sexual Offences Act.**

According to the particulars of the offence, the appellant is alleged to have committed the offence on 13th February, 2008 at Kwa Njenga on a six (6) years old F.N.M. The case was first heard by C. K. Nyaberi, Resident Magistrate but had to start *denovo* before C.K. Obara, Resident Magistrate. No reason was assigned for this.

But after hearing the prosecution witnesses and the appellant, the trial magistrate, C.K. Obara, Resident Magistrate found the appellant guilty of a lesser offence of **committing an indecent act with a child** contrary to **Section 11(1)** of the **Sexual Offences Act** and upon conviction, sentenced him to ten (10) years imprisonment.

That aggrieved the appellant who has brought the present appeal on the grounds that:

i) the trial magistrate erred in substituting the charge with that of indecent act;

ii) the evidence of the complainant was not corroborated;

iii) the appellant's defence was not considered.

But arguing the appeal, learned counsel for the appellant concentrated his submissions on the contradictions of the prosecution witnesses' evidence. He took issue with the dates of the alleged offence and when the complainant was examined by the doctor.

At the initial trial before C.K. Nyaberi, Resident magistrate, the clinical officer told the court that the complainant was referred to him on 31st March, 2008 and that he examined her on 20th March, 2008, eleven (11) days before she was referred to him. It was submitted that that evidence also contradicts the charge sheet which gives the date of defilement as 13th February, 2008 while on the P3 form; the date is

given as 12th March, 2008. It was also submitted that at the fresh trial before C. K. Obara, Resident Magistrate, the clinical officer who testified on behalf of the examining clinical officer and once again contradicted the prosecution evidence.

Learned counsel for the respondent conceded the appeal for the reasons that the examining clinical officer found that there was no penetration and at the same time found that she had been infected through sexual intercourse.

In the initial trial, the complainant said that the appellant only inserted his finger into her vagina and that she did not bleed. But in the fresh trial, she alleged that she bled. The complainant also gave different versions of how she ended up at the appellant's house.

This being the first appeal, this court is enjoined to re-evaluate afresh the evidence on record in order to make its own independent conclusion.

The appellant and the complainant are neighbours. It is not clear how the complainant ended up in the appellant's house as she gave three versions – that he collected her from their home; that she went to the appellant's house by herself; that the appellant took her to his house as she came from school. But what is important is that it was the prosecution case that she went to the appellant's house; that she would go there even on previous occasions.

Although at the initial trial she could not recall the date, she gave 13th February, 2008 as the date of the incident. Her father's testimony was not helpful either. During the initial trial, he said that it was on 21st February, 2008 that he noticed the complainant not happy. But in the subsequent trial he said it was on 22nd February, 2008. What the date it was alleged that the appellant put the complainant at his bed, undressed her and inserted his finger into her vagina. She felt pain and the appellant let her free. She left and upon reaching home told her mother who in turn informed the complainant's father. A report was made to the police while at the same time the complainant was taken to Smile Medical Clinic and later to Ol Kalou District Hospital.

According to the P3 form, the complainant was examined on 31st March, 2008, several days after the alleged defilement. The clinical officer found as a fact that there was no penetration.

In his defence, the appellant averred that on 13th February, 2008, he was at his home and did not see the complainant. In a short decision, the learned magistrate simply said:

"The child was examined on 20th March, 2010 (ought to be 31st March, 2008), over a month after the date of the offence. The doctor concluded that there was no penetration. The evidence on record suggests strongly that the accused had an indecent act with prosecution witness one. Though accused was not charged with an alternative charge, I find him guilty of the minor offence of committing an indecent act with a child……."

With respect, the learned magistrate, although arrived at the correct decision in the circumstances of the case, failed to analyse the evidence and give reasons for the decision. For instance, there was no mention of the contradictions enumerated at the beginning of the judgment. That was critical in view of the appellant's *alibi* defence.

The learned trial magistrate after conducting a *voire dire* examination and finding that the complainant did not possess sufficient intelligence and having received her unsworn evidence upon which she convicted, ought to have given reasons why she was satisfied that the complainant was truthful. See proviso to **Section 124** of the **Evidence Act.**

The learned magistrate also failed to analyse the medical evidence. The clinical officer made some strange observations at the initial hearing. He said:

“The external genitalia was intact. The hymen was also intact. There was a brownish discharge seen. I formed an opinion that there was no penetration but an infection is likely to have been contracted at the time of the act.”

He continued in cross-examination saying:

“It is not possible to state precisely what may have caused the infection. It could be by sexual (sic) or dirt.”

That observation was not as conclusive as one would expect for an expert witness.

In view of the contradictions that I have pointed out, the inconclusive medical evidence and the evidence of a child which formed the basis of the conviction without any reason being assigned, I come to the conclusion that the conviction was unsafe.

The appeal is allowed, conviction quashed and sentence set aside. The appellant shall be set at liberty forthwith unless lawfully detained.

Dated, Signed and Delivered at Nakuru this 1st day of March, 2012.

W. OUKO
JUDGE