IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 62 OF 2007

(From original conviction and sentence in Criminal Case No. 107 of the Chief Magistrate's Court at Nakuru – H.M. NYAGA, SRM)

WILLIAM OUKO……APPELLANT

VERSUS

REPUBLIC……..…..RESPONDENT

JUDGMENT

William Ouko appeals against the decision of H. M. Nyaga (SRM) in CMCRC No. 107 of 2006, in which the appellant was charged with the offence of defilement contrary to Section 145(1) of the Penal Code. It was alleged that on 30/12/2005, at K[...] area in Nakuru, he unlawfully had carnal knowledge of N.M, a girl under the age of 16 years.

In the alternative, the appellant faced a charge of indecent assault on a female, contrary to **Section 144(1)** of the **Penal Code**. It was alleged that he indecently assaulted Nelly by touching her private parts. After the trial, the court convicted the appellant and sentenced him to life imprisonment. He is dissatisfied with that decision and preferred this appeal. The grounds of appeal are contained in the in the petition of appeal and further grounds were contained in the submissions. The grounds of appeal can be summarized as follows:-

1. **Whether the complainant's (minor) evidence was corroborated;**

2. **There was no medical evidence to connect the appellant with the offence;**

3. **That the appellant's defence was not considered;**

4. **Whether the sentence was excessive.**

The prosecution case.

PW1, M.V.M the mother of the complainant (PW2) testified that on 30/12/05, she came from church at noon when the appellant went to her house to take her radio for repair. The appellant informed her that her husband had asked him to take it. She later left for town and returned at 6.00 p.m. when her daughter Sharon (PW4) informed her that Nelly (the complainant PW2) had blood stains on her pants. PW1 checked the complainant and confirmed that there was blood on her underpants and dress. She also examined her vagina and saw that it was swollen. She took PW2 to the doctor on the next day and was informed that the child's vagina had been penetrated. She reported to the police station where she was issued with a P3 form. PW1 said that they live in the same plot with the appellant and that he used to play

with the children. Her children knew the appellant. She said that the children used to call the appellant **'Kuka'** and that PW2 said it is **'Kuka'** who did something to her.

PW2, N.M, a child aged 4 years gave unsworn evidence due to her tender age. She identified the appellant as **'Kuka'** and said that he did **"tabia mbaya"** (meaning "bad manners) to her. The court noted that she pointed to her crotch as she explained that he took her to his bed, removed her pants and it was painful.

PW4, S.M, a sister of PW2, who the mother said was 7 years gave sworn evidence. She recalled that she noticed her sister (PW2) urinating blood and when her mother came from town, she informed her about what she had seen. She identified the appellant as Ouko and said that PW2 went to his house and on coming out, she was urinating blood.

PW3, Dr. Philip Wainaina Kamau of Provincial General Hospital Nakuru recalled having examined PW2 on 9/1/05. He found her genitalia to be swollen, with bruises, but found no spermatozoa on the vaginal swab. He said that the bruises were consistent with defilement.

PW5, PC Allan Okinyi Mbuche went to arrest the appellant following a report of defilement. The appellant was pointed out by PW1 and he found the appellant in his house in the same plot where PW1 lived.

In his sworn defence, the appellant said that he was a casual worker cum electrician; that PW1 went to his house on the material day. She wanted him to repair her radio and he told her the cost. She promised to pay after he finished the work. He later showed her a receipt for spares of Kshs.1,200/- and charged labour of Kshs.300/-. She became hostile claiming it was too much. He got angry and threw the radio to the ground. He said that earlier, PW1 had taken to him a girl to marry but he refused; that PW1 vowed to teach him a lesson. He denied committing the offence.

This being the 1st appellate court, the court has the duty to re-evaluate the evidence, analyse it and arrive at its own findings.

As correctly pointed out by the trial court, there was no other eye witness to the alleged defilement. There is only the unsworn evidence of a child of tender age (4 years), PW2.

I find as a fact that the appellant was not a stranger to the children PW2 and PW4. They lived in the same plot. PW1 said that infact the appellant used to play with her children. That was not denied. According to PW1, the appellant had been to her house on that day to take the radio though the appellant says it is PW1 who went to him. The bottom line is that the appellant was not a stranger to PW2 and PW4. On the said date the appellant was at home in the plot and PW1 said that when she left for town the appellant was in the plot. The appellant did not deny that.

Section 124 of the Evidence Act was amended in 2006, so that in sexual offences, the court can accept the evidence of alleged victim even if it does not comply with the **Oaths** and **Statutory Declarations Act** base its conviction on it provided the court is satisfied based on reasons that it is the truth.

The section reads:-

"S.124. Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act, were the evidence of accused of tender years is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accuse 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 alleged victim who is the alleged victim of the offence, the court shall received 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 child is telling the truth."

Even though PW2's evidence is unsworn, the court can base its conviction on it provided that the court is satisfied that PW2 is telling the truth. PW1 testified vividly as to what happened to her, and even pointed to what was done to her by a person she knew very well. I believe she was truthful.

PW2 told the court that **'Kuka'** who she identified as the appellant, did **"tabia mbaya"** (bad manners) to her. She explained that as she pointed to her crotch. The court found that the words **"tabia mbaya"** ordinarily mean sexual intercourse when used by a child. The fact that the child also pointed to the crotch as she explained what **'tabia mbaya'** means is supported by the evidence of PW1 and PW3 who examined the child and found that her genitalia was bruised and swollen. PW4, aged 7 years was sworn and was also cross examined by the appellant. She did identify the appellant as **"Ouko".** It is PW4 who raised the alarm by informing her mother that PW2 was urinating blood and she had seen PW2 come from the appellant's house. I am satisfied that the evidence of PW3 and PW4 is sufficiently corroborates PW2's evidence.

It is true that the trial court did not make any reference to the appellant's defence. The appellant stated that PW1 vowed to teach him a lesson because first, he had refused to marry a lady she introduced to him and secondly, for the exorbitant charges for the radio repairs. The allegation that he rejected the girl PW1 introduced to him is an afterthought it was never raised when PW1 testfied and is rejected as such. PW1 denied owing the appellant any money but in any event, would PW1 cause her daughter to be injured in such a manner in order to frame the appellant and this court rejects that defence as untrue.

The appellant also raised issue with the fact that the witnesses called by the prosecution were all relatives. The prosecution can only call witnesses who witnessed the incident or have evidence relevant to the charge. A case cannot fail just because witnesses are relatives.

PW3 found that PW2's genitalia swollen and bruised. PW1 and PW4 had seen blood on her inner pants and dress. I am satisfied that the appellant defiled the minor, he was known to her and she vividly described what he did to her. The appellant was in the plot that day and had the opportunity to commit the ofence. I reject the appellant's defence. I find n o reason to interfere with the conviction and I hereby dismiss the appeal and confirm the conviction. The victim was a child of tender age, 4 years. Again I find no good reason advanced for interfering with the sentence. The appeal is hereby dismissed.

DATED and DELIVERED this 2nd day of March, 2012.

R.P.V. WENDOH
JUDGE

PRESENT:

Ms Idagwa for the State.

The appellant in person - present

Kennedy – Court Clerk.