DICKSON ANDALE KIRIOBA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in criminal case Number 4783 of 2007 in the Chief Magistrate's Court

at Makadara – Mr. T. Ngugi (PM) on 22nd November 2010)

JUDGMENT

1. The appellant was tried and convicted for the offence of defilement of a child under **Section 8(1)** as readwith **Section 8(3)** of the **Sexual Offences Act No. 3** of **2006**. He was sentenced to serve life imprisonment.

2. The chief facts are that on the 29th day of October 2007 at about 1.00 p.m. at Soweto village within Nairobi area Province he unlawfully and intentionally committed an act which caused penetration of his male genital organs into the female genital organ of M.A.O a child aged 10 years.

3. The appellant has now brought an appeal against both conviction and sentence in which he has advanced several grounds as follows:

(i) That the conviction was based on contradictory, inconsistent and hearsay evidence;

(ii) The offence was not proved beyond reasonable doubt;

(iii) The prosecution relied on a single witness;

(iv) ***The defence case was rejected without reasons.***

4. Mr. Mulati, the learned state counsel opposed the appeal urging that the sentence was correct because **Section 8(2)** of the **Sexual Offences Act** provides for life imprisonment upon conviction. The child was ten years old at the time of the offence, and **Section 8(2)** was rightly applied. He further urged the court to invoke its inherent jurisdiction under **Section 354 Criminal Procedure Code** to correct the charge sheet to read "as read together with **Section 8(3)** of the **Sexual offences Act."**

5. Being the first appellate court, I analysed and re-evaluated the evidence on record afresh keeping in mind that I neither saw nor heard the witnesses' testimonies myself, as expressed in **Boru & Anor V Republic Cr. App No. 19 of 2001 [2005] 1 KLR,** in whichthe learned judges of the Court of Appeal held *inter alia* that:

"A duty is imposed on a court hearing a first appeal to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld, as well

as to deal with any question of law raised on the appeal?

6. I considered the evidence with regard to ground Nos **1, 2 and 3** in which the appellant urged that the conviction was based on contradictory, inconsistent and hearsay evidence. The main evidence in this case came from **PW1** the complainant. **PW1** who was an 11 year old minor at the time of giving her testimony testified under oath after the voire dire examination had been conducted upon her. She testified that the appellant was known to her before the day he attacked her. He was known to her as Dickson, but was ordinarily called Dick as a short form of his name, and that he was a neighbour who lived in a neighbouring plot.

7. She testified that he called her to his house at about 1.00 p.m on the material date, telling her that he wanted to send her somewhere. When she came to where he was, he held her by the hand, and told her that he could give her the one shilling that her mother had been unable to give her to buy some ice for herself. Instead he shoved her into his house and onto a mattress. He covered her mouth with one hand when she screamed and removed her clothes and his own trousers with the other. He then inserted his penis into her vigina. It was her testimony that she felt pain and screamed again, and that the appellant warned her to keep quiet or he would kill her. He had sex with her and when he was finished, he told her to put on her clothes, before he opened the door and pushed her out telling her to go home.

8. Her testimony was lent support in material fact by the evidence of **PW4,** Christine Nerikirat, a 19 year old girl who lived in the same plot as the appellant. **PW4,** testified that at about 1.00 p.m. on the material date, she saw the appellant call the complainant and go with her into his house. **PW4** got curious to find out what the appellant was doing alone with a little girl in his house. She entered into the vacant room next to that of the appellant and peeped through a hole in the wall, into the appellants abode. The walls between the houses were made of iron sheet walls. It was her testimony that she saw the appellant seated on a chair and the minor was in front of him without any clothes on. **PW4** went outside and waited for the child to come out of the appellant's room. She accompanied the child to her school nearby and made a report to the school's principal.

9. The evidence of identification therefore, was that of recognition of a person well known to both the minor and **PW4,** and the offence occurred broad day light. The testimonies of these witnesses formed direct evidence and was not hearsay. The testimonies of the two witnesses were consistent in material facts. I did however, warn myself that, as stated in **Republic v Turnbull & others [1976] 3 ALLER** 549, mistakes can be made even in cases of recognition, as an honest witness may nonetheless be mistaken even in a case of recognition.

10. On **ground No. 3** the appellant urged that the offence was not proved beyond reasonable doubt. The court found that the evidence of identification was sound and I respectfully agree for reasons that I have set out above.

11. On penetration, I reassessed the evidence of **PW6,** Dr. Kamau the police surgeon and **PW7,** Dr. Rilwan who produced a P3 compiled by Dr. Ketra Mohombe on her behalf. The P3 that **PW7** Dr. Rilwan, produced showed that Dr. Mohombe examined the minor on the 29th of October 2007, the day of the sexual assault. Her findings were that the minor had pubertal external genitalia with freshly perforated hymen, vestibular erythemia and a foul smelling perineum. The minor also had Erythematous introitus but there was no bleeding. The examining doctor made an impression of defilement.

12. Dr. Kamau examined the minor one week later, on 5/11/2007, and noted poor genital hygiene, with no injury to the vulva or perenium. There was however abnormal reddening around the urethra which Dr. Kamau suspected could be attributed to poor hygiene. He made no mention of the hymen and whether it was torn or intact.

13. From the detailed findings of the 1st doctor who examined the minor, I find, as did the learned trial magistrate, that the minor complainant was defiled. The evidence of the two medical witnesses was neither contradictory nor hearsay.

14. To discount the prosecution evidence, the appellant told the court that the charges against him were fabricated as a result of ill-will between the minor's mother and the appellant's sister. That the minor's mother and his sister attended the same "chama" (self-help group), and that the two were always fighting on account of a plot given to them by Hon. Mwenje. That the minor's mother wanted to live on his sister's plot by force and that his sister declined.

15. That because the appellant stepped in to settle the dispute, the minor's mother threatened him with dire consequences, which manifested themselves in this case. The appellant stated further that the minor had been coached and was telling the court what her mother had told her to say.

16. He called one witness in support of his testimony who was the said sister, Sarah Awinja. Sarah Awinja who testified as **DW1** confirmed that she had differed with the minor's mother and that the appellant stepped in to separate them. That thereafter she travelled up country only to learn about these allegations later.

17. The trial court considered the appellant's evidence together with that of the prosecution, and found that the issue of a grudge between the minor's mother and the appellant's sister was never raised during the cross-examination of **PW3,** the said mother. In the opinion of the learned trial magistrate this was an afterthought.

18. The record shows that the complaint did not emanate from the minor's mother but from the minor herself. The complaint was not even made to the minor's mother but as a matter of fact was reported to the school principal by a good Samaritan **PW4**. **PW3** only came to know about the incident when she was summoned to the school by the school principal. I respectfully agree with the learned trial magistrate, that the allegation of a grudge, coming so late in the trial at the defence stage can only have been an afterthought intended to extricate the appellant from the charges against. The allegation is not supported by any of the evidence on record.

19. Upon consideration the material before me and for reasons set out in the body of the judgment I find that the prosecution case against the appellant was proved beyond reasonable doubt.

20. On the sentence the learned state counsel Mr. Mulati urged the court to invoke its inherent powers under **Section 354 Criminal Procedure Code** to correct the charge sheet to include the words "as read together with **Section 8 (3)** of the Sexual Offences Act".

21. I do note that the charge sheet and the original lower court record and all copies submitted together with the appeal read "Defilement of a child contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act No. 3 of 2006"**. There will therefore be no necessity for this court to alter the charge sheet in that respect. I however note that the minor being aged 10 (ten) years at the time of the offence then **Section 8(1)** should have been read together with **Section 8(2)** of the **Sexual Offences Act.**

22. The appellant was tried under **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act** but was sentenced under **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**. Neither the learned trial magistrate nor the prosecutor noted the anomaly.

23. **Section 8(2)** refers to minors aged 11 years or less, and provides for life imprisonment upon conviction, while **Section 8(3)** refers to minors aged between twelve and fifteen years, and provides for a minimum of 20 years imprisonment upon conviction. Even though the particulars of the charge sheet disclosed the age of the minor as being ten years, the appellant should not have been sentenced under a Section for which he was not tried, if the effect was to enhance the sentence, although **Section 8(2)** of the **Sexual Offences Act** was the proper section having regard to the age of the complainant.

24. I therefore **dismiss the appeal on conviction**, but for the above reason alone, **I allow the appeal on sentence**. I reduce the sentence from life imprisonment as imposed by the learned trial magistrate to 20 years imprisonment as provided under **Section 8(3)** of the **Sexual Offences Act**.

It is so ordered.

SIGNED DATED and **DELIVERED** in open court this ***5th*** **day** of ***July*** **2012.**

L. A. ACHODE
JUDGE