



S.M.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant herein S.M was charged with the offence of **defilement of a girl** contrary to **section 145(1) of the Penal code**. The particulars of offence as stated in the charge sheet are that on the 11th October, 2004 in Nakuru District of Rift Valley Province the appellant had unlawful carnal knowledge of N.C a girl under sixteen years.

The appellant also faced an alternative charge of **indecent assault on a girl contrary to section 144(1) of the Penal Code**. The particulars of offence under this charge were that on the 11th day of October 2004 in Nakuru District of the Rift Valley Province the appellant unlawfully and indecently assaulted N.C a girl under the age of sixteen years by touching her private part.

After a full trial before the Molo Senior Resident Magistrate the appellant was acquitted on the main charge and was found guilty of the alternative charge. He was convicted and sentenced to five years imprisonment with hard labour. He has now appealed to this court citing six grounds of appeal as follows:

1. That the learned magistrate erred in law and fact in convicting the appellant when there was no evidence to show that the appellant indecently assaulted the complainant.
2. That the learned trial magistrate erred in law and fact when almost the whole proceedings were unprocedural especially when it came to taking the evidence of the complainant PW2 and PW5.
3. The learned trial magistrate erred in law and fact in ignoring the defence of the accused and the evidence of DW2, DW3 and DW4.
4. The learned trial magistrate erred in law and fact in relying on circumstantial evidence to convict the accused.
5. The learned trial magistrate's judgment was against the weight of the evidence.
6. The sentence meted to the accused by the trial magistrate was harsh and excessive.

The appellant prays that his conviction be quashed and the sentence set aside.

After evaluating the evidence adduced at the trial, the learned trial magistrate convicted the appellant relying mainly on the evidence of the complainant **PW2**, which he found to have been corroborated by the evidence of PW1. PW2 was the complainant in the case and a minor, both at the time of the of the commission of the offence and at the time of the trial.

PW2, gave made an unsworn testimony in the Kiswahili language. She stated that she was seven (7) years old and that she knew the appellant very well. She told the court that she remembered the day the appellant '**did bad things to her**'. She testified that her mother had gone to another woman's house while she and her sister went to play with other children at the appellant's home. She testified further that while at the appellant's home, the appellant lured her into a maize field where he removed his jacket, spread it on the ground and asked her to lie on it then proceeded to defile her. She later reported the incident to her mother who took her to hospital the following day. In an attempt to supply eye witness evidence, the prosecution called PW2's sister, D.C who testified that she was five (5) years old. Her only evidence regarding the case was that she could remember the day the appellant met with her and the complainant.

PW1 testified that she was the complainant's mother and confirmed her age to be seven years. She told the court that on 11th October, 2004 at 3.00 p.m. she asked her two daughters **N.C PW2** and **D.C PW5** to go and play at the appellant's house, while she and the appellant's wife went to fetch water. Upon her return at about 6p.m. she met the two girls as they approached from the appellant's house and they all proceeded home together. At home PW2 narrated how the appellant had lured her into the maize field and defiled her. Pw1 examined the girl's private parts and discovered that she was slightly injured. She took her K Police Station where she was advised to take the complainant for a medical examination at O Hospital. She did so. The complainant was examined and a P3 form completed. In her presence the complainant narrated to the Police the same thing she had told PW1 concerning the incident with the appellant, whom PW1 said was very well known to her being a neighbour and the local pastor. Under cross-examination PW1 testified that when she examined the complainant's private parts she found her hymen torn.

PW3 PC Thomas testified that he received the report of the defilement on 11th October 2004 while on duty at the K Police Patrol Base. He stated he was the one who issued the complainant and her mother with a P3 form. He testified that he knew the complainant as a local pastor and that upon interrogating the complainant he was satisfied that she was telling the truth as regards her complaint that the appellant defiled her. According to him the complainant narrated how, while she and other young children were at the appellant's house, the appellant promised her some sweets then took her to the maize plantation and after defiling her gave her the sweets. PW3 considered the complainant too young to fabricate the story of defilement.

The clinical officer who examined the complainant (**John Rono**) testified as **PW4**. He stated that he examined the complainant on 12th October 2004 but found no scratch marks in her genitalia, although the hymen was broken, suggesting penile penetration. He formed the opinion that indeed there was penetration of the complainant's genitalia notwithstanding that the incident was reported to have taken place about 41 hours prior to the medical examination. He refuted a suggestion that the injury he found on the complainant would have been sustained while playing.

The appellant (DW1) testified on oath in his own defence and called three independent witnesses. He told the court that he was an ordained pastor with the Deliverance Church and denied having committed the offence. He stated that he never left his home on 11th October 2004 but confirmed that his wife had left with PW1. He remembered having noticed some children in the compound, among them, the complainant, and her younger sister. The two were playing with the appellant's own children. DW1 told the trial court that there were two other persons in the home, the house-maid called **G. C (DW2)** and another lady called **J.S (DW3)**. He denied having gone into the maize plantation with the complainant or giving her any sweets. The complainant and her sister were later picked by their mother who did not enter the home. After five days DW1 was arrested when he presented himself at the O Police Station having been informed that he was wanted at the station, in regard to a criminal case. He raised the defence of a grudge between himself and the complainant's grandfather, one JT saying they had differed over some church land. DW2 testified that she was at the appellant's house when PW1 came to collect her two daughters. She told the court that the appellant never went outside the house, adding that at one time the children whom she had left playing in the compound as she made tea left to play on a nearby road where they stayed for about 30 minutes. She testified further that in the course of things she at one time sent the complainant to buy soap for her. The appellant's wife **Z.M** testified under oath as **DW4**. She told the court that she saw the complainant as she left with her mother and noticed nothing

extraordinary about her walk. Testifying also under oath, DW3 corroborated the appellant's (DW1) and DW2's testimony that the appellant never left the house after his wife left with the complainant's mother. Under cross-examination she repeated DW2's evidence that the complainant was playing with other children on a nearby road.

As earlier stated, the learned trial magistrate relied heavily on the evidence of the complainant which he said was corroborated by that of her mother PW1 and the clinical officer, PW4. He found as a fact that the appellant could not have fabricated her evidence and further that she could not have been used to justify the alleged grudge between the appellant and her grandfather. The learned trial magistrate found the testimonies of DW2, DW3 and DW4 as not presenting the whole truth while believing that the complainant told the truth. Finding that there was insufficient evidence to ascertain the nature of penetration said to have been established by the clinical officer in his examination, the learned trial magistrate held that it was unsafe to convict the appellant on the main charge of defilement. He however proceeded to find him guilty on the alternative charge, being convinced beyond doubt that the appellant indecently and unlawfully assaulted the complainant by touching her private parts "*whatever part of his body he used*" (to do so).

While arguing the appeal counsel for the appellant Mr. Limo submitted on all grounds. He pointed particularly to the apparent conflict between the findings of the learned trial magistrate in regard to the main charge and the conclusion arrived at in respect of the alternative charge. Counsel submitted that the court ought to have warned itself before convicting the appellant on the alternative charge on the basis of the evidence of the minor complainant who had not been examined as to capacity to testify or tell the truth, contrary to the requirements of **section 124 of the Evidence Act (Cap 80 Laws of Kenya)** and **section 19 of the Oaths and Statutory Declaration Act (Cap 15 Laws of Kenya)**.

In opposing the appeal learned State Counsel, Mr. Njogu, submitted that the conviction was arrived at on sound evidence and that the issue of not conducting a pre-trial examination of the minor witnesses was neither here nor there. He submitted that the learned trial magistrate must have had a basis on which to order that both the complainant and PW5 testify by way of unsworn statements. According to the learned State Counsel the assault was proved by the medical evidence adduced at the trial.

Although not raised as a ground of appeal it is very clear to this court that the judgment of the trial court does not fulfil the requirements of **section 169(1) of the Criminal Procedure Code**. The learned trial magistrate did not state what part of the evidence adduced before him he took into consideration before arriving at the conclusion that there was sufficient evidence to prove the alternative charge. The basis of the learned trial magistrate's finding was also not laid leading the court to make a finding that was clearly against the weight of the evidence adduced before it. I now turn to the issue raised in regard to the failure by the learned trial magistrate to examine the two minor witnesses. In a recent judgment by the Court of Appeal in **YUSUF SABWANI OPICHO –vs- R. Criminal Appeal No. 208 of 2008**, where the appeal court restated the relevant law and procedure, it was held that the trial court must not only conduct an investigation as to whether minor witnesses understand the nature of an oath and the duty of speaking the truth but must also record that it has done so. It appears from the record of the lower court that this mandatory procedure was not done in the present case.

This court notes that the same State Counsel representing the State in this appeal Mr. Njogu, appeared before the Court of Appeal and readily conceded that appeal on that issue alone. In that case a retrial was ordered owing to the fact that, save for that technical challenge, the weight of evidence was not in issue. I am of the view that in the case of the appellant before me, the evidence adduced against him at the trial, when taken in totality, did not support the finding of guilt on the charge of indecent assault. For that reason I find that the present appeal succeeds on all grounds and is hereby allowed.

The appellant is hereby set at liberty forthwith and shall be released from custody unless he is otherwise legally held.

Dated signed and delivered at Nakuru this 8th day of October, 2009

M. G. MUGO

JUDGE