Case Number:	Criminal Appeal 369 of 2010
Date Delivered:	16 Dec 2011
Case Class:	Criminal
Court:	High Court at Nakuru
Case Action:	Judgment
Judge:	Roseline Pauline Vunoro Wendoh
Citation:	FRANCIS NDUNGU TWENI v REPUBLIC [2011] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 369 OF 2010

(From original conviction and sentence in the Criminall Case No. 1770 of 2010 of the Principal Magistrate's Court at Nyahururu – A. B. MONGARE, SRM)

FRANCIS NDUNGU TWENI…….....…….APPELLANT

VERSUS

REPUBLIC……..……..……..RESPONDENT

JUDGMENT

The appellant herein is Francis Ndungu Tweni. He was charged with the offence of defilement contrary to **Section 8(1)** and **8(2)** of the **Sexual Offences Act, No. 3 of 2006**. The particulars of the charge are that on 26/6/2010 at in Nyandarua Central District within Central Province, intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of B.N.W a girl child aged 9 years.

In the alternative, the appellant was charged with the offence of indecent act contrary to **Section 11(1)** of the **Sexual Offences Act** No.3 of 2006. It is alleged that on 26/6/2010, in Nyandarua Central District, intentionally and unlawfully caused his fingers to touch the vagina of B.N.W a girl child aged 9 years. After a full trial, he was convicted by Mongare, Senior Resident Magistrate and sentenced to life imprisonment.

Being aggrieved by the said conviction and sentence, he preferred this appeal and seeks to have the conviction quashed and sentence set aside. The grounds of appeal are contained in the memorandum of appeal and the filed submissions that were presented to the court. The grounds can be summarized as the follows:-

1. **That the court erred by relying on the evidence of one witness;**

2. **That the court erred by relying on the evidence of witnesses from one family;**

3. **That the court disregarded the doctor's evidence;**

4. **That he did not understand the language used by the Clinical Officer;**

5. That there was no proof of penetration;

6. That the age of the complainant was not ascertained;

7. That there was no corroborating medical evidence.

The appeal was opposed. Mr. Omutelema, learned counsel for the State submitted that the complainant, PW1 was a child aged 9 years; a neighbour to the appellant who lured her into his house with a toy and defiled her; she knew the appellant well; that M.W, PW1's mother returned home to find PW1 unwell; she narrated her ordeal; PW2 took her to hospital and the Clinical Officer PW4, Peter Nginyo confirmed that the complainant had been defiled; that the complainant's age was proved to required standards; that the complainant's age was proved as the mother, PW2, told the court that the complainant was 9 years and documents relating to the age were burnt during the post elections violence in 2007; that the Clinical Officer found a freshly broken hymen; there was evidence of penetration.

This court, being the first appellate court is required to re-evaluate the evidence afresh and make its own findings. This court also appreciates that fact that it was not able to weigh the demeanor of the witness. Before that I will make a brief summary of the background of the case. PW1, a child said to be 9 years was affirmed after a voire dire examination had been conducted. PW1 recalled that she was at home when Baba Hannah, the appellant, called her and gave her a toy, took her to his house and placed her on the bed, removed her pants, removed his trouser, applied something like mucus on her private parts, put his private part into hers and she felt pain. He then warned her to be quiet and she went away, wiped herself and informed her mother (PW2).

PW2, M.W recalled that she returned home on 26/6/2010 when the complainant informed her that the appellant had done bad manners to her after he tricked her that he had the house keys and when she entered the house to get the keys the appellant pulled her on his bed. She examined the child and found as if she was penetrated. She took the child to hospital. Police were called and the appellant was arrested on same night.

PW3, Peter Wanderi reiterated what the complainant's mother told the court. Peter Nginyo, PW4, is the Clinical Officer who examined the complainant and filled the P3 form. He found that the complainant had a broken hymen but the injury was not fresh. The Clinical Officer also took a high vaginal swab but the girl had no infection neither did he see any spermatozoa. PW5, PC Langat arrested the appellant on 26/6/2010 upon receiving a request from the OCS Olkalou.

The appellant was called upon to enter his defence said that he was arrested in the plot on Sunday morning and that he had given Kshs.4,000/- to the complainant's parents and they were supposed to refund him but instead they framed him with this office.

In his submissions, the appellant submitted that the evidence on record did not establish the age of the complainant. The complainant was a child and the court appreciated that fact and took her through a voire dire examination to ascertain whether or not she understood the meaning of oath and was intelligent enough to understand the proceedings. Thereafter, the court affirmed her. The complainant's mother, PW2 testified that the complainant was born in 2002 and that the birth certificate had been destroyed during the 2007 post elections violence. PW4, the Clinical Officer who examined the complainant also estimated her age at 9 years. I am satisfied that the age of the complainant was estimated at 9 years. It is not only a birth certificate that can prove the age of a person and an explanation was given as to why there were no documents in relation to the complainant's birth.

PW1 informed her mother that Baba Hannah, the accused, who was their neighbour, defiled her. The appellant does not deny the fact that he was a neighbour to the complainant. It follows that the complainant knew the appellant very well and there was no possibility of mistaken identity. Besides, the appellant admits that they knew each other when he alleged that they owed him money.

Was the complainant defiled" The complainant explained vividly what happened to her. That the appellant applied on her private parts something that felt like mucus, then he put the part he uses to urinate into hers and she felt pain. However, PW1's evidence was not supported by that of the Clinical Officer who examined the complainant on the same date. He did not find any spermatozoa on the high vaginal swab, there was no infection, there were no injuries in her private parts or genitalia and though the hymen was broken, it was not a fresh injury. From the evidence of PW4, it is evident that there was no penetration. I however, have no reason to doubt the complainant's evidence regarding what happened. Even though the appellant claimed that he was owed money, he never substantiated that claim, how did it arise, under what circumstances, had he demanded it" There is no way that the complainant, a girl of 9 years could have been dragged into a frame up of this nature. Her evidence was not displaced on cross examination. The only conclusion I can make from the facts on record is that the appellant committed an indecent act with the complainant.

The appellant submitted that he was not able to understand the language used by the Clinical Officer and that is why he did not ask him any questions. PW4 testified in English and so did PW5. The court wonders how the appellant could understand PW5's testimony but not PW4. He crossed examined PW5 though the record shows he testified in English. I do not believe the appellant's contention that he did not understand the court's language. He should have raised that complaint then but he kept quiet even when he made his defence. The allegation is an afterthought.

PW1 testified that she was alone when the incident occurred. It was in broad daylight. Her parents had gone to work. Nobody witnessed the incident. The appellant took issue with the calling of the complainant as the only witness or that the other witnesses were basically the family. The trial court relied on Section 124 of the Evidence Act which provides that the court can rely on such evidence of a child provided the court has reason to believe that the victim was truthful**. Section 124** reads as follows:-

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

The trial court believed the complainant's evidence because she knew the appellant, as a neighbour and referred to him as "Baba Hannah", a fact that was not disputed, and she vividly narrated what happened to her. Lastly, the complainant's evidence was not shaken on cross examination. In addition to the above the law does not require any particular number of witnesses to be called in support of the prosecution case. Each case depends on its special circumstances and even one witness may suffice to prove a fact provided the court believes the witness. Section 143 of the Evidence Act provides as follow:-

"S.143. No particular number of witnesses shall, in the absence of any provision of law

to the contrary, be required for the proof of any fact."

It is only where a law specifically requires a particular number of witnesses to prove a fact that the court would be required to call that number. In this case there is no such requirement.

In the end, I do find that the evidence does support the alternative charge, that the appellant committed an indecent act on the complainant. For all the above reasons I hereby set aside the conviction on the main charge and quash the sentence and instead find the appellant guilty of the alternative charge of indecent act on a child contrary to **Section 11(1)** of the **Sexual Offences Act**. He is sentenced to a period of 10 years imprisonment. The sentence will run from 25/11/2010 when he was sentenced by the trial court. It is so ordered.

DATED and DELIVERED this 16th day of December, 2011.

R.P.V. WENDOH

JUDGE

PRESENT:

Appellant present – in person

Mr. Omari for the State.

Kennedy – Court Clerk.