REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BOMET

CRIMINAL APPEAL NO. E012 OF 2021

(From Original Conviction and Sentence of Hon. J. Onwange

in Criminal Case S.O. Number. 35 of 2019 by the

Senior Resident Magistrate's Court at Sotik)

DAVIS KIPKOECH.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant, Davis Kipkoech was charged with the offence of defilement contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act No. 3 of 2006. The particulars were that on the 27th day of July 2019, at Simoti location, Koinoin sub-county within Bomet county intentionally caused his penis to penetrate the vagina of DC a child aged 17 years.

2. The Appellant was also charged with an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on the 27th day of July 2019, at Simoti location, Koinoin sub-county within Bomet county intentionally touched the vagina of DC a child aged 17 years.

3. The Appellant pleaded not guilty to both the main charge and the alternative charge. During the trial, the prosecution intended to call 6 witnesses but ended up calling only 4 witnesses. At some point during the trial, the Appellant made an application to have the first two witnesses (the victim, (PW1) and her father (PW2) recalled. The Appellant had legal representation at the time of recalling the witnesses and the trial court granted the prayer. The two witnesses were recalled and cross-examined.

4. At the close of the prosecution's case, the trial court found that the Appellant had a case to answer and put him on his defense. The Appellant gave sworn evidence and called two witnesses – DW2 who was his uncle and DW3 who was his cousin.

5. By judgment delivered on 10th March 2021, the trial court acquitted the Appellant on the first count of defilement and instead convicted him of the alternative count of committing an indecent act with a child contrary to section 11(1). The trial court then requested for a pre-sentence report which was favourable to the Appellant in that it recommended a non-custodial sentence. The trial court considered the Pre-Sentence report vis a vis the mandatory nature of the sentence (which it wrongfully referenced section 8(4) as opposed to section 11) and sentenced the Appellant to serve 7 years in jail.

6. Being dissatisfied with the judgment, the Appellant filed his Memorandum of Appeal dated 29th March 2021 on the following nine (9) grounds:-

a) That the learned trial magistrate erred in law and in fact by failing to note that there were no eye witnesses in this matter and the P3 Form spoke for itself.

b) That the learned trial magistrate erred in law and in fact by relying on the evidence of PW1 and PW2 which was inconsistent.

c) That the learned trial magistrate erred in law in holding that PW2 arrested PW1 whereas PW1 contradicted PW2 by stating that she was not arrested by PW2.

d) That the learned trial magistrate erred in law and in fact by failing to consider the evidence of the defence.

e) That the learned trial magistrate erred in law and in fact by holding that the prosecution had proved its case beyond reasonable doubt without suporting evidence and in view of the unresolved contradiction in the prosecution case.

f) That the learned trial magistrate erred in law and in fact in holding that the evidence of the Appellant had not proved his case though the Respondents had not produced any evidence to challenge it.

g) That the learned trial magistrate erred in law and in fact by failing to make a determination on merits.

h) That the learned trial magistrate erred in law and in fact by failing to make a valid judgment.

i) That the learned trial magistrate erred in law and in fact by making a conviction and sentence that was not supported by evidence on record as the prosecution failed to prove its case beyond reasonable doubt.

7. Later, the Appellant filed amended grounds in his Petition of Appeal against the conviction and sentence, raising four (4) grounds as follows:-

a) The trial court misdirected itself on the facts by finding the offence of committing an indecent act with a child was proved to the required standard.

b) The trial court erred in law and fact on the ingredients of the offence of committing an indecent act.

c) The trial court erred in law and facts by failing to record reasons for believeing a single witness contrary to section 124 of the Evidence Act.

d) The trial court erred in law by failing to consider the defence of the Appellant that was plausible and that impeached the prosecution's case.

8. The Appeal was canvassed through written submissions.

The Appellant's Submissions.

9. The Appellant submitted that the trial court misdirected itself when it convicted him of indecent act with a child. The evidence of PW1 was that they had had sex while the medical report stated that there was no penetration hence the trial court acquitting him on the first charge. Further, that the victim never stated whether the Appellant touched her vagina or breasts. He cited that the case of **Abdi Ismail vs. Republic (2019) eKLR.**

10. He also submitted that his conviction was based on the sole evidence of the victim and this ought to have been treated with caution as per the guidance under section 124 of the Evidence Act. That trial magistrate having failed to state his reasons for believing the victim made the conviction unsafe and the subsequent sentence illegal. It was his conclusion that the Respondent did not prove the charge to the required standard.

The Respondent's Submissions

11. The Respondent submitted that the ingredients of the offence of committing indecent act with a child were indeed never proven in the trial court and that the trial court failed to also record it reasons for believing the sole evidence of the victim. It conceded to the appeal and agreed with the cited authority of Abdi Ismail Maulid (supra).

Issues for Consideration

12. From my review on the Record the grounds of appeal and the parties' respective submissions, the main issue for determination is whether the the offence of committing an indecent act with a child was proven to the required standard and whether the conviction was safe.

13. The Court of Appeal in **Kiilu & Another vs. Republic (2005) 1 KLR, 175** aptly defined the duty of a first appellate court in reconsidering evidence from a trial court. It stated as follows:-

> ***"It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions.... Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses."***

(See also **Peters vs. Sunday Post [1978] E.A. 424**.)

14. It follows then that the mandate of this Court in respect of this Appeal is to carefully examine and analyze afresh the evidence presented at the trial, notwithstanding that the appeal is conceded by the prosecution, and come to its own conclusion. Be that as it may, this Court is also cognizant of the fact that it does not have the benefit of seeing and examining the demeanor of the witnesses first hand and therefore gives deference to the observations of the trial court. (See also **Okeno vs Republic [1972] EA, 32**)

15. The charge of committing an indecent act with a child is more often fashioned as an alternate to a main charge of defilement while in other instances it may be brought as a stand-alone or main charge. In the present case, it was an alternative charge to the main charge of defilement. The offence is provided for under section 11(1) of the sexual Offences Act No. 3 of 2006 as follows:-

"11. Indecent act with child or adult

> *(1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years."*

16. The term 'indecent act' is also defined under **section 2** of the Act as follows:

"indecent act" *means an unlawful intentional act which causes—*

> *(a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration;*
>
> *(b) exposure or display of any pornographic material to any person against his or her will;*

17. The ingredients constituting this offence are therefore clear. Like any other criminal offence, the charge of indecent act with a child must be proven. It is axiomatic that the standard for all criminal convictions should be one beyond reasonable doubt. Lord Denning stated this standard in the case of **Miller vs. Minister of Pensions (1942) A.C** thus:-

> ***"It need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadows of doubt. The law would fail to protect the community if it admitted forceful possibilities to deflect the course of justice. If the evidence is so forceful against a man to leave only a remote possibility in his favour which can be dismissed with the sentence, of course it is possible but not in the least probable, the case is proved beyond reasonable doubt but nothing short of that will suffice."***
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> (See also **Woolmington Versus DPP 1935 A C 462**)

18. The judgment from the trial court addressed the issue of defilement, which was the first charge at length. Having found that the medical evidence was insufficient in proving penetration, the trial magistrate came to the conclusion that the offense of defilement was not proven to the required standard and rightfully acquitted the appellant. However, the learned magistrate did not endeavour to analyse the evidence on Record as against the ingredients of the alternative charge. His was a generalized conclusion as follows:

> ".....In view of the above, the accused is acquitted of the main count. From the full evidence on Record, it is clear that the accused and the complainant removed their clothes and engaged in sex. It is clear that their genitals touched each other hence an indecent act. As a consequence, the accused is convicted under section 215 of the Criminal Procedure Code for the offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act 2006."

19. The above seems like a straight conclusion drawn by the learned magistrate without any analysis. It appears that his conclusion was that, since the first charge could not be proven, then automatically the alternative one was proven and yet, just like any other criminal case, this charge ought to have been proven to the required standards.

20. I agree with the exposition of J. Mrima in a similar case in Migori **Criminal Appeal No. 3 of 2019, Paul Otieno Okello vs. Republic [2019] eKLR;** Where he held that: -

> ***"As to whether there was any contact between any body part of the appellant with the genital organ, breast or buttocks of the complainant which act however did not cause any penetration, I must say that I have re-read the proceedings severally and did not see anywhere where the complainant alleged that the appellant touched her genital organ, breast or buttocks. The complainant talked of the appellant having had sex with her twice, an allegation which the trial court rejected for lack of proof and no appeal was lodged against the finding. The complainant was not lead to describe how the sexual act unfolded and which part of her body was touched by which part of the body of the appellant. With such state of evidence, I do not see how the offence of committing an indecent act with a child was proved. A trial court should not assume that once it finds no evidence of commission of the principal charge of defilement then the lesser charge of committing an indecent act with a child must have been committed. Every offence has the same threshold of being proved beyond any reasonable doubt." (Emphasis added)***

21. From my perusal of the trial file and particularly the evidence of PW1 the victim, there is nothing on the Record that describes what the Appellant did to the victim. She merely stated that they had sex. The medical evidence also indicated that there was no proof of recent penetration.

22. This kind of evidence casts doubt. It follows then that if the trial court wanted to convict the Appellant on the sole testimony of the victim then it needed to seek guidance from **Section 124 of the Evidence Act.** The said section is clear and provides as follows:-

> *"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the Prosecution in the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him unless it is corroborated by other 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 offense, 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." (Emphasis added)

23. The proviso to section 124 allows a court to convict an accused person in a sexual offence case but only if it believes that the victim is being truthful and records its reasons for believing the witness. See **Chila Vs.Republic 1967 E A 722 cited in Martin Okello Alogo Vs Republic (2018) eKLR.**

24. In this case, the record does not indicate any reasons as to why the trial magistrate chose to believe the sole testimony of the victim. A keen look at the evidence of PW1 gives the impression that she was not a candid witness. Initially she testified that it was her first time to have sex. However, when she was recalled for cross-examination, she changed her testimony and stated that it was not her first time to engage in sexual intercourse. Secondly, in her testimony, she stated that it was 7.00 p.m. when she was on her way to visit a friend, that the Appellant accosted her and while holding her hand, took her to his cousin's house suggesting that they casually walked to the house together.

25. In the present case, the same was not done. Only a *voire dire* was conducted which enabled the trial court to satisfy itself that the victim understood the meaning of the oath, hence her giving sworn evidence. Based on my analysis of her testimonies, I am not pursuaded that her word is entirely truthful and therefore it would be improper to sustain a conviction of any kind based on her sole testimony.

26. Additionally, the prosecution did not make any attempt to prove the charge of indecent act. Since an acquittal for defilement does not automatically amount to a conviction on the alternative charge – indecent act with a child – then it behoved the prosecution to adduce adequate evidence to sustain the charge. At the very least, the trial court ought to have evaluated the existing evidence, weighed it against the ingredients of the alternative charge and made a determination as to whether a conviction was the correct conclusion. In the absence of this kind of evidence, then the Appellant ought to be given the benefit of doubt.

27. This was the position in **Ouma vs. Republic (1986) KLR, 619** where the Court stated as follows:-

"At the time of evaluating the prosecution's evidence, the court must have in mind the accused person's defence and must satisfy itself that the prosecution had by its evidence left no reasonable possibility of the defence being true. If there is doubt, the benefit of that doubt always goes to the accused person."

28. At present none of the ingredients listed under section 2 and 11(1) have been described in the trial court record. It is my finding therefore that the evidence was insufficient and the conviction was unsafe. Having found the conviction unsafe I find no need to address the grounds respecting sentence.

29. In the end, I find the appeal merited. The conviction is quashed and sentence of 7 years in prison is set aside. The appellant is set at liberty forthwith unless otherwise lawfully held.

30. Orders accordingly.

Judgement delivered, dated and signed at Bomet this 31st day of January 2022.

.....

R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of the Appellant,

Ms.Chemutai holding brief for Mr. Bii for the Appellant

Mr. Muriithi for the Respondent, and Kiprotich (Court Assistant).