



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 100 OF 2019

FRED WAWIRE MUSE.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(An appeal from the judgment of Hon. G. Kiage, Resident Magistrate delivered on 21st day May 2018 in the Chief Magistrate's Court Sexual Offence Case No. 60 of 2016).

J U D G M E N T

1. The Appellant was accused with the offence of Sexual Assault contrary to Section 5(1) (a) (ii) and (2) of the Sexual Offences Act No. 3 of 2006.
2. The particulars were that Fred Wawire Musi on the 4th day of July 2016 at [Particulars Withheld] area in Likoni Sub-County within Mombasa County unlawfully penetrated the vagina of SH with a finger.
3. In Count 2 the Appellant was charged with the offence of committing an Indecent Act with a child contrary to Section 1(ii) of the Sexual Offence Act No. 3 of 2006.
4. The particulars were that on the 4th day of July 2016 at [Particulars Withheld] area in Likoni sub-county within Mombasa Country intentionally touched the vagina of SH a child aged 4 years with his finger.
5. The trial Magistrate upon considering the evidence tendered by the prosecution and the Appellant found the appellant guilty and convicted him for the offence of Sexual Assault contrary to section 5(1)(a)(II) & (2) of the Sexual Offences Act No. 3 of 2006.
6. The Appellant was sentenced to serve 20 years imprisonment. The Appellant was aggrieved by the conviction and sentence and he preferred the appeal herein on the following grounds:-
 - a) That the trial Magistrate erred both in law & fact by convicting the Appellant solely relying on the evidence of a single witness who was untruthful and was unreliable.
 - b) That the Hon. trial Magistrate erred in law & fact by relying on contradicting evidence.
 - c) That the Hon. Magistrate erred both in law & fact by relying on evidence that was scanty & wanting in detail.
 - d) That the Hon. Magistrate erred both in law & fact in finding that the prosecution had proved its case beyond reasonable doubt as required by law.
 - e) That the Hon. Magistrate erred both in-law & fact by failing to consider that the appellants defence was not shaken by the prosecution.
 - f) That the trial Magistrate erred in-law & fact in relying on evidence that was not subjected to investigations as such the credibility of such evidence remain in doubt.
 - g) That the Hon. Magistrate erred in both law & fact in imposing a sentence that was manifestly harsh & excessive.

7. The appeal herein was canvassed by way of written submissions. The Appellants counsel submitted that the charge was defective for reasons that the offence under Section 5(1)(a)(ii) & 2 provides that penetration of the genital organs of another should be with an object manipulated by another & in this case the particulars refer to a finger having been used to penetrate the complainants genital organ.
8. The Appellant's counsel relied on the authorities of **Yongo vs Republic [1983] KLR 319** and **Isaack Omamba vs Republic [1995] eKLR** to support their position that the charge was defective.
9. It was submitted that since no amendment was carried out the prosecution was bound by the particulars of the charge and it was erroneous for the trial Magistrate to consider the provisions of Section 5(b) of the Act which was not quoted in the charge sheet without an amendment of the same.
10. The Appellants counsel also pointed at the variance in particulars in Count I in relation to those in Count II where it is indicated that a finger was used in Count 1 whereas a toe was used in Count II to penetrate the complainant's genitals.
11. The Appellants counsel also pointed out that in the charge sheet, it is alleged the offence took place on 4th day of July 2016, whereas the complainants mother – PW 1 stated that she learnt that the incident happened on 1st July 2016 and in cross examination she said she learnt of the incident on 1st July 2016 but it must have happened before 1st July 2016.
12. PW 2 also said she didn't know when the incident took place. PW 4 could also not confirm that the child was defiled on 4th July 2016 when she was taken to hospital. It was argued that the discrepancy on the date was very glaring in the eyes of the court and it could not have been cured by the provisions of Section 382 of the Criminal Procedure Code. The court was urged to resolve the doubt created by the discrepancy on date in favour of the Appellant.
13. The Respondent on the other hand submitted that the state adduced the Complainants evidence which was corroborated by medical evidence adduced by PW 4 and the Appellant was successfully linked to the offence. It was submitted that together with evidence of PW 1 & PW 2 the state adduced overwhelming evidence that met the required threshold.
14. The Respondent submitted that Section 124 of the Evidence Act permits the court to rely on the sole evidence of a victim of Sexual Offence if it is satisfied that the victim is truthful. It was argued that failure to call witnesses will only be fatally the evidence presented is insufficient to sustain a conviction & contains gaps which could have been filled by a witness who is not available. It was submitted that the evidence of the prosecution witnesses together with medical evidence proved that PW 3 had been assaulted sexually by the Appellant.
15. The Respondent submitted that sufficient evidence was tendered by 4 witnesses and charge was proved beyond all reasonable doubt. It was further submitted that at page 66 of the proceedings the trial court considered the Appellant's defence and that ground cannot succeed.
16. On issue of sentence the Respondent submitted that this is the discretion of the trial court as established in the case of **Shadrack Kipkoach Kogo & Republic in Eldoret CR. Appeal No. 253 of 2003**. The Respondent submitted that the trial court exercise his discretion judiciously owing to the fact that PW 3 was 4 years old at the time of the incident and the sentence was proportional & commensurate with the offence. The Respondent urged the court to uphold the conviction and sentence and dismiss appeal.
17. The prosecution's case was that PW 2 found the complainant inserting her finger in the genital of another child and when PW 2 informed PW 1 the mother of the child they questioned her and she told them it is fundi wa radio who did to her tabia mbaya using his finger. That PW 3 said he had done it 3 times and that he warned her not to tell anyone. PW 3 led PW 1 & PW 2 to the fundi wa radio's electronics shop and it was the Appellant Report was made to DW 2 Mwajuma Swaleh Village elder for Mwatsalafio village and which the child came and again identified the Appellant as the one who did to her tabia mbaya.
18. DW 2 referred PW 1 to an NGO. Sauti ya Kinamama which aids women & girls in the village. PW 2 & PW 3 were advised to go and report police at Likoni and then statements were recorded and PW 3 was taken to hospital examined and treated by PW 4 who confirmed she had been assaulted sexually. PRC and P3 forms were duly filled.
19. The Appellant gave sworn statement and said allegations against him were false. He said that on 3rd July 2016 he was working in his shop when the village elder summoned him. That he proceeded to village elder and found her with others elders. It was explained to him that there was a certain child he had defiled and he was required to confess but he insisted to know the complainant.
20. That when the child and the mother came he demanded that they go to his shop but the village elder refused. He said that since there were 4 fundis in the area, the village elders told him to go back to work while they continue with investigations.
21. Appellant said the door to his shop is very small. He produced a photograph but the court declined to admit them as they were not taken on date of alleged offence. The appellant testified that according to the date on charge sheet the child was defiled after he was summoned by the village elder.
22. He said that the name of complainant as per OB No. xxxx is KN whereas the complainants, name in statement is KNM and he could not tell who is who. He said the complainants names are also confusing as statement issued to him is on the name of SH and the one who testified is SHN. He said PW 2's name in the statement was Mariam Athuman but in court she gave her name as Mariam Athuman Nduku.
23. He said the date, an Investigating Officer statement is indicated as 7/6/2016 long before offence was committed on 4/7/2016. He said the validity of charge against him is doubtful. He said the doctor who filled P3 didn't come to court because she knew the charges against him are untrue.

24. He said allegations against him are mandatory and the court should not allow them to stand. Appellant called the village elder whose evidence confirmed what PW 1, PW 2 & PW 3 said in their testimonies in court.

25. Having considered the evidence on record for the prosecution and the Appellant as well as the judge mention of the trial Magistrate, the grounds of appeal and submissions the issues for determination are:-

i. Whether the prosecution proved beyond all reasonable doubt that the complaint was defiled.

ii. Whether evidence relied on to convict the Appellant was contradictory.

iii. Whether charge sheet is defective

iv. Whether conviction was based on evidence of a single witness.

v. Whether sentence was manifestly harsh & excessive.

26. On the issue of whether charge sheet is defective on account of the fact that object alleged used in Count I is different from Count II, I have seen the 2 counts and in Count 1 it is stated Appellant used his finger to penetrate the genital organ of the complainant. In Count II, it is stated the Appellant used forefinger and not a toe to penetrate the genital organ of the complainant. There is no material contradiction. Whether the Appellants finger is an object or apart of his, again the material issue is the sexual assault of the 4 years old child.

27. On whether the prosecution proved its case beyond all reasonable doubt, it is PW 2 who found, the Complainant using his fingers to touch the private part of another child and reported to complainant's mother. When the complainant PW 3 was interrogated she told PW 1 & PW 2 that 'fundi wa TV' had done 'tabia mbaya' to her on 3 different occasions and PW 3 led them to the Appellants shop where she identified the Appellant as the assailant.

28. PW 1 and PW 2 reported to the village elder DW 2 and again the complainant identified the Appellant to the village elder as the one who penetrated her genital with his finger. It is Appellants witness DW 2 who referred PW 1 & PW 2 to Sauti ya Kinamama an NGO in the village & in turn they were referred to police and later to Hospital where PRC & P3 forms were duly filled after the Complainant had been examined.

29. The evidence of prosecution witnesses that the complainant identified the Appellant as the culprit is corroborated by evidence of DW 2. Appellants own witness. Medical evidence confirmed the complainant's hymen was broken and there were healed lacerations on the vaginal area. PW 1, PW 2 & DW 2 also examined the child and saw her vagina appeared reddish/inflamed & gaping. This court finds that the prosecution satisfactorily proved that it was the Appellant who sexually assaulted the child whose age was proved to be 4 years old and Appellant was therefore properly convicted.

30. On issue of contradictions on dates when offence occurred, PW 3 said that prior to 1/7/2016 the Appellant had defiled her 3 times and it was from the action of the Appellant that she started touching the genital of the child they were playing with. The evidence of PW 1 & PW 2 is very clear that it is on 1/7/2016 that they realized that the child had been sexually assaulted and the fact that charge-sheet referred to 4/7/2016 cannot vitiate the truth that Appellant defiled the child on 3 occasions on earlier dates. I do find that to be a minor typographical error which should not affect the charge.

31. The offence of sexual assault under Section 5(2) of the Sexual Offences Act provides for a penalty of life imprisonment. The Appellant was sentenced to serve 20 years imprisonment. He didn't give any mitigation. I do find that the trial Magistrate properly exercised his discretion in meting out the sentence and there is no reason to unsettle the conviction and sentence.

32. The upshot is that appeal lacks merit and it is dismissed.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 27TH DAY OF JANUARY 2022

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of:-

Ogwel - Court Assistant

Mr. Mulamula for Respondent

Appellant present in person

Ms. Chala Advocate for Appellant

HON. LADY JUSTICE A. ONG'INJO

JUDGE