REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL NO. E052 OF 2020

DAVID ONDANGA WANYAMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant, *David Ondanga Wanyama*, was tried and convicted of the offence of sexual assault contrary to *Section 5 (1) (ii)* of the *Sexual Offences Act No. 3 of 2006* (the *Act*).

2. The particulars supporting the charge were that on diverse dates between the month of April 2017 and 6th May 2017 at [Particulars Withheld] South Estate within Nairobi County, the appellant intentionally and unlawfully caused his finger to penetrate the vagina of *AN*, a child aged 3 years.

3. Upon conviction, the appellant was sentenced to serve 10 years imprisonment. He was dissatisfied with his conviction and sentence. He proffered the instant appeal through a petition of appeal dated 11th December 2020 filed on his behalf by the firm of *PM Karanja & Associates*. In his grounds of appeal, the appellant complained as follows:

> ***i. The learned magistrate erred in law and fact by admitting into evidence the evidence of a minor who was adjudged not to be competent and allowing the admission of inconclusive documentary evidence.***
>
> ***ii. The learned magistrate erred in law and fact by failing to consider the refusal/and or the absence of key witnesses to testify.***
>
> ***iii. The learned magistrate erred in law and fact by ignoring the defendant's evidence together with that of his witnesses.***
>
> ***iv. The learned magistrate erred in law and fact by failing to appreciate that the evidence of the accused was unchallenged and in lieu went to make personal observations that were not collaborated.***
>
> ***v. The learned magistrate erred in fact and law by failing to consider the mitigation by the accused.***

4. The appeal was prosecuted by way of written submissions. The appellant filed his submissions on 30th November 2021 while those of the respondent were filed on 29th November 2021.

5. The court record shows that in support of its case, the prosecution called a total of five witnesses. PW2, the victim who was a minor stated to be three years old when the offence was allegedly committed gave an unsworn statement after a brief *voire dire* examination. She claimed that on an undisclosed date and time, one *Baba Angela* found her at the stairs and touched her *"chuchu"* (vagina) twice with his nails; that he scratched and pressed her. She felt pain and was about to bleed. She reported what *Baba Angela* had done to her parents.

6. PW1, the victim's mother testified that on 6th May 2017 at night, PW2 informed her that when she was downstairs during the day, *Baba Angela*, the appellant herein had touched and inserted his fingernails into her vagina two times. PW1 recalled that PW2 repeated the same allegation before her father who reported the matter to the area chairman, the chief and eventually to PW5 at Buru Buru Police Station.

7. According to the Post Rape Care form (PCR) and the medical certificate produced as *Pexhibit 1 (a)* and *1 (b)* by PW4, the complainant was examined at the Makadara Health Centre on 11th May 2017. According to PW4, after examination, PW2's external genitalia was found to be normal with no physical injuries but her hymen though intact had a bruise at the internal fouchette.

8. Another medical examination conducted by PW3 *Dr. Maundu* on 15th May 2017 revealed similar findings as can be seen in the P3 form produced as *Pexhibit3*.

9. On her part, PW5 recalled that on 10th May 2017, she received a complaint from PW2's father to the effect that a neighbour, one *Baba Angela* had sexually assaulted his three year old daughter. She was not among the officers who arrested the suspect on 18th May 2017 but after recording statements from witnesses, she charged the appellant with the offence for which he was convicted.

10. When put on his defence, the appellant gave a sworn statement in which he raised an alibi. He denied having committed the offence as alleged and claimed that he is never in the apartment building he shared with the complainant's family during the day since he leaves for work at 5am daily and only returns at 8pm.

11. In addition, he claimed that the charge was a fabrication by PW2's father who was allegedly unhappy with him for failing to take him for a treat after having hosted a white man in his house.

12. In support of his defence, he called his wife as DW2 who confirmed his claim that he was not normally at home during the day as they used to leave the house together for work at 5am daily and the appellant only returned in the evening between 8-9pm.

13. This being a first appeal to the High Court, I am enjoined by the now settled principle regarding the duty of the first appellate court which was well captured by the Court of Appeal in ***Kiilu & Another V Republic, [2005] 1 KLR 174,*** where the Court stated thus:

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.***
>
> ***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."***

14. Guided by the above principle, I have carefully considered the grounds of appeal, the evidence presented before the trial court and the written submissions filed on behalf of the parties.

I have also read the judgment of the trial court.

Having done so, I find that two key issues arise for my determination namely:

i. Whether the evidence adduced by the prosecution was sufficient to prove the charge of sexual assault preferred against the appellant beyond any reasonable doubt.

ii. If the answer to the first issue is in the affirmative, whether the appellant's sentence should be set aside on account of the trial court's failure to consider his plea in mitigation before passing sentence.

15. On the first issue, the offence of sexual assault is created by *Section 5* of the *Sexual Offences Act* which provides that:

> ***"(1) Any person who unlawfully:***
>
> ***(a) penetrates the genital organs of another person with—***
>
> ***(i) any part of the body of another or that person; or***
>
> ***(ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;***
>
> ***(b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault."***

16. The Court of Appeal in the case of ***John Irungu V Republic, [2016] eKLR*** which was cited by the learned trial magistrate in his judgment pronounced itself on the essential ingredients of the offence of sexual assault as follows:

> ***"…Thus, for purposes of sexual assault, the penetration is not limited to penetration of genitals by genitals. It extends to penetration of the victim's genital organs by any part of the body of the perpetrator of the offence, or of any other person or even by objects manipulated for that purpose."***

17. From the foregoing, it is clear that in order to establish the offence, the prosecution must prove that there was penetration into the genital organs of the victim by any part of the body of the person accused of the offence or any other person or objects manipulated by the accused person for that purpose.

The essential elements of the offence therefore are, proof of penetration and positive identification of the assailant.

18. In his written submissions, learned counsel *Mr. Karanja* urged me to find that the prosecution had failed to prove the offence beyond reasonable doubt because the learned trial magistrate relied on the unsworn statement of a minor who, due to her tender age was not intelligent enough and was incapable of giving evidence. He pointed out that the witness was unable to identify the appellant as her assailant. He advanced the view that due to her tender age, PW2 was a vulnerable witness who should have been provided with an intermediary which was not done by the trial court.

19. Further, *Mr. Karanja* asserted that the prosecution failed to call crucial and material witnesses such as the complainant's father, the chairman of the area, *Mr. Willy* and two ladies who were the first people to hear the complainant's allegations against the appellant as well as the children who allegedly witnessed the incident in question.

20. Counsel also argued that the medical evidence adduced did not conclusively prove penetration and that the charges were a fabrication by the complainant's family as stated in the appellant's defence. He urged me to find merit in the appeal and allow it as prayed.

21. In opposing the appeal, learned prosecuting counsel *Mr. Mutuma*, supported the appellant's conviction and sentence contending that the evidence of the minor was corroborated by medical evidence as well as the evidence of PW1; that the evidence tendered by the prosecution proved the charges against the appellant to the required legal standard.

He implored me to dismiss the appeal for want of merit.

22. Given the particulars supporting the charge subject of the appellant's conviction in this case, the question I must now answer is whether the evidence adduced by the prosecution before the trial court proved beyond reasonable doubt that the appellant penetrated PW2's genitalia by inserting his finger as alleged.

23. According to the victim's unsworn statement, one *Baba Angela* touched her vagina twice with his nails and she felt pain. She reported the matter to her parents and according to PW1, this was done on the night of 6th May 2017. As PW2 described only one incident of sexual assault which she reported to her parents, the only inference that can be drawn from the above evidence is that the alleged sexual assault occurred on 6th May 2017. PW1 recalled that after receiving PW2's report, she bathed her with salt and in the process noted that her vagina was red because she had scratched herself and there was a watery discharge.

24. When PW2 was examined at Makadara Health Centre on 11th May 2017 about five days later, her genitalia was found to be normal with no discharge. A bruise on the interior fouchette was however noted. A further examination by PW3 8 days later revealed similar findings.

25. It is noteworthy that the medical reports produced by both PW3 and PW4 did not state the age of the injury noted. They did not indicate whether it was fresh or had been inflicted a few or many days ago to enable the court determine whether it was related to the alleged sexual assault on 6th May 2017.

It is also important to note that PW4 in his evidence in cross examination stated that normal child's play can also cause the bruise noted on PW2's hymen.

26. It is not clear why PW1 did not take PW2 for medical examination soon after learning about the alleged incident which is what would be expected of any responsible parent.

27. Considering that PW2's first medical examination was conducted five days after the alleged incident and the age of the injury was not stated in the medical reports and taking into account PW4's averment that even normal child's play can cause such an injury, I find that the evidence as tendered created a serious doubt whether the said injury was caused by penetration in the manner and on the date alleged or whether it was caused by anything else in the intervening period.

28. It should not also be forgotten that PW1 in her evidence in cross examination stated that at the time she was bathing PW2, she noted that her vagina was red due to scratching. Is there then a possibility that the bruise in her hymen was caused by the said scratching?

29. In view of the foregoing, contrary to the finding made by the learned trial magistrate, I have come to the conclusion that the evidence adduced in this case including the medical evidence did not conclusively prove penetration as envisaged in *Section 5* of the *Sexual Offences Act*.

30. Regarding whether the appellant was positively identified as the assailant, PW2 only stated in her evidence that she was assaulted by a *Baba Angela*. The trial court's record confirms that PW2 was unable to identify the appellant as the person who assaulted her when she testified before the court.

31. Although there is some merit in *Mr. Karanja's* submission that PW2, due to her tender age qualified to be declared a vulnerable witness to enable her testify through an intermediary, the learned trial magistrate who had power to make such a declaration under *Section 31* of the *Sexual Offences Act* and who had an opportunity to see and assess PW2's competence during the *voire dire* examination did not find it necessary to do so.

Instead, he found her to be a competent witness fit to give an unsworn statement as she did not understand the meaning of an oath. As an appellate court, am unable to fault the trial court for this finding since I did not have the advantage of seeing or hearing the witness.

32. Although PW1 claimed in her evidence that PW2 on the night of the alleged incident informed her that *Baba Angela* the appellant had sexually assaulted her, PW2's failure to physically identify the appellant in court as the *Baba Angela* she had referred to in her evidence made PW1's claim insignificant and of very little probative value especially because no evidence was tendered before the court to prove that the appellant was known by that name in the neighbourhood he shared with the complainant's family.

33. It is also instructive to note that PW5 was not among the officers who arrested the appellant. The arresting officers were not called as witnesses to inform the court how they identified the appellant as the suspect referred to in the complaint made to the police before they arrested him.

34. In my opinion, the mere description of the appellant by a name only was not sufficient to positively identify him as PW2's assailant.

The name could have referred to the appellant or to any other person and there was therefore need for the prosecution to draw a link between the name and the appellant which it failed to do. The fact that the appellant was PW2's neighbour is not disputed but this fact would have aided the prosecution's case only if PW2 was able to physically identify the appellant as her assailant as it would have demonstrated that hers was a case of recognition not mere identification.

35. It is apparent from the evidence on record that this case was very poorly investigated, if at all which is very unfortunate not only because of the nature and seriousness of the complaint made to PW5 but also because it involved a victim of very tender years.

I must remind investigating officers that they play a very important role in the criminal justice system and failure to execute their duties diligently can very easily lead to a miscarriage of justice.

36. That said, it is trite that in criminal cases, the prosecution has the burden of proving the guilt of an accused person as charged beyond any reasonable doubt. That duty subsists throughout the trial and it does not shift to an accused person. As such, an accused person does not have any obligation to prove his or her innocence. See: ***Kiarie V Republic, [1984] KLR 739; Wollmington V DPP, [1935] AC 462***.

37. After my own independent appraisal of the evidence on record, I have come to the inevitable conclusion that the prosecution case had many wide gaps and it was insufficient to prove the charges preferred against the appellant beyond any reasonable doubt. It is my finding that the learned trial magistrate erred by failing to carefully and objectively interrogate the evidence placed before him and thereby made a wrong finding that the charge had been proved against the appellant to the required legal standard.

38. In view of the foregoing, I am satisfied that the appellant's conviction was unsafe and cannot be sustained. I therefore find merit in this appeal and it is hereby allowed. Consequently, the appellant's conviction is quashed and sentence set aside. He shall be set free forthwith unless otherwise lawfully held.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this 28th day of February 2022.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Karanja for the appellant

Appellant present

Ms Chege for the respondent

Ms Karwitha: Court Assistant