REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BOMET

CRIMINAL APPEAL NO. E005 OF 2020

(Being an Appeal from the judgment of Hon. P.J Aduke (RM) in Bomet Senior Principal Magistrate's Court S.O No. 44 of 2018 delivered on 6th August 2020)

NICHOLAS KIPKEMOI CHEPKWONY.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Brief Facts

1. The Appellant was charged with the offence of Indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 22 September 2018, at Mulot Sunset Trading Centre in Bomet East sub-county within Bomet county, did intentionally and unlawfully cause his hands to come into contact with the breasts of B.C a girl aged 12 years.

2. The prosecution called three witnesses being B.C the complainant (PW1), Stella Chelang'at the complainant's mother (PW2) and PC Isaiah Modin, the Investigating Officer (PW3).

3. Mercy Chesang, the person who came to the rescue of the complainant during the incident and who was believed to have engaged in a scuffle or fight with the Appellant in the defence of the complainant failed to testify. Daisy Chepkoech who was also said to be another witness also failed to testify.

4. At the conclusion of the prosecution's case, the Accused was put on his defence. Section 211 and 306 of the Criminal Procedure Code were explained to him by the Court and he opted to give a sworn statement. He did not call any witnesses. He was then convicted at the conclusion of the trial and sentenced to 12 years imprisonment.

5. The Appellant has now appealed against the judgment and the sentence on four grounds reproduced as follows:-

(i) That the learned Magistrate erred in law and fact by solely relying on hearsay.

(ii) That the learned Magistrate erred in law and fact by wrongly arriving at the conclusion to convict the Appellant.

(iii) That the learned Magistrate erred in law and fact by failing to consider the mitigation given by the Appellant.

(iv) That the learned Magistrate erred in law and fact by harshly sentencing the Appellant.

6. The principle in a first appeal is that the court should independently re-evaluate the evidence from the lower court and make its own finding without necessarily seeking to support the lower court's findings and conclusions. It is only by doing so that the first appellate court can be able to determine whether the lower court's decision can be supported or varied or altogether quashed. (**See Okeno vs. Republic [1972] EA 32, Kiilu & Ano. vs. Republic [2005] 1 KLR 174, COA.)**

7. The Appeal was urged through written submissions. On record are the Appellant's and Respondent's submissions dated **26th March 2021** and **15th March 2021** respectively.

Appellant's submissions

8. The Appellant's main contention was that the prosecution's case was not proven to the required standard. To this end, he relied on Section 111 (1) of the Evidence Act. The Appellant faulted the learned magistrate for stating that the Appellant had failed when giving his defence, to explain the reason for his fight with one Mercy Chesang as this amounted to shifting the burden of proof to the Accused. He relied on the case of **R. Vs. Gachanja (2001) KLR 425.** Secondly, he submitted that the trial magistrate relied on hearsay evidence contrary to law. He relied on the case of **Cullen vs. Clarke (1963) I.R. 368, 378.**

9. Thirdly, the Appellant submitted that the court had the power under S. 150 of the Criminal Procedure Code to summon any witnesses where such a person's evidence would appear to be essential to the just determination of the case. That failure to call a crucial witness was fatal to the prosecution's case. He relied on **Bukenya & Others vs. Uganda UGC 1952 (1972) EA 549**.

10. On sentence, the Appellant submitted that the sentence was harsh and unproportional to the offence committed. He cited the case of **Caroline Auma Majabu vs. R (2014) eKLR** to support this submission.

Respondent's submissions

11. The Respondent submitted that the complainant's testimony was corroborated by the members of the public and the witnesses produced before the trial court. They submitted that the complainant had adequately proven that she was a minor as evidenced by her Health Card. On identification, the Respondent stated that the Appellant was well known to PW2. They also submitted that the complainant was able to recognize the Appellant since the incident occured at around 11.00 am. The Respondent further submitted that they relied on Section 143 of the Evidence Act in justifying Mercy Chesang's failure to testify as a prosecution witness.

12. The Respondent submitted that under Section 124 of the Evidence Act, the evidence of the complainant was sufficient to convict the Accused as the trial court was pursuaded that the victim was telling the truth. That the Appellant never contested the testimony or evidence of the victim during the cross-examination.

13. On sentence, the Respondent reiterated that the sentence was lawful, legal and just and that the court ought to be guided by the principle in **Wanyema vs. Republic (1971) EA 494** in deciding whether to interfere with the same. Finally, it was their prayer that the Appeal should be dismissed for lack of merit as the offence of indecent Act was proven to the required standard.

Issues for consideration:

14. From my consideration of the Record, the Grounds of Appeal and the rival Submissions, the only issue for consideration is whether the prosecution proved the charge to the required legal standard and whether the sentence was lawful.

Whether the Prosecution proved the charge to the required standard and whether the conviction was lawful

15. The Sexual Offences Act under Section 11 defines an indecent act as follows:-

> ***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.***
>
> ***"indecent act" means an unlawful intentional act which causes—***
>
> > ***i. 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;***
> >
> > ***ii. exposure or display of any pornographic material to any person against his or her will;***

16. In the persuasive decision of the Supreme Court of New South Wales **R. vs. Stringer**, the test of indecency was stated as:-

> ***"The test of indecency has been variously stated as whether the behaviour was unbecoming or offensive to common propriety…….or to modesty…or would offend the ordinary modesty of the average person…"***

17. The Appellant is accused of having touched the breasts of the victim in this case. Breasts are listed as one of those parts of the body under Section 11 of Sexual Offences Act above. It follows then that the touching of the minor's breasts constituted an indecent action.

18. In the present case, the complainant PW1 testified that she was going home from the shop when she found the Appellant along the road. He followed her and offered to buy her a soda and when she refused, he began to touch her breasts at which point she screamed for help. She told the court that one Mercy Chesang came to her aid and when she (Mercy) asked the Appellant why he touched the child, he hit her and a fight ensued between them. PW1 said that about 10 people came to the scene including Stella Chelang'at, the complainant's mother.

19. PW2, the complainant's mother testified that she arrived at the scene and found a scuffle and a fight between Mercy and the Appellant. It was also her testimony that Mercy told her that the Appellant had touched her child and the child also confirmed that the Appellant grabbed her breasts. When she questioned the Appellant on his actions, he tried to beat her and then took off on a motorbike.

20. The Investigating Officer (PW3) was notified by the Officer in Charge of Station that a person suspected of indecently touching a child had been arrested by members of the public. He reiterated what the victim had stated in her evidence concerning the incident.

21. It seems clear that PW2 was not present at the scene when the incident occurred. Her testimony is only limited to what she was told by her child and not what she actually saw. Similarly, PW3 only investigated the offence afterwards. The court can only therefore only rely on the complainant's testimony in determining whether the said offence was committed and proven to the required standard.

22. There was no dispute on the age of the minor. Her health card was exhibited (P-exhibit 1) which indicated that she was born on 4 August 2006. She also stated that she was in class 7. Thus she was 12 years old at the time of the incident. I find her age adequately proven.

23. The law has made provision on how the evidence of a minor is taken. **Section 19** of the **Oaths and Statutory Declarations Act** provides:-

Evidence of children of tender years

> ***1. Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section.***

24. In this case, it is clear from the record that a *voire dire* was conducted on the minor. This was to ascertain whether the minor was able to fully comprehend the importance of her testimony under oath and whether her testimony could be relied on by the court.

25. V*oire dire* was defined by the Court of Appeal in the case of **Maripett Loonkomok vs. Republic (2015) eKLR** as follows:-

> ***"Voir dire, a Latin phrase (verum dicere) for saying 'what is true', 'what is objectively accurate or honest' has been used in most Commonwealth jurisdictions and in some instances in the United States of America, as 'a trial within a trial', a hearing to determine the admissibility of evidence or the competency or qualification of a witness or juror, (See Duhaime, Lloyd. 'Voir Dire definition' Duhaime's Legal Dictionary)……Section 19 of the Oaths and Statutory Declarations Act is concerned with the reception and admissibility of evidence of a child of tender years. The section starts by declaring that where the child does not, in the opinion of the court understand the nature of an oath, his evidence may nonetheless be received though not given upon oath. But that evidence shall only be received if, again in the opinion of the court the child is possessed of sufficient intelligence to justify the reception of the evidence and also if, the child understands the duty of speaking the truth...The question therefore is, who is a child of tender years? The Sexual Offences Act and the Oaths and Statutory Declarations Act are silent on this question. However way back in 1959 in the celebrated case of Kibageny Arap Kolil v R (1959) EA 82 the Court of Appeal for Eastern Africa held that the phrase 'a child of tender years' meant a child under the age of 14 years. The only statutory definition of a 'child of tender years' is section 2 of the Children's Act where it is defined to mean a child under the age of 10 years. This Court has recently in Patrick Kathurima vs. R, Criminal Appeal No.137 of 2014 and in Samuel Warui Karimi vs. R Criminal Appeal No.16 of 2014 stated categorically that the definition in the Children's Act is not of general application; that it was only intended for the protection of children from criminal responsibility and not as a test of competency to testify. It follows therefore that the time-honoured 14 years remains the correct threshold for voir dire examination..."***

26. It is trite that the evidence of a victim should be corroborated by other independent evidence. The proviso to Section 124 of the Evidence Act, however allows the court to convict on the uncorroborated evidence of the victim. It provides:-

> ***124. Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is 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.***

27. From the complainant's testimony it can be deduced that she understood the implication of the oath that she had taken and the evidence she produced before court. She also stated during cross-examination that there was no one who witnessed the accused touching her but that she had told the court what had happened to her. Her evidence remained the same as what she had told her mother and the police.

28. The Court is at a disadvantage since it is unable to observe the demeanor of the witnesses (see **Shantilal M. Ruwala vs. Republic [1975] EA, 57** and **Pandya vs. Republic (1957) EA 336**). This notwithstanding, I am required to review the evidence on record and determine if the trial court stated the reasons for which it chose to believe the evidence of the child. From a perusal of the proceedings, no reasons were provided by the trial magistrate on why the evidence of the child was believable.

29. The above notwithstanding, I am persuaded that the victim's testimony was believable. I would find no reason for the minor to falsely allege that someone had accosted her and touched her breasts. Besides, the minor's testimony was supported by PW2's testimony that she found the Appellant and one Mercy fighting over the alleged act by the Appellant and that subsequently members of public were engaged forcing the Appellant to flee.

30. On identification, PW1 testified that she used to see the Appellant walking around her home area. Her mother PW2 also testified that the

Appellant was a watchman in their area. The incident is also said to have occurred at 11.00 am according to the Investigating Officer (PW3). This means that there could be no mistake of identification. The Appellant was known to the complainant and therefore it was a case of recognition.

31. The vexing issue in this Appeal is whether the case was proved to the required legal standard.

32. It is trite that the burden of proof in a criminal trial is vested in the prosecution. Referring to the English case of **H.L. (E)* Woolmington vs. DPP [1935] A.C 462 pp 481**, Viscount Sankey L.C stated the law on legal burden of proof in criminal matters as follows:-

> ***"Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.''***

33. It follows then that the Prosecution must by all means adduce evidence that is necessary to support the charges it prefers against an accused person. This entails calling any witnesses who may be material to their case. It is the view of this court that if there was a witness who could have corroborated and thus fortified the evidence of the minor victim, then that witness ought to have been presented.

34. This court agrees with the Respondent's submissions that they were not required under Section 143 of the Evidence Act to call any specified number of witnesses. However, they were required to produce witnesses who would adduce sufficient evidence to sustain a charge and prove it beyond all reasonable doubt (see **Keter vs. Republic [2007] 1 EA 135**).

35. Further, it is the prosecution's duty to assess the nature and importance of the witness and their evidence in advancing its case. Where such evidence is crucial to a case, and the same is not adduced, this will play to the detriment of the person relying on the evidence, in this case, the prosecution. In **Bukenya & Others vs. Uganda [1972] EA 549**, the court of Appeal outlined the following guidelines in this respect:-

> ***(i) "The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.***
>
> ***(ii) That the Court has the right and the duty to call witnesses whose evidence appears essential to the just decision of the case.***
>
> ***(iii) Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tendered to be adverse to the prosecution."***

36. In this case, the Appellant submitted that it was important for the prosecution to have brought Mercy Chesang to testify since she was the one who was said to have seen him touch the child. From the Record, I note that the prosecution did request for summons to have the said Mercy Chesang presented in court to testify. However, she was reported to have been involved in an accident and was admitted at Moi Teaching and Referral Hospital. Subsequently she never appeared to testify.

37. Secondly, in his testimony, the Appellant stated that he wished to call the said Mercy Chesang and one Daisy Chepkoech as his witnesses. He never called them and the reasons for his failure to call them is also not clear from the file. He however claimed that he had previously disagreed with the victim's mother (PW2) and admitted having fought with Mercy Chesang.

38. I have considered the Appellant's defence with respect to his assertion that he had disagreed with PW2 and that he had fought with one Mercy who failed to testify. While I dismiss the claim of differences between him and PW2, I find that the failure of the Prosecution to have Mercy testify dents the Prosecution case. Mercy was indeed a crucial witness as she was the one said to have rescued the minor. I draw an adverse inference that the uncalled witness would have tended to be adverse to the Prosecution. It is my conclusion also that the defence casts some doubt on the prosecution case.

39. The offence with which the Appellant was charged is indeed serious and must be condemned. I have also stated earlier that the evidence of the victim was believable. The issue is whether this evidence meets the legal standard of proof beyond reasonable doubt. In this regard, I associate myself with the holding of Mrima J. in the case of **JOO vs. Republic [2015] eKLR**, that:-

> ***"It is not lost to this Court that the offence which the Appellant faced was such a serious one and ought to be denounced in the strongest terms possible. However, it also remains a cardinal duty on the prosecution to ensure that adequate evidence is adduced against a suspect so as to uphold any conviction. The standard of proof required in criminal cases is well settled; proof beyond any reasonable doubt hence this case cannot be an exception. This Court holds the view that it is better to acquit ten guilty persons than to convict one innocent person."***

40. Similarly in the Supreme Court of Canada in 1997, in the case of **R vs. Lifchus {1997}3 SCR 320,** the court stated as follows:-

> ***"The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the Crown has, on evidence put before you, satisfied you beyond a reasonable doubt that the accused is guilty…the term 'beyond a reasonable doubt' has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its***

meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt."

41. The evidence in this case creates a strong suspicion in the mind of the court that the Appellant may have committed the offence. This is because this court found the evidence of the victim credible. The totality of the prosecution evidence however was compromised by the failure of a crucial witness to testify.

42. As held by the Court of Appeal case of **Sawe –vs- Rep [2003] KLR 364**:-

"Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt."

43. In **Mary Wanjiku Gichira s. Republic, Criminal Appeal No. 17 of 1998**, the Court of Appeal once again held that:-

"suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. Before a court of law can convict an accused person of an offence, it ought to be satisfied that the evidence against him is overwhelming and points to his guilt. This is because a conviction has the effect of taking away the accused's freedom and at times life."

44. Similarly, in the Tanzania Court of Appeal in **R vs. Ally (Criminal Appeal No. 73 of 2002) [2006] TZCA 71** it was held that:-

"Suspicion, however grave, is not a basis for a conviction in a criminal trial. The appellant ought to have been given the benefit of doubt and acquitted."

Conclusion

45. In the final analysis, I find that trial court fell in error to convict the Appellant on evidence which fell short of the required legal standards. I find that the conviction was not safe. I quash the conviction and set aside the sentence. I substitute therefor an order acquitting the Appellant for insufficiency of evidence.

46. The Appellant is set at liberty forthwith unless otherwise lawfully held.

47. Orders accordingly.

JUDGMENT DELIVERED, DATED AND SIGNED THIS 30TH DAY OF SEPTEMBER, 2021.

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R. LAGAT-KORIR

JUDGE

Judgment delivered in the presence of the Appellant (Virtually present at Kericho Prison), Mr. Wawire for the Respondent and Kiprotich (Court Assistant).