



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO. 07 OF 2020

ALI SALIM ABDULREHMAN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence from the original Sexual Offence Case No. 21 of 2018 in a Judgment delivered on 03.03.2020 by Hon. T. A. Sitati – Principal Magistrate at Lamu Law Courts).

Coram: Hon. Justice R. Nyakundi

Mr. Mwangi for the state

Mogaka Bwongaki advocates for the appellant

J U D G M E N T

The appellant **Ali Salim Abdulrehman** was charged, tried, convicted to ten (10) years imprisonment for the offence of indecent assault contrary to Section 11 (1) of the Sexual Offences Act. The particulars of the charge alleged that on the 10.11.2018 at around 1800 hrs at [Particulars Withheld] home in Lamu West Sub-County, appellant intentionally and unlawfully touched the breast and vagina of **MM** a child aged 14 years.

Being aggrieved with the conviction and sentence, appellant preferred an appeal to this Court on the following grounds:

- (1). That the Learned Magistrate erred in Law and fact by failing to consider that the prosecutor failed to prove their case beyond reasonable doubt as required by the Law contrary to Section 109 and 110 of the Evidence Act.***
- (2). That the Learned Magistrate erred in Law by relying on the evidence of witnesses which was insufficient to warrant a safe conviction.***
- (3). That the pundit Magistrate erred in Law and fact by failing to consider both the conviction and sentence were against the merits of the prosecution case.***
- (4). That the Learned trial Magistrate erred in Law and fact by failing to consider sharp contradictions by the prosecution witnesses thereby casting doubt in breach of Article 163 (1) of the Evidence Act. Making the prosecution witnesses being incredible to their case.***
- (5). That the Learned trial Magistrate erred in Law and fact by failing to consider the appellant's defence. Creating doubt on the prosecution case.***

The appellant was represented by **Mr. Mogaka** seeking the leading of the appeal. **Mr. Mogaka** relying on his written submissions among others advanced the following arguments. That the case before the trial Court was depended purely on circumstantial evidence but one which failed the threshold enunciated guidelines in the case of **PON v R {2019} eKLR; Omar Mzungu Chimera v R CR Appeal No. 56 of 1998**. **Mr. Mogaka** further contended that the evidence of the six witnesses was of a nature that never joined the dots in the chain to implicate the appellant with the alleged indecent acts as known in Law.

Given the chronology of events as explained by the complainant and her witnesses **Mr. Mogaka** argued and submitted that the burden and standard of proof as asserted in Section 107 (1) of the Evidence Act, and yardstick outlined in **Miller v Minister of Pensions {1947} 2 ALL**

ER 372; R v Kamau Mburu & 2 others {2016} eKLR and David Njuguna Wairimu v R {2010} eKLR was never satisfied to warrant a finding of guilty and conviction against the appellant. He went further to submit that the criminal elements of *mens rea* and *actus reus* did not manifest in the prosecution case. It was also the case for the appellant that there were glaring contradictions in the evidence on the location of the scene, the body position of the complainant, the dressing code of the complainant and the circumstances surrounding the offence. According to **Mr. Mogaka** contention, the discrepancies in the testimony of the complainant with that of **(PW3)** and **(PW5)** was sufficient to render the conviction untenable. He placed reliance on the principles in **JMK v R {2020} eKLR** and **Erick Onyango Ondeng v R {2014} eKLR** to persuade this Court to so rule the evidence as being out of order in supporting the allegation of indecent acts against the appellant. **Mr. Mogaka** summed up his submissions, in attacking the Learned trial Magistrate failure to appreciate the evidence given by the appellant to controvert the prosecution case.

The appellant prays that this Court allows the appeal and quashes the conviction by the trial Court. The respondent counsel opposed the appeal and did support the decision by the trial Court. I have considered the appeal, the submissions for either side, and the Law as urged upon me to rule more in favor of the appellant.

Determination

This being a first appeal, the Court has a duty to review the evidence of the case, to reconsider the whole material before the trial Magistrate. Thereafter, the Court must then draw its own conclusion on the matter without disregarding the impugned Judgment. (**See Okeno v R {1972} EA 32**). In the case at bar, the prosecution quest was to prove the elements of indecent acts which means an unlawful and 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.

The prosecution besides the above was required to prove the age of the complainant and that it is the appellant who performed the indecent act on the complainant. As reiterated earlier by the appellant counsel, the prosecution retains the burden of proof of beyond reasonable doubt on all the elements of the offence to be proven against the appellant. (**See Miller v Minister of Pensions**)

The trial Court in making findings on the issues raised in the charge sheet made reference to the complainant testimony **(PW1)**. She gave a history of the events of the fateful day on 10.11.2018. These chain of events according to the complainant happened within the surroundings of the [Particulars Withheld] home. In **(PW1)** own testimony she was assigned some tasks by one nurse **(Amin)** to fetch water from the kitchen. In the meantime, the kitchen staff did not give her the water, and within that interim period she was found by one **Khadija**. It was at that moment the appellant lured her to the nearby sink and without hesitation by use of his hands pressed the breasts and private parts.

Apparently, in acceptance with the complainant's evidence the appellant had made a habit of seeking every available opportunity to intentionally and unlawfully touch her indecently.

At that trial, **(PW2) NA** at the Children's home told the Court that as she went about her duties, the information on the indecent acts between the appellant and the complainant came to her attention. In

(PW3) (IK) evidence it happened that on stated day and time, he had also passed through the clinic when he came face to face with the appellant touching the complainant indecently. Further, on close observations, **(PW3)** stated that he saw the complainant lying on the clinic table and the appellant contouring his hands all over her chest and private area.

(PW4) Khadija testified that on the due date at the home where they reside, together with **(PW1)** and **(PW3)** they had been instructed to go to the clinic to be dispensed of drugs and nutritional supplements. She told the Court that at one time she appeared in company of the complainant **(PW1)** and **(PW3)** but the appellant directed them to stay out leaving behind **(PW1)** alone. It happened that both of them **(PW3)** and **(PW4)** waited for long as the complainant stayed inside the clinic with the appellant. Further, **(PW4)** testified that when the complainant came out she informed her what had transpired involving the touching of her breasts and private parts by the appellant.

In his defence the appellant denied the offence as graphically presented by **(PW1)**, **(PW3)** and **(PW4)**. He told the Court that all those falsehood was on account of him making demands to the administration for the underpayment of the salary against the terms of employment contract. On review of the evidence and the facts of the charge against the appellant, I hold the following view that the prosecution evidence of **(PW1)**, **(PW3)** and **(PW4)** proved beyond reasonable doubt. That it was the appellant who committed the indecent acts against **(PW1)**. The indecent acts were commissioned by the clear and credible evidence of **(PW3)** and **(PW4)**. The essence of the evidence was that the appellant created an opportunity within the work place environment to commit the indecent acts. The substance of it flows from what **(PW3)** saw when he entered the clinic, to the effect that **(PW1)** had been laid on the table as the appellant caressed her on the chest all through to the private parts area.

I have considered the appellant's grounds of appeal. He complains of discrepancies and inconsistencies of **(PW1)**, **(PW3)** and **(PW4)**, which on that account failed the test of case proved beyond reasonable doubt.

As to this point, I have had the opportunity of appraising the record afresh and the contention by the appellant holds no weight to dissuade this Court from upholding the requirements of the Law and jurisdiction issues as laid down in **Okeno case (supra)**. Those facts as prosecuted and proved by the prosecution resonate well with the principles in **Obwahatum Francis v Uganda CR Appeal No. 30 of 2015**, where the Supreme Court held that:

“The Law on inconsistency is to the effect that where there are contradictions and discrepancies between prosecution witnesses which are minor and of a trivial nature, these may be ignored, unless they part to deliberate untruthfulness. However, where contradictions and discrepancies are grave, this would ordinarily lead to the rejection of such testimony unless satisfactorily

explained.” (See also Twehangane Alfred v Uganda Crim Appeal No. 139 of 2001 {2003} UGCA 6; R v Ahmed Mohammed & Another {2019} eKLR)

with these principles in mind, and considering the sequence of events that the complainant was indecent assaulted. There is no dispute as to the scene, the intentional and unlawful acts of touching of the breasts and private parts by the appellant. Taking the witnesses (**PW1**), (**PW3**) and (**PW4**) undisputed evidence that the indecent act was spontaneous as they went to pick their drugs and nutrition supplements from the appellant, strongly demolishes any claims of inconsistencies and or discrepancies. The complainant (**PW1**), (**PW3**) and (**PW4**) were all familiar with the appellant, and knew him very well considering that they all operated in the same children’s home. The appellant was an employee of the home whereas (**PW1**), (**PW3**) and (**PW4**) happened to be residents of the home. The complainant testified on the nature of the indecent acts by the appellant on the separate occasions they came into contact with each other. This critical date of 10.11.2018 happened to be an occasion when she was expected to collect some drugs from the clinic. In her own narration the appellant sensed the opportunity to lay her down and went ahead to touch the body parts of the breasts and area genitals what was the span of time the witnesses had with the appellant satisfies the criteria set out in **R v Turnbull {1976} 3 ALL ER** and **Roria v R {1967} EA 583**.

In the present case, its abundantly clear that the prosecution proved beyond reasonable doubt that it is the appellant who committed the indecent act on the complainant who also happened to be aged below 18 years old. To be precise at the staged date of the offence, she was aged fourteen (14) years old and a resident of the children’s home where all the ordeal took place. Consequently, none of the grounds pleaded by the appellant are capable of a rebuttal of the prosecution case proved at the trial beyond reasonable doubt.

In contrast with the appellant’s submissions on absence of *mensrea* and *actus reus*, his conviction ordains two basic elements:

(1). That the appellant committed the actus reus of sexual assault of an indecent act of touching which was unwanted.

(2). The mensrea was formed at the moment he laid the complainant in that clinic and proceeded to touch the breasts and the genitals. He so willfully did so with lack of consent from the complainant who was being touched.

Here the appellant knew that the complainant was under maturity age and incapable of consenting to any such encounter. The trial Court record conclusively establishes that the appellant persistent and increasingly serious advances constituted an indecent act for which he had no defence. Kenya is a party to the convention on the Elimination of All forms of Discrimination against women, which requires respect and observance of the human rights of women. Violence against women or any other stereotype, sexual assault and other acts of discrimination are as much a matter of equality as it is an offence against human dignity and a violation of human rights. These human rights are protected by Articles 27, 28, and 29 of Kenyan Constitution. Their violations constitute an offence under the sexual assault provisions of the Sexual Offences Act. The findings necessary to support a verdict of guilty and conviction on the charge of indecent act with accused were made by the trial Court.

In particular, to this appeal, there was no evidence from the defence that would give an air of reality to a defence of honest, but mistaken belief for any of the sexual actively which took place at the Children’s home. How so far as the objection raised on behalf of the appellant herein, with regard to non-proof of *mensrea*, it’s to be noted that sexual offences are crimes of general intent. Therefore, the prosecution need only prove that the appellant intended to touch the complainant in order to satisfy the basic *mensrea* requirement.

As a whole, the grounds of appeal are on facts which attack the weight of the evidence and the severity of sentence. I take the strong view that there was ample evidence to support the conviction. None of the grounds raises any point of Law for consideration by this Court. As a result, I order the appeal on conviction and sentence to be dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 27TH DAY OF OCTOBER 2021

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R NYAKUNDI

JUDGE

In the presence of:

1. The appellant
2. Mr. Mwangi for the state