



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 95 OF 2019

BASHIR ABDULLAHI APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal against the conviction and sentence in Criminal Case No. 24 of 2019 at Kisii Law Courts before Hon. S.N. Makila (SRM) delivered on the 15th day of November, 2019)

JUDGEMENT

1. The Appellant, **BASHIR ABDULLAHI**, was charged with the offence of defilement contrary to **Section 8(1) (3) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that on the 10th day of February 2019 at [particulars withheld] Estate of Kisii Central Sub- County within Kisii County, he intentionally caused his penis to penetrate the anus of Z.I. a child aged 12 years.
2. In the alternative, he was charged with committing an indecent act with a child contrary to **Section 11(1) of the Sexual Offences Act, 2006**. The particulars of the alternative charge were that on the 10th day of February 2019 at [particulars withheld] Estate of Kisii Central Sub- County within Kisii County, he intentionally touched the buttocks of Z.I. a child aged 12 years with his hands.
3. The appellant now appeals against the conviction and sentence on the grounds set out in his petition of appeal and his submissions. He contends that the trial magistrate convicted him of coming into contact with the vagina of the minor yet there was no evidence led to support that finding. He also argues that the evidence of the child who reported the incident to the complainant's grandmother was crucial yet she had not been called to testify. He pointed out that the medical evidence showed no signs of defilement and the learned magistrate should have made a finding that the prosecution had not proved its case. On sentence, the appellant argues that being 70 years old the imprisonment of 10 years is excessive. He prays for a lesser sentence or a non-custodial sentence.
4. As this is a first appeal, I am required to review all the evidence and come to my own conclusion bearing in mind that I neither heard nor saw the witnesses testify in order to assess their demeanour. The evidence as it emerged before the trial court was as follows.
5. After *voir dire*, the complainant, Z.I. testified that on the material day, she had been sent to the appellant's shop by her grandmother to buy roycy cube. She testified that she found the appellant alone at his shop. The complainant stated that the appellant lived behind the shop and she had to go inside his house to make her purchase. She testified that the appellant told her to remove her underwear and when she did so he removed his penis and touched her anus with it. The complainant told the trial court that she had not felt pain and did not scream as she was frightened. She also divulged that it was not the first time the appellant had done it. She testified that a child known as Zainab had peeped and seen what happened. Zainab asked her about it the following day and reported the incident to her grandmother.
6. The complainant's grandmother, H.T.A (PW3) testified that when she sent the complainant to the shop, she noted that she had stayed out longer than expected. She testified that the complainant's play mates informed her that the complainant had told them that she had been defiled. She took the child for examination and treatment at Kisii Teaching and Referral Hospital. She also testified that the complainant was 12 years old at the time of the incident and produced a birth certificate to support this.
7. The clinical officer Daniel Nyameino (PW4) examined the complainant at Kisii Teaching and Referral Hospital on 15th February 2019. He saw no bruises on her private parts. A whitish vaginal discharge was taken to the laboratory for testing and the complainant was also tested for hepatitis B, C, HIV and Syphilis. All tests were negative. A urinalysis test was normal. He testified that the vaginal swab showed epithelial cells, pus cells and yeast cells. He stated that he had not done an anal test and when cross examined he admitted that there was no medical signs of sexual assault or defilement.
8. PC. Mildred Wafula (PW2) testified the incident was reported at Kisii Police Station four days after it had occurred. She sent the complainant to hospital where a P3 form was filled and proceeded to arrest the appellant at his shop.

9. When placed on his defence, the appellant testified that he did not see the complainant at all on the material day. He told the trial court that he had some grudges with his cousin Ali Hussein who wanted him to dispose of part of the family land but he declined. The appellant testified that Ali and the complainant's grandmother were friends and the child had been used to frame him.

10. Having considered the evidence adduced by the prosecution, the trial court found that the main charge had not been proved and acquitted the appellant on that count. The court did however find that the alternative charge had been proved. The appellant was convicted on the alternative charge and sentenced to 10 years imprisonment.

11. The appellant noted that at paragraph 4 on the last page of the judgment, the trial court held;

“The prosecution’s evidence has proved that the penis of the accused came in contact with the vagina of the complainant”

The appellant has argued that there was no evidence to support this conclusion.

12. The particulars of the charge were *“that on the 10th February 2019 at [particulars withheld] Estate of Kisii Central Sub-County within Kisii County, he (appellant) intentionally touched the buttocks of Z.I a child aged 12 years with his hands.”*

13. The trial court in my view fell into a grave error by failing to appreciate the discordant between the evidence adduced and the particulars of the charge. The framing of the charge at no time required the appellant to defend himself against a charge relating to his penis coming into contact with the vagina of the complainant.

14 The conclusion reached by the trial court that the prosecution had proved that the penis of the appellant came into contact with the vagina of the complainant is completely at variance and strange to the alternative charge that the appellant was confronted with. This is not a minor discrepancy that can be wished away.

15. Coming to my own evaluation of the evidence as am obliged by the law to do, the complainant's testimony was clear that the appellant had asked her to remove her underwear and had touched her anus with his penis. In contrast, the particulars in the charge sheet read that the appellant had touched the buttocks of the complainant with his hands.

16. In determining the effect of a defective charge on a conviction, the court is required to assess whether the defective charge occasioned a miscarriage of justice.

17. **Section 134** of the Criminal Procedure Code provides that;

“Every charge or information shall contain, and shall be sufficient if it contain, and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence”.

18. In **Joseph Kakei Kaswili vs. R Criminal Appeal No. 102 of 2015 [2017]eKLR** the Court of Appeal expressed itself thus on evidence that is at variance with the charge sheet;

“Udo Udoma Chief Justice of Uganda (as he was then) in State of Uganda versus Wagara [1964] E.A. 366, at page 368, stated inter alia that in the absence of any amendment, the prosecution was bound by the particulars of the charge. In Furo versus Uganda [1967] EA 632, the same Chief Justice Udo Udoma faulted the trial magistrate for relying on evidence that was at variance with the particulars of the charge without amending the charge, and re-aligning it to the evidence tendered by the prosecution. In Mwasya versus Republic [1967] EA 345, the Court held inter alia that where a crucial issue of fact is not contested in any trial, the variance between the charge and the evidence tendered is curable under section 382 of the Criminal Procedure Code. In Yongo versus Republic [1983] KLR 319, the Court held inter alia that a charge is defective where it inter alia gives a misdescription of the alleged offence in the particulars. In Kimeu versus Republic [2002] 1 KLR 756, the Court held inter alia that not every conflict between the particulars of the charge and the evidence will vitiate a conviction especially where the conflict is minor or of such a nature that no discernible prejudice is caused to the accused.” [Emphasis added]

19. Was the conflict between the particulars of the charge and the evidence minor and therefore curable under Section 382? I think not. An accused person's right to be informed in advance of the evidence the prosecution intends to rely on is a right pronounced in **Article 50 (j)** of the **Constitution**. In this case the charge sheet stated that the appellant had touched the buttocks of the complainant with his hands while the evidence adduced was that the appellant had touched the complainant's anus with his penis. In my view, there was a stark difference between the particulars in the charge sheet and the evidence adduced before the trial court which was likely to cause an injustice.

20. I accordingly allow the appeal of the appellant, quash the conviction and set aside the sentence imposed on him. He is hereby set free unless otherwise lawfully held.

Dated, Signed and Delivered at Kisii this 30th day of July 2020.

A. K NDUNG'U

JUDGE