



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO 200 OF 2019

DKAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

(Being an appeal from the judgement of Hon.Sogomo. G (PM) delivered on 31st October 2019 in Tigania S.O No.35 of 2018)

1. The Appellant was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No.3of 2006.
2. The particulars are that DK on the 31st day of May 2018 at [Particulars withheld] Market Kianjai Location in Tigania West Sub County within Meru County intentionally touched the thighs and breast of AM a child aged 17 years with his hands.
3. The Prosecution called 4 witnesses including the complainant AM who testified that she had visited her grandfather the accused at [Particulars withheld] Market where they shared a cup of tea at Mukulima Hotel and while there a group of Men arrived and began to accuse her grandfather of misleading school going pupils, that her pleas that the accused was her grandfather fell on deaf ears. She said that the accused did not touch her on that day.
4. The accused person in his defense denied having committed the offence and called Stephen Kirianki a fellow miraavendor who testified that the accused had been visited by the granddaughter who required a rubber at school but before the rubber was bought the Assistant Chief arrived and demanded to know what the accused was doing with a school girl in uniform at a miraa stall.
5. That the Chiefs started beating the accused and the girl and members of the public joined in. That a hotelier nearby intervened and asked the Chiefs to stop beating the accused. The complainant also testified again as the accused person's witness and said that she had gone to her grandfather's miraa stall when 3 men arrived and began slapping her grandfather claiming that he was having an indecent act with a school girl. He learnt the assailants were sub chiefs at Kianjai
6. She said that she never used to have sex with her grandfather.
7. Upon considering the evidence for the prosecution and the defense the trial Magistrate found the Appellant guilty and convicted him and sentenced him to 10 years' imprisonment.
8. The Appellant was aggrieved by the conviction and sentenced and filed the petition of appeal dated 7th November 2019 on the following grounds;
 - a. That the learned Magistrate erred in law and fact by failing to note that the evidence adduced before court was not watertight to warrant a conviction.
 - b. That the learned trial Magistrate erred in matters of law and fact by failing to note that the evidence adduced by the complainant was not supporting the allegations brought before the court by the area chief
 - c. That the learned trial Magistrate erred in matters of law and fact by failing to note that the prosecution's evidence was contradicting uncorroborated and inconsistent.

d. That the learned trial Magistrate erred in matters of law and fact by failing to note evidence adduced by the Prosecution contained a lot of lies since the incident occurred in the market place where there are a lot of people

e. The learned trial Magistrate erred in matters of law and fact by failing to note that the evidence adduced by the area Chief was a frame up because there was a grudge between him and the area Chief.

9. The appeal was canvassed by way of written submissions. As this is the Appellant's first appeal, the role of an appellate court of first instance is well settled. It was held in the case of **Okeno vs. R (1977) EALR 32** that this court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

10. Having considered the evidence on record for the prosecution and the judgement of the trial court as well as the grounds of appeal and the submissions by the Appellant and the Respondent the issues for determination are;

a. Whether the allegations by the Appellant that he was assaulted by the Chief and the Assistant Chief on 28th of May 2018 led to him being fabricated by the same Chiefs

b. Whether the trial Magistrate properly analyzed the evidence of the complainant.

c. Whether the prosecution proved beyond reasonable doubt that the accused committed the offence.

11. The complainant in this case testified and confirmed that the accused person was her grandfather and that on 31st of May 2018 she had gone to her grandfather's miraa kiosk and while there PW1 and PW2 together with a third person all of whom she learnt were Assistant Chiefs went to the kiosk and started beating her and her grandfather on allegations that her grandfather was misleading school going pupils. She denied that the accused touched her inappropriately.

12. According to the Investigating Officer, corporal Samuel Kanya, the Appellant was charged after the ODPP wrote a letter with instructions that the Appellant should be charged. He recorded statements from the Chiefs and 3 members of the public but only PW2 and PW3 came to testify in court. The members of the public who are alleged to have alerted the chief about the criminal acts of the Appellant did not testify in court to confirm the evidence of PW2 and PW3 that the Appellant was seen fondling the breasts and thighs of the complainant.

13. DW2 Stephen Kirianki the Appellant's colleague in the miraa business testified that the Appellant's granddaughter had visited him at the place of business and before long the Assistant Chief arrived and demanded to know what the accused was doing with a school girl in uniform in a miraa stall. DW2 testified that the Chiefs began to beat the Appellant and the girl and members of the public joined in and it is Nana who intervened and asked the Chiefs to stop beating the Appellant.

14. From the EXD1 produced by the Appellant the statement of Corporal John Matthew, the Appellant and his granddaughter were taken to the police station and upon interrogation, it was confirmed that the Appellant was the grandfather of the girl and that no offence was established and the acting OCS instructed that the Appellant and the girl should be released.

15. According to PW4 Corporal Samuel, his colleague handled the investigation casually and upon release of the Appellant and A they turned the case against the Chiefs and this led to the Office of the Director of Public Prosecutions recommending the Appellant to be charged several months down the line from the date of the commission of the offence.

16. In consideration that the complainant and the Appellant denied that the offence was committed and in consideration that Corporal Samuel Kanya PW4 confirmed that the investigations were handled casually by his colleague upon which the Appellant and the complainant were released; and in consideration that the Appellant also called a witness DW2 Stephen Kirianki who confirmed that the complainant went to visit the Appellant and sat on a bench in the miraa stall but he did not see any offence being committed by the Appellant; and finally the fact that the person who informed PW2 that the Appellant was indulging in miraa chewing with a school girl namely PK and two other witnesses failed to attend court to corroborate what PW2 and PW3 said concerning the offence allegedly committed by the Appellant, this court finds that the evidence of the prosecution stood in the balance with the evidence of the defense and therefore did not meet the standard of beyond reasonable doubt.

17. In the circumstances this court finds that the appeal has merit and the same is allowed. The conviction is quashed and the sentence set aside. The Appellant shall be set at liberty forthwith unless otherwise lawfully detained.

HON.ANNE ADWERA ONG'INJO

JUDGE

DATED AND DELIVERED AT MERU VIA MICROSOFT TEAMS THIS 30th DAY OF JULY 2020.

HON.ANNE ADWERA ONG'INJO

JUDGE