REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL APPEAL NO. 3 OF 2020

GERALD OGARO OBAE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

{Being an appeal against the Judgement of Hon. C. W. Waswa – RM Nyamira in the original Nyamira Chief Magistrate's Court Sexual Offence No. 35 of 2019}

JUDGEMENT

The appellant is serving a term of imprisonment for ten years for the offence of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act. This was an alternative count to the main charge of defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act.

The particulars of the offence were that on the night of 7th April 2019 in Manga Sub-county within Nyamira County he intentionally and unlawfully touched the vagina of NMN a child aged 12 years. In the main charge it was alleged that on the night of 7th & 8th April in Manga Sub-county within Nyamira County, intentionally and unlawfully caused his penis to penetrate the virgin of NMN A CHILD AGED 11 YRS OLD.

The prosecution called three witnesses – the complainant t(Pw1), a clinical officer (Pw3) and the investigating officer (Pw2).

Briefly the facts of the case were that on the material day at about 4pm the victim was on her way to a place called Kemera when the appellant who was on the road requested her to see him on the way back. She obliged him and that is when he took her to his house where they spent the night and **"had sex".** The next morning, he served her breakfast which she ate and then slept. Then a girl who worked there peeped through the window, saw her and opened the door for her. It was then that the Chief was called and she was taken to Manga Police Station. Thereafter she was taken to Manga Sub-county Hospital where she was examined by Clinical Officer David Arwanga (Pw3). According to the clinical officer the laboratory tests conducted turned out negative but she had a broken hymen indicative of penetration. Corporal James Maneno (Pw2) confirmed to have been at Sengera (Manga) Police Station when the complainant and the appellant were taken there on 9th April 2019 at 1715hours (5.15pm). He confirmed having issued the complainant with a P3 Form and also that she was escorted to Manga Sub-county Hospital for examination. He produced a certificate of birth to prove the complainant was born on 6th July 2007 hence twelve years old at the time of the offence. The prosecution also produced a P3 Form (Exhibit P2) and treatment notes from Manga Sub-county Hospital (Exhibit P3).

In his defence the appellant vehemently denied the offence and stated that he did not even know the complainant. He contended that he was away at work the whole day only to be arrested when he went back home at 6pm. He stated that he was kept at Manga Police Station for two days before being taken to court.

After considering and evaluating the evidence by both sides, the trial Magistrate came to the conclusion that the evidence adduced regarding the age of the complainant did not support the charge of defilement. This was because according to him the complainant being 11 years fell in the bracket of children covered by Section 8 (1) as read with Section 8 (2) whereas the appellant was charged under Section 8 (3). He reckoned therefore that the charge of defilement as framed was fatally defective and acquitted the appellant. He however found that the evidence had proved the alternative charge of committing an indecent act with a child beyond reasonable doubt and convicted the appellant and sentenced him to imprisonment for ten years.

Being aggrieved, the appellant preferred this appeal. The petition of appeal is premised on the following grounds: -

"Being dissatisfied with the sentence and conviction of 10 years imprisonment imposed upon me on the 21/()1//2020 at

Nyamira law court on the offence of defilement contrary to section 8(l)of the sexual offences do here by appeal against the same on the following grounds. That your lordship I pleaded not guilty at trial.

That your lordship during my trial I requested for the prosecution statements and was denied which was a violation of my rights as per the law. That your lordship during my trial I requested for the prosecution statements and was denied which was a violation of my rights as per the law.

That your lordship I requested the honourable law court my case to start a fresh and I was denied as I did my case to start a fresh and I was denied as I did my case without statements and some of the essentials witnesses were not summoned to clear their evidence in court.

That your lordship I was acquitted by the honourable law court under section 202 after the said witnesses failed to come to court and I was cheated by the prosecutor that I wait for the arresting officer to release me instead the case proceeded and I was convicted due to I knew nothing about the law."

Due to the Covid-19 pandemic this appeal was heard virtually through an online platform (Microsoft Teams) initiated by the Kenyan Judiciary. The appellant canvassed the appeal by way of written submissions where he stated that the prosecution failed to call crucial witnesses and that the evidence of the witnesses was not consistent and when he requested to be allowed to recall them his plea was rejected. He contended that the clinical officer who testified did so on behalf of another officer as did the police officer hence confirming he was framed. The appellant also submitted that whereas it was recorded that Section 200 was read to him that was not the case. Further, that his rights were violated when he was kept at the police station for two days being forced to admit the offence. He described the evidence on record as a fabrication and urged this court to set him at liberty.

On her part, Learned Prosecution Counsel Ms. Mokua urged this court to find that the charge against the appellant was proved beyond reasonable doubt as all the elements of the offence of defilement were established. On the issue of identification, she submitted that there was no possibility of mistaken identity as the appellant was arrested at his homestead by the area Chief. Regarding the appellant's contention that he had requested that the matter start afresh, Ms. Mokua submitted that no reasons were advanced for that plea and that Section 200 was not relevant to this case as the trial was conducted by one Magistrate. Counsel pointed out that the appellant was given an opportunity to cross examine the witnesses and to present his defence and hence his trial was fair. On the issue of failure to call crucial witnesses, Counsel submitted that it is the law that no number of witnesses are required to call a particular number of witnesses and hence the omission to call the so called crucial witnesses was not fatal. She urged this court to dismiss the appeal, affirm the conviction and uphold the sentence.

As the first appellate court I am enjoined to reconsider and evaluate the evidence in the trial court so as to arrive at my own independent conclusion while keeping in mind that I did not see or hear the witnesses ***(See Okeno v Republic [1472] EA 32).*** I have also carefully considered the submissions by both sides.

The trial Magistrate acquitted the appellant on the charge of defilement for reason that the age of the victim did not fall within the bracket of the offence created by Section 8 (3) of the Sexual Offences Act; that while Section 8 (3) prescribes the punishment in respect of victims between the age of 12 and 15 years the charge indicated the victim was eleven years old. I have considered this and I am of the view that the Learned trial Magistrate fell into error. The offence of defilement is created by sub-section (1) of Section 8 of the Sexual Offences Act and the objective of sub-sections (2) and (3) is merely to subscribe the punishment which punishment depends on the age of the victim – the younger the victim the stiffer the punishment. In my view, an offender whose case has been proved beyond reasonable doubt ought not to get away merely on the ground that the charge sheet quoted the wrong sub-section. It behoved the trial Magistrate to determine if the offence of defilement had been proved beyond reasonable doubt and after that to sentence the appellant depending on the age of the victim. As however the prosecution did not cross appeal the acquittal that issue is not before this court and I shall not therefore determine whether or not the offence was proved.

What is for determination **is whether the charge of committing an indecent act with a child was proved beyond reasonable doubt.**

The offence of committing an indecent act with a child is created under **Section 11 (1) of the Sexual Offences Act** which states: -

"11 (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."

Section 2 (1) of the **Sexual Offences Act** defines indecent act as follows**: -**

"indecent act" means an unlawful 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;

(b) exposure or display of any pornographic material to any person against his or her will."

In this case there is no doubt whatsoever that at the material time the complainant was a child aged twelve. There is conclusive proof of that in her certificate of birth. It is also trite that the trial court had power to convict the appellant on the charge of indecent act with a child if it was proved beyond reasonable doubt. It is also trite that the evidence of the complainant did not require corroboration – ***see Section 124 of the Evidence Act.*** However, after reconsidering the evidence in the lower court I am not satisfied that the charge was proved beyond reasonable doubt. The complainant stated that she had sex with the appellant. By its very definition the offence of indecent act is established if it is proved there was any contact between any part of the body of a person with the genital organ, breast or buttocks of another but the act

must not be one that causes penetration. The trial Magistrate was therefore required to consider whether there was any contact between any part of the appellant's body with the genital organ, breast or buttocks of the complainant. In my view there was no such evidence. All the complainant stated was that she had sex with the appellant. She was not even asked to elaborate what she meant by **"had sex"** despite the fact that she was a child. She did not complain that the appellant touched her in her genital organ, breast or buttocks. The particulars of the charge which were that the appellant touched her vagina with his hand were therefore not supported by the evidence. It is clear from the judgement that the only reason the trial Magistrate found the appellant guilty of this offence was because although he believed the complainant, he perceived that he could not convict the appellant for the offence of defilement because of the deficiency of the charge.

In **John Irungu v Republic [2016] eKLR** the Court of Appeal deciding on a similar issue held: -

> **"On the last issue pertaining to the appellant's conviction for the offence of indecent act with a child contrary to section 11 (1) of the Act, we agree that it is a minor offence compared to the offence of defilement of a child contrary to Section 8 (1) and (2), under which the appellant was charged and whose prescribed punishment is life imprisonment. However, with respect the appellant could not have been convicted of indecent act with a child simply because of the definition of that offence under the Act. Section 2 of the Act defines "indecent act" as follows: -**
>
> > **"indecent act" means an unlawful 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, <u>but does not include an act that causes penetration;</u>**
> >
> > **(b) exposure or display of any pornographic material to any person against his or her will."** (Emphasis added).
>
> **The evidence on record, in particular the evidence of NW and the medical evidence adduced by PW2 which was accepted by the two courts below was that the appellant had caused his penis to penetrate the vagina of NW. accordingly, with penetration having been proved, the appellant could not be convicted of committing an indecent act with NW as the High Court did."**

As was pointed out by Mrima J in the case of **Paul Otieno Okello v Republic [2019] eKLR** –

> **".....A trial court should not assume that once it finds no evidence of commission of the principal charge of defilement then the lesser charge of committing an indecent act with a child must have been committed. Every offence has the same threshold of being proven beyond reasonable doubt."**

While I am not persuaded that the trial was not fair as clearly the appellant ought to have given the grounds upon which he wished to have the witnesses recalled and as **Section 200 of the Criminal Procedure Code** was not relevant to his case and the delay in bringing him to court does not entitle him to an acquittal, I find that the offence for which he was convicted was not proved beyond reasonable doubt. Accordingly, the appeal has merit and the conviction is quashed and the sentence is set aside. He shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

Signed, dated and delivered in Nyamira this 23rd day of July 2020.

E. N. MAINA

JUDGE

Judgement delivered electronically via Microsoft Teams