



IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 7 OF 2020

CORAM: D.S. MAJANJA J.

BETWEEN

SHADRACK MUTUMA KABERIAAPPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. G. Sogomo, PM, dated 21st June 2018 at the Magistrate's Court at Tigania in Sexual Offence Case No. 28 of 2017)

JUDGMENT

1. Although he was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* ("the Act"), the appellant, **MUTUA NDATHO**, was convicted on the alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Act*). The particulars of the charge were that on 22nd September 2016 in Tigania West Sub-County within Meru County, he intentionally and unlawfully committed an indecent act by touching the vagina of RK, a child aged 6 years with his penis.

2. The appellant was sentenced to 10 years' imprisonment and now appeals against conviction and sentence. As this is a first appeal, it is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see *Okeno v Republic* [1972] EA 32). In order to consider the grounds of appeal, it is necessary to set out the evidence emerging at the trial.

3. The complainant, PW 1, gave unsworn testimony after a *voire dire*. She testified that she was in Class 1. She recalled that on 22nd September 2016 at about 7.00pm, she was walking home from the shop when she saw the appellant chasing another woman, PW 3. PW 3 managed to escape whereupon the appellant turned on PW 1 who was not home and asked her to accompany him to a shop where he would buy her mandazi. She narrated what happened as follows:

When I accompanied Shadrack he took me to the farm at Karamita. He put his finger inside where I pass urine. My mother found Shadrack putting his finger inside me and when he saw her he ran away. He had removed my underpant by then. My mother took me to hospital and also to the police station.

4. The appellant's mother, PW 2, recalled that on the material evening, she went home and asked where PW 1 was. She was informed that PW 1 had left with the appellant. She went to look for her and found her crying in a nearby shamba. PW 1 told her how the appellant had removed her clothes and groped her. She took PW 1 home and noted that her vagina was inflamed when she examined her. She escorted the child to hospital and reported the matter to the police. PW 2 testified that the appellant went into hiding after the incident. He came to her home after 2 days and threatened to kill her.

5. PW 3 testified that on the material evening, as she was from the shop, she met the appellant who started chasing her. As she ran to a nearby homestead, she saw the appellant ask PW 1 to follow him to the shop so that she could buy her mandazi. Thereafter, PW 2 came looking for PW 1 whereupon she informed him she had seen the appellant with PW 1. She later heard about the incident.

6. The clinical officer, PW 4, who produced the P3 medical form and treatment notes testified that PW 1 was seen at the hospital on 23rd September 2016. Upon examination, PW 1 had bruises on the labia minora and her hymen was perforated. The high vaginal swab revealed red blood cells and presence of bacteria but there were no spermatozoa. He concluded that the child had been defiled.

7. The Investigating officer, PW 5, confirmed that he received a report of the incident on 23rd September 2016. He escorted PW 1 and PW 2 to the hospital. He recorded witness statements and later arrested the appellant.

8. In his unsworn statement, the appellant denied the charge. He stated that the case was a fabrication because he had fought with PW 2

whose husband is his friend and had separated from her. He stated that PW 2 blamed him for the separation. He further stated that he left home in 2016 and came back in 2017 only to be arrested over the matter. He stated that he had demanded to know why PW 2 was slandering him when he returned.

9. The appellant's witness, DW 2, stated that the appellant was his neighbour. He recalled that on 21st October in a year he could not recall, he accompanied the appellant to construct a pit latrine in Igembe. They returned home after 3 days whereupon the appellant was arrested.

10. The appellant's appeal is contained in the amended supplementary grounds of appeal and written submissions. The thrust of the appeal is that the prosecution failed to prove its case beyond reasonable doubt and that the evidence was contradictory, inconsistent and conflicting. He also pointed out that important witnesses were not called to testify. The respondent supported the appeal on the ground that the prosecution proved all the elements of the offence.

11. An "*Indecent act*" under **section 2** of the **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;*

12. I have evaluated the evidence and I find that PW 1's testimony was straightforward. She narrated how the appellant lured her into a farm, proceeded to remove her pants and proceeded to insert his finger in the vagina. Her testimony was corroborated by that of PW 2 who found her leaving the shamba in a state of distress and her testimony that the vagina was inflamed when she examined her. Further PW 3, saw the appellant pick up the child and go with her shortly before she was sexually violated. PW 2 and PW 3 knew the appellant, who admitted as much in his defence that he knew PW 2.

13. That the appellant inserted his finger into PW 1's vagina is corroborated by the medical evidence which showed bruises on the vagina. This is consistent with the act of inserting a finger and corroborates PW 1's testimony.

14. Finally, and as regards the defence, the appellant stated that the case was a fabrication and that he had an alibi. The issue of a grudge was an afterthought as it was never put to PW 2 in cross-examination. The appellant's alibi defence could not withstand the weight of the prosecution case as he was clearly seen on that day by PW 3 before and after the incident. DW 2's evidence was inconsistent with the appellant's case. While he stated he was away for a period of time. His witness stated that they had gone for some work for a few days. The appellant's disappearance from the area and threats to the appellant belies his guilt. I therefore reject the appellant's defence.

15. Although the appellant contends that there were inconsistencies in the evidence, the totality of the evidence is consistent on what happened. The incident was in the evening and PW 2 came to the scene where she met PW 1. It is for this reason that PW 1 would have believed that PW 2 had seen what had happened. PW 2 stated she did not see the appellant. I do not think anything turns on this.

16. A final issue is that the evidence is at variance with the charge. The charge alleged that the indecent act was committed by the penis. The evidence shows that the indecent act was committed with a finger and not the penis as stated in the charge. The test in this case whether the conviction based on the alleged defective charge occasioned a miscarriage of justice resulting in great prejudice to the appellant as was held in **JMA v Republic [2009] KLR 671**, where the court held that:

It was not in all cases in which a defect detected in the charge on appeal would render a conviction invalid. Section 382 of the CPC was meant to cure such an irregularity where prejudice to the appellant is not discernible.

17. I am satisfied that in this case the discrepancy did not prejudice the appellant and that no miscarriage of justice has been occasioned as a result because the evidence was led and the appellant had the opportunity to cross-examine the witness and defence himself. **Section 382** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)** which provides;

Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

18. The appellant was sentenced to the mandatory minimum sentence under **section 11(1)** of the **Act**. While I am alive to the fact that mandatory minimum sentences are no longer tenable, the sentence was appropriate in light of the circumstances including the age of the child. I am not convinced that the sentence is harsh or excessive in the circumstances. I affirm the sentence.

19. I dismiss the appeal.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED and DELIVERED at NAIROBI this 20th day of AUGUST 2020.

A. MABEYA

JUDGE

Appellant in person.

Mr Maina, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.