REPUPLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL NO. 67 OF 2020

(Being an appeal against the judgment of the CM's Court Kibera

Sexual Offence Case No. 28 of 2017, by Hon. E. Boke, SPM

dated 31st January, 2020)

LESIIT, J

DMM..APPELLANT

VERSUS

REPUBLIC...RESPONDENT

JUDGMENT.

1. The Appellant is one **DMM** was charged with 2 offences under the **Sexual Offences Act (SOA)**. The main count is of **Attempted Defilement** contrary to **section 9(1)** as read with **section 9(2)** of **Sexual Offences Act**. The particulars of the charge was as follows:

> **Count I.**
>
> **"On the 20th day of March 2017 at around 1.00p.m. within Nairobi County intentionally attempted to cause his penis to penetrate the vagina of WBW a female child aged 4 ½ years."**

2. In the alternative count the Appellant was charged with **Indecent Act with a child** contrary to **section 11(1)** of the **Sexual Offences Act**. The particulars of the alternative count was:

> **Count 2.**
>
> **"On the 20th day of March 2017 at around 1.00p.m. within Nairobi County being a male person committed an indecent act to WBW a female child aged 4 ½ years by placing his fingers and his penis on her genital organ (vagina)"**

3. After a full trial, the Appellant was found guilty and convicted of the alternative count of **Indecent Act with a child** contrary to **section 11(1)** of the **Sexual Offences Act**. He was sentenced to 3 ½ years' imprisonment. Being aggrieved by the conviction and the sentence, the Appellant filed this appeal.

4. The Appellant has filed his Petition of appeal which raises four grounds which I summarize as follows:

> **(i) The learned trial magistrate erred for failing to appreciate that the prosecution did not prove their case beyond any reasonable doubt.**
>
> **(ii) The learned trial magistrate erred for failing to pay attention to the Appellant's demeanour and thus failed to subject him to a proper mental examination, based on his advanced age of 91 years.**
>
> **(iii) The learned trial magistrate misdirected herself in fact and law by failing to appreciate that the evidence of Dr. Mbugua and Dr. Kimani indicated that the Appellant did not commit any indecent act to PW1.**

(iv) The learned trial magistrate misdirected herself by not attaching requisite weight to the defence.

5. The prosecution called five witnesses. The facts of the prosecution case were that the victim, the complainant in this case was a child of 4 years old. She was PW1. Her evidence was that she returned home from school, her parents were not home. That her grandfather, the Appellant in this case, went for her and took her to his house. She said that he undressed her and then himself, and asked her to lie on him, after which he inserted his finger and thing in her genitalia. She said she felt pain. PW1 told her mother, PW3 what the Appellant had done to her.

6. PW3 testified that upon learning what the Appellant had done to her daughter, she went to him and enquired from him about the complaint against him. She said that the Appellant was a neighbour's watchman, who PW1 had known for 4 months, and who she referred to as '*guka'* that is grandfather. PW3 testified that the Appellant denied having done anything to her. She said that she took her daughter to hospital same day but found it closed. She took her again on the following day where she was examined.

7. The Report by the doctor shows that the complainant had no physical injuries and that her vaginal walls were tender. Her hymen was intact. The doctor stated that PW1 was anxious at the time of examination. The vaginal swabs taken by the doctor, and the complainant's stockings recovered by PW5, were analyzed by PW4, the Government Chemist. He found no blood or semen on both. PW5 was the investigating officer who also escorted the samples to PW4 for analyses. She also arrested the Appellant for this offences.

8. The accused gave his defence in court saying he was born in 1929. That means at the time of alleged offence he was 88 years old. He denied committing the offences charged and said that at his age he could not allow that.

9. Mr. Mwinzi for the Appellant and Ms. Kibathi for the State both filed written submissions which they highlighted in court.

10. Mr. Mwinzi in his submissions urged that the prosecution failed to prove their case against the Appellant beyond a reasonable doubt. Counsel urged that the prosecution evidence of PW1, PW2 and 3 was contradictory. Counsel urged that PW3 reported to PW2, Dr. Sara that she found the Appellant red handed having inserted his penis into the complainant's genitalia. Counsel urged that PW3 in her evidence in court told court that she found her daughter seated outside the house. PW3 narrated that the complainant told her that the Appellant removed a snake like thing and asked her to touch it, a fact that PW1 never stated in her evidence.

11. Mr. Mwinzi urged that the doctor PW2 did not find any injuries on the complainant and that her hymen was normal. Counsel urged that the prosecution relied on the uncorroborated evidence of a child of tender age, without corroboration.

12. Ms. Kibathi, learned Prosecution Counsel submitted that on the issue of contradiction between the evidence of PW1 and PW3 the charges the Appellant faced did not require evidence of penetration. Counsel urged that the prosecution proved that the Appellant committed an indecent act with a child by inserting his fingers in her genitalia and was rightfully convicted. Counsel urged that the learned trial magistrate who observed the complainant, ruled that she had no reason to doubt that the Appellant was telling the truth.

13. Mr. Mwinzi in his submissions urged that the Appellant's defence was never considered. Counsel urged that in his defence the Appellant told court that he touched the complainant when he lifted her to place her in a vehicle where she sat until her parent came. He relied on ***Douglas Maina vs. Republic*** CA No. 13of 2015, for the proposition that where defence is not considered, a conviction should be found to be unsafe and ought not to stand.

14. I have considered the evidence adduced by both the prosecution and the defence before the trial court, as well as the submissions, both oral and written by both sides.

15. This is a first appellate court and that being the case, I have the duty to analyze and evaluate afresh all the evidence that was adduced before the lower court, and draw my own conclusions of the matter, while giving an allowance for not having had the benefit of observing the witnesses. I am guided by the case of **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs. Republic**, Criminal Appeal No. 272 of 2005 where it was stated as follows:

> **"In the same way, a court hearing a first appeal (i.e. a first appellate court) also has a duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same. There is now a myriad of case law on this but the well-known case of** *Okeno vs Republic [1972] EA 32* **will suffice. In this case, the predecessor of this court stated:**
>
> 'The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala vs. R. [1975] EA 57). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.' **"**

16. The issues which arise for determination in this appeal, are:

I. Whether the prosecution proved its case beyond any reasonable doubt.

II. Whether the evidence of the prosecution was full of contradiction and inconsistency.

III. Whether there was cause to have medical assessment of the Appellant

IV. Whether the Appellant's defence was considered.

17. I have carefully examined, evaluated and analyzed the entire evidence adduced before the trail court afresh, and drawn my own conclusions while bearing in mind that I neither saw nor heard the witnesses, and have given due allowance.

18. The first two issues are related and will be considered together. They are whether the prosecution proved its case beyond any reasonable doubt**;** and whether the evidence of the prosecution was full of contradiction and inconsistency. It was the Appellant's contention that the evidence of the prosecution witnesses was so full of contradictory statements that there was no way the prosecution could prove its case against the Appellant beyond reasonable doubt.

19. The contradictions highlighted by the Appellant's counsel were several. It was Mr. Mwinzi's submission that the evidence of PW2, Dr. Sara who examined PW1 told the court that what PW3, the victim's mother reported to her was that she found the Appellant with his penis inside PW1's vagina. Mr. Mwinzi urged that in her evidence PW3 had told court that when she returned home at 3pm on the material day, she found her daughter seated outside the house. Further that PW1 reported to her that the Appellant had removed something like a snake which he asked her to touch. Mr. Mwinzi urged that PW1 did not give such evidence, but that rather she said that some 'thing' was inserted in her.

20. I have analyzed the evidence of the prosecution, especially that of PW1, PW2, and PW3. There was no inconsistency between the evidence of PW2 and PW3. PW2 was in fact not Dr. Sarah as the Appellant's counsel urged. PW2 was Dr. Edward Mbugua who testified on behalf of Dr. Sarah. Dr. Sarah is the one who examined PW1 and filled the P3 form and the GVRC form produced as Exhibits 2 and 3 respectively. She proceeded for studies before she could testify. PW2 had no prior contact with PW3 and only came to produce the said exhibits. He could therefore not contradict PW3's evidence.

21. As for the evidence of PW1 and PW3, according to PW3, PW1 told her that the Appellant removed his penis and asked her to touch it. Then later when he told her to lie on his stomach, he inserted his fingers in her genitalia. In her evidence in court, PW1 testified that the Appellant inserted both his penis and his fingers in her genitalia. I find a variation in the evidence of PW1 and PW3 which is immaterial and does not go to the root of the prosecution case. The only inconsistency in the evidence of the was in PW1's evidence adding that the Appellant inserted his penis in addition to his fingers. That does not amount to contradiction.

22. I noted that there was no direct evidence to corroborate the evidence of PW1, the victim in this case. The victim was a child of 5 years, according to the immunization medical card produced by PW3, her mother to show her age. Under the **Children Act**, **section 2** thereof, the victim fell within what is accepted as *a child of tender years*. While the learned trial magistrate considered the victim's age, she did so in terms of proof that PW1 was under the age of 18 years, and therefore a child, for purposes of proving the charges before court.

23. There was another aspect of the victim's age which was equally important, and which was overlooked by the court. The age for purposes of determining the probative value of the evidence adduced. I noted that the learned trial magistrate did carry out a *voire dire* examination of PW1. In the celebrated case of **JOHNSON MUIRURI VS REPUBLIC [1983] KLR 445, Madan, Porter JJ & Chesoni Ag. JA** held:

> **(1) "Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a *voire dire* examination, whether the child understands the nature of an oath in which even his sworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him.**
>
> **(2) It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided.**
>
> **(3) When dealing with the taking of an oath by a child of tender years, the inquiry as to the child's ability to understand the solemnity of the oath and the nature of it must be recorded, so that the cause the court took is clearly understood.**
>
> **(4) A child ought only to be sworn and deemed properly sworn if the child understands and appreciates the solemnity of the occasion and the responsibility to tell the truth involved in the oath apart from the ordinary social duty to tell the truth.**
>
> **(5) The judge is under a duty to record the terms in which he was persuaded and satisfied that the child understood the nature of the oath. The failure to do so is fatal to conviction."**

24. The learned trial magistrate did carry out a *voire dire* examination of PW1, and the Appellant raised no complaint about that. In regard to the probative value of the child's/victim's evidence, **Section 124** of the **Evidence act** provides as follows:

> **"S.124. Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.**
>
> **Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."**

25. The proviso to **section 124** of the **Evidence Act** is clear that a conviction can only be entered if for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth. The learned trial magistrate examined the evidence before her, and applied the relevant law to the facts of the case. I will get back to this issue at a later stage of this judgment.

26. The learned trial magistrate considered the principles of the law on '*attempt'*, for the purposes of making a determination on the main count facing the Appellant. She came to the conclusion that as required under **section 388** of the **Penal Code**, no demonstration of an intention to commit the main offence, or an overt act shown that was sufficiently proximate or immediately connected to the offence as to prove that the Appellant had intention to commit the offence of attempted defilement.

27. This is how the trial court delivered herself on this issue:

> **"But from the narration of the child, the court is left wondering that if the accused had intended to defile her, then what made him stop and yet they were only the two of them? Therefore, the court is left in doubt as to whether the element of intention has been proved because from the child's narration it is clear that there was a possibility that if the accused had undressed her and told her to lie on his stomach and then he failed to defile her, his intention was not to defile her but something else."**

28. The court next considered the alternative charge of *indecent act with a child*, to determine whether the same was proved. The **SOA**'s definition of *indecent act* was considered by the court. **Section 2 (1)** of the said **Act** defines an 'indecent act' as follows:

> **"Indecent act means an unlawful intentional act which causes:-**
>
> **Any contact between any part of the body of a person with the genital organ, breast or buttocks of another, but does not include an act that causes penetration;**
>
> **Exposure or display of any pornographic material to any person against his or her will."**

29. I did peruse the trial court's judgment and this is how the learned magistrate weighed the evidence on indecent act:

> **"The fact that her hymen was intact portrays that there was no complete or partial penetration of the male genital organ into her genital organs … the accused person stated that he did not do it, that his age can't allow that. He said he was born in 1929 thus by 2017 he was aged around 88 years. Though he did not clarify what he meant by saying that his age can't allow that whether he meant defilement/attempted defilement or touching. I have no reason to make me doubt the narration of the child that he touched her private parts with his fingers and also maybe with his penis… I find the child's narration more believable than the accused person's mere denial, for the offence related to indecent touching."**

30. The learned trial magistrate believed that the victim, PW1 was telling the truth, giving reason for that belief. This met the proviso to **section 124** of the **Evidence Act** and I see no reason to fault it. On my own assessment of PW1's evidence, I found that she spoke in a clear and forthright manner, and for her age, I do find she was a brilliant and jovial personality. There is nothing on the record to raise any doubts about her evidence, or lead to a finding that she had been coached.

31. Regarding whether there was cause to have medical assessment of the Appellant, Mr. Mwinzi for the Appellant urged that the Appellant should have been taken for mental check-up due to his advanced age, of 88 years. Counsel urged that in court, the Appellant kept talking to himself loudly to the extent of disrupting the court proceedings, and that his suggestion that he be subjected to mental assessment was ignored.

32. Ms. Kibathi in response urged that the submission on the Appellant's Mental status was an afterthought. Counsel urged that the Appellant was able to give a sworn defence showing he understood the charges he faced in court.

33. I have perused the entire proceedings. The record is very clear that the Appellant represented himself during his trial. That being the position, it is not correct what Mr. Mwinzi submitted that he was ever present in court during the trial. Secondly, there is no record of the Appellant muttering to himself, or for any reason disrupting the proceedings. It is unfortunate that counsel sought to mislead the court in this manner.

34. In answer to this issue, it is my finding that there was nothing on record to show that the learned trial magistrate should, in exercise of her discretion, have doubted the sanity of the Appellant's mental status as to find it expedient to order for mental assessment. I find that nothing turns on this ground.

35. Whether the Appellant's defence was considered. I have carefully perused the judgment of the trial court. I find that the learned trial magistrate devoted at least two paragraphs to the Appellant's defence. I find that the defence was given due consideration, and that the conclusions drawn by the court were correct and cannot be faulted. Nothing turns on this issue.

36. Having carefully examined, analyzed and evaluated afresh all the evidence adduced before the trial court, together with the submissions by both sides, I have come to the conclusion that the conviction entered in this case against the Appellant was safe and should stand. I therefore no merit on the appeal against the conviction.

37. As to the sentence, the learned trial magistrate considered the Appellant's advanced age of 91 years old and overlooked the minimum sentence recommended for this offence of 10 years' imprisonment, giving the Appellant a sentence of 3 ½ years' imprisonment. In total, the

Appellant was in custody for two weeks before he was released on bond, and in jails serving sentence for a period of 9 months and two weeks. That makes a total of ten months.

38. These are serious times we are living in. I have considered the offence committed by the Appellant, inserting his fingers inside the victim's genitalia. I have considered the tender age of the victim, of 5 years at the time of the offence. Both circumstances are bad enough. However, as learned trial magistrate found, it appears the Appellant had no intention of actually defiling the child. He nevertheless behaved very indecently, invading the young child's person, an act which is deplorable, and which has been on the rise in the country.

39. That said, at 91 years of age, an imprisonment term seems to be akin to sentencing the Appellant to death due to the covid-19 pandemic, and the Appellant's vulnerability due to his age. I do not think that it will be justifiable to sentence the Appellant to death for what he did, not at all excusing him for it. Having served ten months, it is my view that he has served enough sentence in the prevailing circumstances.

40. In the result, I will allow the appeal against sentence, set aside the sentence of 3 ½ years' imprisonment and in substitution reduce it to the period served.

41. Those are my orders.

DATED, SIGNED AND DELIVERED THROUGH TEAMS THIS 30TH DAY OF NOVEMBER, 2020

LESIIT, J

JUDGE

In the presence of

Mr. Kinyua..Court Assistant

Mr. Mwinzi..For the Appellant

Mr. Momanyi..For the State

LESIIT, J

JUDGE

November, 30th 2020