



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 147 OF 2014

MICHAEL KIPKASI KOECH.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of the Resident Magistrate's Court (Hon. C.M. Wattimah, RM) delivered on the 2nd day of September 2014 in Kapsabet Senior Principal Magistrate's Criminal Case No. 1866 of 2014)

JUDGMENT

[1] This is an appeal from the decision of the Learned Trial Magistrate, **Hon. C.W. Wattimah, RM**, in **Kapsabet SPM's Criminal Case No.1866 of 2014**. The Appellant had been charged before the lower court with Attempted Defilement contrary to **Section 9(1) and (2) of the Sexual Offences Act, No. 3 of 2006**. It was alleged that on the **2nd day of June 2014** within Nandi County, he intentionally and unlawfully attempted to cause his penis to penetrate the vagina of **GJC**, a child aged 8 years.

[2] The Appellant was also charged with two Alternative Counts, namely, **Indecent Act with a Child**, contrary to **Section 11(1) of the Sexual Offences Act** and **Assault Causing Actual Bodily Harm**, contrary to **Section 251 of the Penal Code, Chapter 63 of the Laws of Kenya**. The particulars of the Alternative Charge of Indecent Act with a Child were that on the **2nd day of June 2014** within Nandi County, he intentionally committed an indecent act by causing his penis to come into contact with the vagina of **GJC** a child aged 8 years. In respect of the Alternative Charge of Assault, the particulars were that on the **2nd day of June 2014** within Nandi County, the Appellant unlawfully assaulted **GJC** by pressing her left hip to the ground using his knee, thereby occasioning her actual bodily harm.

[3] The Appellant denied the charges and after trial before the lower court, he was found guilty of the offence of **Indecent Act with a Child** contrary to **Section 11(1) of the Sexual Offences Act**. The Appellant was accordingly convicted thereof, and sentenced him to serve 10 years' imprisonment. Being aggrieved by his conviction and sentence, the Appellant preferred this appeal on **3 October 2014**, raising four Grounds of Appeal; namely:

[a] That the Learned Trial Magistrate erred in law and fact in sentencing the Appellant to serve 10 years in jail while there was no evidence to sustain the said conviction;

[b] That the Learned Trial Magistrate erred in law and fact in using the uncorroborated evidence of the minor complainant;

[c] That the Learned Trial Magistrate erred in law and fact in making a finding that the Appellant was guilty of the offence of Indecent Act with a Child when the Complainant clearly said that there was no contact between the Appellant's genital organ and that of the Complainant;

[d] The Learned Trial Magistrate erred in law and fact in failing to appreciate that the evidence adduced by the Complainant contradicted the particulars of the Charge of Indecent Act with a Child.

[4] With leave of the Court, granted on **27 July 2017**, the Appellant filed Amended Grounds of Appeal pursuant to **Section 350(2)(v) of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya**, raising the following grounds:

[a] That the Learned Trial Magistrate erred in law and fact in failing to call a vital witness, namely, his wife, who received the "Magadi" from the Complainant;

[b] That the Learned Trial Magistrate erred in law and in fact in failing to find that the Prosecution did not prove its case beyond reasonable doubt;

[c] That the Learned Trial Magistrate erred in law and in fact in failing to hold that the evidence before the court was flimsy and uncorroborated;

[d] That the Learned Trial Magistrate erred in law and in fact in failing to find that the evidence tendered by the Prosecution Witnesses was inadequate;

[e] That the Learned Trial Magistrate erred in law and in fact in failing to find that the sentence of 10 years was manifestly harsh, excessive and draconian and had resulted in a serious miscarriage of justice;

[f] That the Learned Trial Magistrate erred in law and in fact in failing to hold that the Charge, the elements and facts thereof were not proved to the requisite standards;

[g] That the Learned Trial Magistrate erred in law and in fact by failing to give sufficient cognizance and recognition of the Appellant's reasonable defence;

[h] That the Learned Trial Magistrate erred in law and in fact in failing to find that the injuries sustained by the minor were not proved to have been occasioned by the Appellant;

[i] That the Learned Trial Magistrate erred in law and in fact in failing to hold that the dock identification of the Appellant was not safe to sustain a conviction, as he was not mentioned by name;

[j] That the Learned Trial Magistrate erred in law and in fact in not questioning why the medical evidence produced was sourced from different hospitals, namely, Webuye District Hospital, Chepterwai Hospital and Kabiyet Hospital, which are in different counties;

[k] That the Learned Trial Magistrate erred in law and in fact in relying on the testimony of **PW2** yet she had been declared a hostile witness;

[l] That the Learned Trial Magistrate erred in law and in fact in failing to find that **PW6** gave contradictory evidence in stating that the place of the alleged attempted defilement was along the road and not at the river; and that the offence occurred on **3 June 2014** as opposed to **2 June 2014**.

[5] The Appellant, who was represented herein by **Mr. Tororei**, relied on the written submissions filed by the Appellant along with his Amended Grounds of Appeal. **Mr. Tororei** highlighted those submissions on **5 July 2018**, and submitted that the Learned Trial Magistrate misdirected herself and applied the wrong standard of proof in evaluating the evidence; and in relying on the evidence of **PW4**, notwithstanding that she had been declared a hostile witness. It was further the submission of **Mr. Tororei** that, after making a finding that there was no evidence of assault on the minor, there was no basis for the Appellant's conviction. He accordingly urged the Court to reconsider the matter with a view of having the conviction by the lower court quashed and the sentence set aside.

[6] **Ms. Kegehi**, Learned Counsel for the State opposed the appeal. She was of the view that the evidence presented before the trial court proved all the essential ingredients of the offence of **Indecent Act with a Child**, namely, the age of the Complainant, and that the Appellant had started putting his intention of defilement into motion, thereby occasioning the Complainant injuries on the hip. She urged the Court to note that treatment notes and a P3 Form were produced before the lower court as exhibits to prove the allegations. **Ms. Kegehi** also urged the Court to take note that the Appellant, in his defence before the lower court, conceded that he had met the Complainant on the date in question and sent her to buy some "Magadi" for him. According to the State, the Prosecution had discharged the burden of proving the offence of **Indecent Act with a Child** against the Appellant beyond reasonable doubt. Counsel accordingly urged for the dismissal of the appeal.

[7] This being a first appeal, I am mindful of the obligation to reconsider afresh the evidence adduced before the lower court and the need for this Court to come to its own conclusions thereon. In **Okeno vs. Republic [1972] EA 32** by the Court of Appeal for East Africa made this point thus:

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ... and to the appellate court's own decision on the whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...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 conclusion; 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..."

[8] The contention of the Prosecution before the lower court was that the Complainant, a school going pupil then aged 9 years, had been sent by her mother to the local shopping centre; and that on her way back home, she met the Appellant near the river, and that he got hold of her and pulled her into the bush and attempted to defile her before he was interrupted by a neighbour of the Complainant's who happened to be passing by the scene. The Complainant testified as **PW1** before the lower court and stated that she suffered injuries on her hip at the hands of the Appellant, for which she was taken to hospital for treatment.

[9] The Complainant's testimony was corroborated by her mother, **RM (PW2)**. She confirmed having sent the Complainant to [particulars

withheld] on the **2 June 2014** at about 6.00 p.m.; and that the Complainant returned later than usual at 7.30 p.m. and reported the incident to her. She noted that the Complainant was walking with difficulty as she had suffered injury on the left leg. They took up the matter with the Police and so the Appellant was arrested and charged. The Complainant was also escorted to **Chepterwai Sub-District Hospital** for treatment and was thereafter referred to **Webuye District Hospital** for x-rays. Thereafter, the Complainant was issued with a P3 Form which was filled at **Kabiyet Health Centre** by **Wilson Kirwa (PW3)**.

[10] According to **PW3**, the Complainant was accompanied to his office at **Kabiyet Health Centre** by her parents; and that she had with her the treatment documents and x-rays films taken at **Webuye District Hospital**. The injury noted was on the left hip joint. He filled the P3 Form and had it produced before the lower court as **Prosecution's Exhibit No. 4**. He similarly produced the treatment documents issued at **Chepterwai Sub-District Hospital** and **Webuye District Hospital** as exhibits.

[11] The Prosecution also called **Jane Bor (PW4)** as witness before the lower court. She is a neighbour of the parents of the Complainant and was said to have found the Appellant in the process of undressing the Complainant with a view of defiling her. It was therefore the contention of the Complainant that having interrupted the Appellant and come to the rescue of the Complainant, **PW4** instructed her to go home and report the matter to her parents. She however recanted the contents of her witness statement and was consequently declared a hostile witness.

[12] **PW5** and **PW6** were the police officers who received the Complainant's report and effected the arrest of the Appellant and/or carried out investigations into the allegations of attempted defilement. **PW5**, an Administration Police Officer attached to **Chepterwai D.O.'s** office, told the court that the incident was reported to their office on **3 June 2014** at 7.00 a.m. He then proceeded to **Chepterwai Hospital** where he found the minor with her parents awaiting treatment in the company of the area Village Elder. After interviewing them, he arrested the Appellant and escorted him to **Kipkaren Police Station**. At **Kipkaren Police Station**, the matter was handled by **PW6**, who interviewed and recorded the statements of the witnesses, issued the Complainant with a **P3 Form** and followed up on her medical examination, including age assessment. **PW6** also gathered the relevant exhibits, which included the clothes the Complainant was wearing on the date in question. He produced them before the lower court as exhibits. He also produced the Witness Statement of **PW4**, who turned hostile before the lower court, as an exhibit.

[13] In his defence before the lower court, the Appellant denied the allegations against him, contending that he had gone about his usual work on the **2 June 2014** upto about 3.00 p.m. when he went to the home of his grandmother, **JB (PW4)**. As it had rained, he left **PW4's** home to go and plant some trees; and that it was while planting trees that the Complainant passed by on her way to the shopping centre; and that he then sent her to buy some "Magadi". According to the Appellant, the Complainant came back and told him that she had given the "Magadi" to his wife and then went away. He then narrated how later that evening the parents of the Complainant went to his home with allegations that the Complainant had been assaulted in an attempted defilement and that he was to blame for the same. He denied having assaulted the Complainant and told the lower court that the parents of the Complainant were out to extort money from him.

[14] Having considered the evidence presented before it, the lower court was of the finding that the Prosecution had proved that the Complainant was a minor for purposes of the **Sexual Offences Act**; and that she gave cogent evidence to inculcate the Appellant in connection with the incident. She noted that though the Complainant was the only eye witness, she was credible. Upon my reconsideration of the evidence, I find no fault with that conclusion, granted the proviso to **Section 124** of the **Evidence Act**.

[15] It is however manifest from the record of the lower court that there was a grave misdirection on the part of the Learned Trial Magistrate in her handling the reception of the evidence of the Complainant. Having conducted a *voir dire* and satisfied herself that the minor was not possessed of sufficient intelligence to understand the meaning of oath, and ruled that she would give unsworn statement, she ought to have provided the Appellant with an opportunity to cross-examine the minor. This is because **Section 208** of the **Criminal Procedure Code** is explicit that:

- (1) If the accused person does not admit the truth of the charge, the court shall proceed to hear the complainant and his witness and other witnesses (if any).
- (2) The accused person or his advocate may put questions to each witness produced against him.
- (3) If the accused person does not employ an advocate, the court shall, at the close of the examination of each witness for the prosecution, ask the accused person whether he wishes to put any questions to that witness and shall record his answer.

[16] Accordingly, in **Nicholas Mutula Wambua vs. Republic, Mombasa Criminal Appeal No. 373 of 2006** the Court of Appeal held thus:

"The second point we wish to discuss is whether or not a child witness, who gives evidence not on oath is liable to cross-examination. There appears to be a widespread misconception that a child witness who is allowed to give evidence without taking oath because of immature age, should not or cannot be cross-examined...It would appear that misconception arises from a view that because accused persons are not cross-examined whenever they make unsworn statements in the defence, child witnesses who did not take the oath should be treated in the same way. Such a view is oblivious of the peculiar protection given to an accused person in the form of a right to make an unsworn statement with no liability to be cross-examined.

That thinking is expressed in Section 208 of the CPC which govern hearing of Criminal proceedings in the Magistrate's courts. It provides that during the hearing, the accused persons or his advocate may put questions to each witness produced against him. Accordingly, all prosecution witnesses are liable to be cross-examined in order to test the credibility and the veracity of the witness. The Trial Courts should always observe that requirement of the law in criminal trials to obviate an otherwise stable case from being lost on that omission."

[17] The record shows that the Appellant was not afforded an opportunity to cross-examine PW1. This was clearly a misdirection that tended to colour the judgment of the trial court as to the weight to attach to the Complainant's evidence, and therefore led her to the wrong conclusion. Thus, she expressed the view that:

"...the only eye witness is the complainant who is a minor that gave unsworn evidence. It is therefore very important to ascertain whether the evidence is admissible or not. It is the duty of the court to determine whether the minor is competent to give evidence...whether the minor herein was assaulted, from the evidence adduced, the minor did sustain injuries, but there is no clear evidence to show that the accused was seen or assaulted the minor. The accused is said to have tried to remove his clothes, but it is not indicated whether his manhood came into contact with the minor's private parts. The evidence adduced proves the offence of indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006, which I hereby convict the accused accordingly. The accused is acquitted on the second count of assault causing actual bodily harm."

[18] Having satisfied herself as to the credibility of the Complainant, the Learned Trial Magistrate ought not to have made the remarks that there was no evidence of assault. Moreover, it is manifest from the record that PW1's evidence in this regard was corroborated by the evidence of her mother (PW2), the Medical Officer (PW3) as well as the police officers, (PW5 and PW6). That evidence would have led her to the conclusion that this was a case of an attempted defilement; having believed the Complainant's testimony that the Appellant had **"...pressed her on the ground and knelt on her..."** occasioning her injuries on the left leg and left hip. The lower court record further reveals that the Learned Trial Magistrate was also convinced that the Appellant had removed the Complainant's clothes and had therefore began to execute his nefarious intention. Hence, the Learned Trial Magistrate posed the following pertinent questions:

"...why could the accused remove the minor's clothes? Did these acts amount to preparation for the act of defilement? By pressing the victim/minor on the ground the accused had started putting his actions into execution within the definition of attempts. The accused in his evidence did state that indeed he met the minor on the way and even sent her for Magadi..."

[19] Yet, without any further reference to her analysis in connection with the attempted defilement allegations, the trial court proceeded to convict the Appellant of **Indecent Act with a Child**, contrary to **Section 11(1)** of the **Sexual Offences Act** without any analysis of the evidence that led her to the conclusions that the elements of the offence laid in the first Alternative Charge had been proved. For purposes of that provision, **"Indecent act"** is defined in **Section 2** of the Act to mean:

"...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."

[20] The indecent act that was alleged in the particulars of the first Alternative Charge was that the Appellant caused his penis to come into contact with the vagina of the Complainant. It is undoubtedly clear that no evidence of such contact was adduced before the lower court; and the Learned Trial Magistrate herself made observations to that effect. Accordingly, there was no basis upon which to found a conviction for the Alternative Charge of **Indecent Act with a Child**. I would accordingly agree with the Appellant that the offence of which he was convicted had not been proved beyond reasonable doubt.

[21] In the premises, and given that there was credible evidence in proof of the offence of Assault contrary to **Section 251** of the **Penal Code**, the lower court still had the option to convict the Appellant of the second Alternative Count of assault; and this Court would have registered a conviction under that provision. However, I note that the Appellant was acquitted thereof by the lower court in respect of which no appeal was preferred.

[22] In the result, I find merit in the appeal and would allow it and set aside the conviction and sentence imposed on the Appellant by the lower court. I direct that he be set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 24TH DAY OF JANUARY, 2019

OLGA SEWE

JUDGE