



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 104 OF 2018

(An Appeal arising out of the conviction and sentence of Hon. Stephen Jalang'o -SPM delivered on 8th June 2018 in Makadara CMC. CR. Case No.6684 of 2012)

ROBA ABDI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant was charged on the first count with the offence of **attempted defilement** contrary to **Section 9(1)** as read with **Section 9(2)** of the **Sexual Offences Act**. The particulars of the offence were that on the 21st day of December 2012 at Eastleigh in Kamukunji District within Nairobi County, he attempted to cause his penis to penetrate the vagina of MAA, a child aged thirteen (13) years. On the second count, 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. The particulars of the offence were that on the 21st day of December 2012 at Eastleigh in Kamukunji District within Nairobi County, the Appellant intentionally and unlawfully committed an indecent act with MAA, a child aged thirteen (13) years by touching her private parts namely vagina.

When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, the Appellant was acquitted of the charges in the first count. He was however convicted as charged on the second count. He was sentenced to serve ten (10) years imprisonment.

In his petition of Appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that the trial court failed to consider his defence in making its decision. He faulted the trial magistrate for failing to acknowledge that the prosecution failed to call crucial witnesses. He took issue with the trial court's decision to convict him based on the uncorroborated evidence of the complainant. The Appellant complained that the trial court failed to abide by the provisions of **Section 214** of the **Criminal Procedure Code**. He was aggrieved by the trial court's decision that the complainant positively identified him. He asserted that the trial court relied on the evidence adduced by the prosecution, which was not sufficient to warrant a conviction. He was of the view that the trial court erred in convicting him based on circumstantial evidence. He faulted the trial magistrate for convicting him based on a defective charge whose particulars were insufficient to disclose the stated offence.

During the hearing of the Appeal, the Appellant presented to court written submissions in support of his appeal. Counsel for the Appellant averred that the trial court failed to consider the Appellant's defence in making its decision. He submitted that the trial court failed to consider the evidence tendered during cross-examination. He stated that the complainant was not able to recall the house where the incident took place. PW2 received information from PW1. Nothing in PW1's testimony points to the offence of indecent assault. The crime scene was not established. He stated that his defence to the effect that he was framed was not considered by the trial magistrate. He asserted that there was no record of the place of arrest from the investigation diary. There was also no record of the police visiting the scene of crime. The investigators failed to link the Appellant to the scene of crime.

Counsel for the Appellant further submitted that the prosecution failed to call crucial witnesses. The arresting officer was not availed by the prosecution to testify in the case. The complainant's mother was also not availed to give evidence. The mother was crucial in confirming whether the garment produced in court was the same one her daughter wore on the material day. He averred that from the evidence adduced by the prosecution, it was stated that one June took the complainant to the Appellant's house. The said June was not called to adduce evidence in court. He averred that PW2 stated that he initially made a report to the area Chief. The Chief was also not called to court to testify. He submitted that failure to call those witnesses was fatal to the prosecution's case.

Counsel for the Appellant asserted that the trial court failed to comply with Section 213 as read with **Section 310** of the **Criminal Procedure Code**. He averred that the Appellant was not given a chance to make his final submissions. He relied on the case of **Finali Akhuya vs**

Republic [2003] eKLR where the court held that failure of the court to give the Appellant a chance to make his final submissions was fatal to the case. The court further held that the Appellant should have been informed of his right to be represented by an advocate. Counsel for the Appellant further submitted that the trial court failed to comply with **Section 214** of the **Criminal Procedure Code**. The Appellant was not given a chance to plead afresh to the amended charges.

Ms. Sigei for the State partially opposed the appeal. She submitted that the trial court failed to comply with **Section 214** of the **Criminal Procedure Code**. The prosecution on 28th August 2014 applied to amend the charge sheet. The amended charge sheet introduced a new charge. The Appellant was not given an opportunity to plead to the amended charges. She asked this court to order for a retrial on those grounds. She stated that the Appellant was out on bail during the trial court proceedings. Learned State Counsel averred that the age of the complainant was established. The Appellant was also positively identified as the perpetrator. The complainant testified that she met a lady by the name June on 21st February, 2012. June is the Appellant's sister. June took her to the Appellant's house. The Appellant tried to have sex with the complainant. She refused. He started touching her all over the body. He touched her breasts. The complainant was in the Appellant's house for three (3) days. She did not allow the Appellant to have sex with her.

Learned State Counsel stated that the complainant was examined at Nairobi Women's Hospital a few days after the alleged sexual assault. She averred that PW2 filed a missing person's report. Investigations were conducted by the police. She submitted that all the witnesses necessary to secure a conviction against the Appellant were availed in court to adduce evidence. She pointed out that the trial court considered the Appellant's defence. She maintained that the conviction of the Appellant was safe. In addition, the sentence meted by the trial court was legal.

The facts of the case according to the prosecution are as follows. PW1, M. A. A., is the complainant. She stated that on 21st December 2012, her mum sent her to the shop. She met June, the Appellant's sister. June asked her to accompany her to another shop to buy vegetables. However, June instead took her to the Appellant's house. PW1 stated that at the said house, they met the Appellant and Osama. She testified that June left her at the Appellant's house. The Appellant started touching her all over her body. She said that the Appellant tried to do "**bad manners**" with her. He asked her to quit school. He threatened to stab her if she did not accept his advances. The Appellant left and locked her in the house. He came back at night. PW1 and the Appellant slept on the same bed. She stated that he touched her inappropriately throughout the night.

PW1 stated that the Appellant left the next morning. He came back that night. He again asked PW1 to have sex with him. She refused. He touched her inappropriately all over her body. She stated that he touched her breasts. The Appellant left the next morning. He locked her in the house. PW1 stated that she escaped through a window. The house was on the third floor. She sustained injuries when she jumped out of the window. She stated that she received treatment from two hospitals.

PW2, AAA, is the complainant's father. He stated that the complainant was thirteen (13) years of age at the time of the incident. On 19th December, 2012, PW1's mother sent her to the shop. PW1 did not return back home for a period of three (3) days. He stated that he looked for his daughter during that period. He received a call from the Appellant's sister. She informed him that his daughter was at the Appellant's house. He went to the said house. Two men fled from the house upon his arrival. One of them was the Appellant. He however did not find his daughter. The next morning, at around 7.00am, as he was looking for his daughter, he saw a crowd of people. They were surrounding his daughter. She had jumped from the 2nd floor of a building. She was injured and unconscious. He stated that he took her to Medicins Hospital.

PW2 testified that he interrogated his daughter after she had received treatment. She narrated to him how the Appellant locked her up in his house. He tried to have sexual intercourse with her. He touched her breasts. PW2 stated that he also took the complainant to Nairobi Women's Hospital for examination. He later reported the matter to the area Chief. The Chief instructed him to report the matter to the police. He testified that he knew the Appellant from the neighbourhood.

The case was investigated by PW3, Sgt. Presne Knaboro. He was stationed at Pangani Police Station. He stated that PW1 and PW2 came to the station on 21st December, 2012. They reported an attempted rape. He interrogated PW1. She narrated to him how her mother sent her to the shop. On the way, she met a lady who took her to a house. There were two men in the said house. One of the men was dark. The other was light skinned. She identified the light skinned man by the name "**Roba**". The light skinned man was the Appellant. The Appellant informed her that he wanted to marry her. The dark skinned man left the house. The Appellant and the complainant were left alone in the house. The Appellant tried to rape her. He touched her breasts. He tore the complainant's clothes in the process.

PW3 stated that the complainant told him she stayed in that house for three days. On the third day she jumped through the window of the said house. It was on the 2nd floor. She sustained injuries on her face and back. She was taken to the hospital for examination and treatment. PW3 stated that the complainant took police officers to the house where she was allegedly detained. The Appellant was found in the said house. He was arrested. PW3 produced the Appellant's birth certificate in court.

PW4, Purity Kasusa, stated that she was a Clinical Officer at MSF Hospital in Mathare, Eastleigh. She was adducing evidence on behalf of her colleague Irene Nyagwaeni who was indisposed. She stated that she was familiar with Irene's handwriting and signature. She testified that the complainant was brought to the clinic on 21st December, 2012. The complainant narrated how she had been detained by the Appellant in his house. He had tried to rape her. She escaped. PW4 stated that the complainant had no visible injuries on her vagina. The hymen was normal and intact. The anal region was normal. She was given pain killers and taken for a counselling session. PW4 produced a medical report as well as a post rape care form in court as prosecution exhibits.

PW5, Peter Ngatia Kendi, stated that he was a Clinical Officer at Nairobi Women's Hospital. He applied to adduce evidence on behalf of his colleague, Dr. Kawa. Dr. Kawa was no longer working at the said hospital. He stated that he was familiar with his handwriting and signature. He testified that the complainant was examined at Nairobi Women's Hospital on 30th December, 2012. Her vagina was normal. The hymen was intact. She was under medication from Medicins Hospital for an injury occasioned by a fall. PW4 produced a medical report and a laboratory report in court as prosecution exhibits.

The Appellant was put on his defence. He stated that he resided in Eastleigh. He was a driver. He was arrested when he came home from a journey. He was not given any reasons for his arrest. He stated that he had seen the complainant around the neighbourhood before. He denied sexually assaulting her.

As the first appellate court, it is the duty of this court to subject the evidence adduced before the trial court to fresh scrutiny and re-evaluation, before reaching its own independent determination whether or not to uphold the conviction and sentence of the Appellant. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make comment regarding the demeanour of the witnesses (See **Okeno vs Republic [1972] EA 32**).

In the present appeal, the issue for determination is whether the prosecution established the charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act to the required standard of proof beyond any reasonable doubt.

This court has re-evaluated the evidence in this case.

Section 11(1) of the Sexual Offences Act provides that;

“Any person who commits an indecent act with a child and is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term not less than ten years.”

The definition of **“indecent act”** under **Section 2** of the **Sexual Offences Act** is any unlawful intentional act which causes;-

a) any contact between the genital organs of a person, his or her breasts and buttocks with that of another person; or

b) exposure or display of any pornographic material to any person against his or her will, but does not include any act which causes penetration.

The Appellant in his grounds of appeal contends that his conviction was based on a defective charge sheet. The particulars of the offence as given by the prosecution are as follows:

“The particulars of the offence were that on the 21st day of December 2012 at Eastleigh in Kamukunji District, within Nairobi County, he intentionally committed an act with Mahfuda Ali Aliow, a child aged 13 years, by touching her private parts namely vagina.”

The trial court relied on the evidence of PW1 as the only witness of the alleged indecent act. PW1 narrated to the court how the Appellant's sister took her to the Appellant's house. She stated that she stayed at the Appellant's house for three days. This court notes that in her testimony, she did not specifically state that the Appellant touched her vagina. PW1 stated that the Appellant started touching her all over her body. He left and came back at night. They slept on the same bed. She stated that he touched her the whole night. She did not state where the Appellant touched her that night. The next day he left the house. When he came back, PW1 stated that;

“...He started touching me by force. Then I lay on my back. I completely refused to let him have sex with me. He touched me on the breasts. We slept and when he woke up he left...”

The error in the charges on the second count is glaring at the particulars. The particulars failed to indicate that the Appellant committed an **“indecent”** act. The complainant stated that the Appellant touched her breasts. On the other hand, the particulars of the charge indicate that he touched her vagina. Nowhere does PW1 explicitly state that the Appellant touched her vagina. PW1, a girl aged fifteen (15) years, would know the difference between touching breasts and touching the vagina. Her evidence only related to touching breasts and not vagina as stated in the particulars of the charge in the charge sheet.

The Appellant is prejudiced if he is not informed of the charge against him with sufficient particularity. The facts of the case as given by the prosecution failed to prove the particulars of the offence stated in the charge sheet. There is no evidence adduced by the prosecution to prove that the Appellant touched the complainant's vagina. The particulars of the charge do not indicate that the Appellant committed an **“indecent”** act. The particulars were not amended by the prosecution. The prosecution was therefore bound to prove the said particulars. The trial court also failed to discharge its duty under **Section 214** of the **Criminal Procedure Code**. The said Section allows the court to order for an alteration or amendment or a substitution of the charge as the court may deem necessary, when the same is found to be defective.

The Court of Appeal in **Isaac Omambia V Republic, [1995] eKLR** held that:

“In this regard, it is pertinent to draw attention to the following provisions of S. 134 of the Criminal Procedure Code which makes particulars of a charge an integral part of the charge: Every charge or information shall contain, and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence.”

This court therefore holds that the charge sheet in the present appeal was defective since the facts of the case were in variance with the particulars provided in the charge sheet. The same is not curable under **Section 382** of the **Criminal Procedure Code** as it was prejudicial to the Appellant. There was a miscarriage of justice to the Appellant since he had a right to be given all information as to the nature of his offence to enable him prepare his defence. In the **Isaac Omambia case** (supra), the Court of Appeal observed that there was a miscarriage of justice in that case since the particulars established at trial were different from those indicated in the charge; even though the said facts nonetheless amounted to the offence. The court is not allowed to create a new charge against the Appellant. It has to deal with the charge

presented before it. The particulars of the charge before it were that the Appellant was alleged to have touched the Respondent's vagina. The same is not supported by the facts of the case as presented by the prosecution. Failure by the trial court to raise an objection to the charge, with regards to the particulars set out therein, occasioned a miscarriage of justice.

In the premises therefore this court finds merit in the appeal lodged by the Appellant. The Appeal is hereby allowed. The conviction is quashed. The Appellant is acquitted. The trial court's conviction and sentence is hereby set aside. The Appellant is set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 22ND DAY OF FEBRUARY 2019

L. KIMARU

JUDGE