



REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CRIMINAL APPEAL NO. 21 OF 2017

ANDREW OBWOGI..... APPELLANT

-VERSUS-

REPUBLICRESPONDENT

(From original conviction and sentenced in Criminal Case No. 3730/14, from CM'S Court at Kiambu by the Hon. PM J Kituku)

JUDGMENT

1. The appellant was charged with the offence of defilement of seven (7) year old girl contrary to Section (8) (1) as read with **Section 8(2) of the Sexual Offences Act No.3 of 2006** with an alternative charge of committing an Indecent Act with a child contrary to **Section II (1) of the Act**. He was convicted and sentenced for the alternative charge and sentenced to serve (10) ten years imprisonment. The particulars of the charge and were that on the 20th day of December 2014 at [particulars withheld] village within Kiambu County he intentionally and unlawfully touched the vagina of M A a child aged (7) seven years with his penis. The child will herein below be referred to as the victim.

2. He appealed against both the conviction and the sentence on grounds that there was no proper identification, credibility of the victim's evidence and that the trial magistrate shifted burden of proof to the appellant.

3. The Children's Act No.8 of 2001 defines and gives meaning to

1. "a child" as any human being under the age of eighteen years

2. "genital organs" include the whole or part of the male or female genital organs for purpose of the act – Sexual Offence Act – including the anus.

3. "Indecent Act" means 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.

4. As the first appellate court, my duty is to re-examine and re-evaluate the totality of the evidence adduced before the trial court and come up with my own findings – **Pandya –vs- Republic (1973) EA 32**.

5. The victim's age was proved by production of the clinic card. As stated in the case. **Dominic Kibet Mwareng –vs- Republic and Hilary Nyongesa Mwilu J** (as she then was) is very critical in sexual offences that it has to be conclusively proved as it is upon the age of the victim that punished or sentence is based on.

6. I have considered the victims evidence. A *voire dire* examination was conducted. The trial magistrate was satisfied of her intelligence and capability of testifying.

She was eight years old at date of the hearing of the case. She testified on oath as PWI.

Her testimony was that the appellant who was her next door neighbour went to their house and carried her to his house, that he gave her his phone to play with while lying on his bed. That he undressed her and put his penis into her vagina but removed it when she told him that she felt pain.

The victim stated that she was threatened not to tell anyone, and he let her go, but the victim went and told her grandfather, but did not tell her mother.

7. **PW2 the mother** of the victim knew the appellant as a neighbour. She took the victim for medical examination one day after the alleged offence on the 21st December 2014. The Doctor **PW4** examined the victim on the 21st December 2014.

In his report (PExt 2 and 3), he stated that there was no evidence of injury, no discharge or infection to the victim's genitalia. The P3 form that was also filled and produced in court – PExt 2 showed no evidence of injury.

8. Upon the medical report **PW5** the investigating officer decided to charge the appellant with defilement and the alternative charge of indecent act with a child.

On the matter of identification, the prosecution witnesses had no trouble identifying the appellant as he had been a neighbour of both the victim and her mother.

9. The question for the court to determine is whether the appellant committed the alleged indecent act with the victim.

None of the prosecution witnesses saw the appellant carrying the victim from her mother's house or going into his house with the victim. Her mother **PW2** testified having been told by **PW3** a neighbour that she saw the victim coming out of the appellant's house whom she stated did not know after which her evidence was that she told one Mzee B who in turn told the victim's mother **PW2**. This Mzee B did not testify and no reason was stated for that failure.

PW3 on cross examination stated that the victim was walking with her legs apart. She did not tell the victim's mother when she noticed the girl was walking in the manner she described.

10. This evidence in my view does not support the doctors the examination of the victim and his evidence that nothing wrong was found within and outside the victim's genitalia the following day.

PW1 the victim testified that when she was carried into the appellant's house, **PW3** was standing at the gate. **PW3** did not testify to this instead her testimony was that she saw her coming out of the appellant's house.

11. The victim told the court that she did not have a broom that the appellant had requested for but again says she gave the broom to another girl by name S to take to him. She further testified that she is the one who took the broom to the appellant's house when he made her lie on his bed. If the victim was with the girl S at what point did she go to the appellant's house with the broom; yet her testimony was that the appellant carried her to his house?

12. **PW3** testified that when the victim left the appellant's house, he too locked his house. This is in complete contrast to the victim's evidence that when the appellant let her go out of his house, he locked the door and slept. Being an adult and apparently watching events at the appellant's house, **PW3's** evidence and the victim's evidence are at variance in every material aspect. I do not believe in the truth of **PW1 PW2 and PW3**. It is contradictory and shallow in detail. I agree with the appellant's submissions that the prosecution evidence was heavily contradictory and inconsistent to the extent that they cannot be ignored as in my view go to the root of the prosecutions evidence against the appellant.

13. In the case **Philip Muiruri Ndaruga –vs- Republic (2016) e KLR** the court citing an Indian case state of **Punjab –vs- Jagir Singh (1974) 35cc 277** stated that

“A criminal trial is not like a fairy tale wherein one is free to give flight to one's imagination and fantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the crime he is charged ---

In arriving at the conclusion about the guilt of the accused charged with the commission of a crime the court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses.

Every case the final analysis would have to depend upon its own facts...”

14 The totality of the prosecution evidence in my mind creates a reasonable doubt as to whether or not the offence the appellant was charged with was indeed committed by the appellant.

It is necessary for the court before drawing an inference of an accused guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference – **Republic –vs- Edward Kamaru Mburu & 2 Others (2016) e KLR**.

15. There appears to have been some sorts of relationship gone sour between **PW2** and the appellant which may have caused a frame up of his offence by the mother of the victim (**PW2**) and the appellant. I say so because **PW2** (mother of victim) testified that she never greeted the appellant at all though he was her neighbour. She however denied there having been a grudge between them, yet in her own testimony she testified as having knowledge of the appellant yet upon cross examination she testified that the appellant was staying with his wife but she left, and actually left his house keys with the victim, and was on defensive that she even never talked to him. Collectively, **PW2's** evidence does not add up, thus not credible in my view.

16. Clearly the trial Magistrate failed to analyse the evidence adduced before her sufficiently to find that the prosecution failed to adduce sufficient evidence to nail the appellant that he indeed committed the offence he was charged with.

17. Liberty of the person is guaranteed under the Kenyan Constitution. It should only be taken away when the evidence is overwhelming that the accused cannot evade being held liable due regard to all circumstances surrounding the alleged commission. **Abanga alias Onyango – vs- Republic (Criminal Appeal No.32 of 1990** (unreported).

18. For the foregoing I find that the prosecution did not prove its case against the appellant beyond all reasonable doubts as by law required.

Consequently, I find the appeal merited.

It is allowed. The trial magistrate's conviction and sentence are quashed.

The appellant is set free unless otherwise lawfully held.

Dated and signed at Nakuru this 27th Day of March 2019.

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J.N. MULWA

JUDGE

Dated, signed and delivered at Kiambu this 10th Day of April 2019.

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C. MEOLI

JUDGE