REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 112 OF 2017

(From Original Conviction and Sentence in Criminal Case No. 65 of 2014 by the Chief Magistrate's Court at Kakamega)

GERALD MUHATIA.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT

1. The appellant was convicted by Hon E Malesi, Senior Resident Magistrate, on 21st September 2017, of indecent act or contact with a minor contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006, and was accordingly sentenced to ten (10) years imprisonment.

2. The particulars of the charge that faced the appellant were that on the 28th day of June 2014 at [Particulars withheld] Secondary School, school milking yard, in Shibuye Location, Kakamega East District of Kakamega County, he intentionally and unlawfully inserted his genital organ namely penis into the genital organ namely vagina of AM, a child aged 14 years. He had also faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act. The particulars of the alternative charge were that on the same date and at the same place as stated in the main count, he had intentionally and unlawfully caused his penis to come into contact with the vagina of the subject child.

3. The appellant pleaded not guilty to the charges before the trial court, and the primary court conducted a full trial. The prosecution called five (5) witnesses.

4. AM, the complainant, testified as PW1. She gave sworn testimony. She stated that on 28th July 2014 at about 5.00 PM she went to [Particulars withheld] Secondary School to collect milk. It was a routine. The appellant was the milk man there. She slept with him in a room where milk was stored. He gave her Kshs, 20.00 and *githeri*, and she left for home. Prior to that he had been giving her Kshs. 50.00 but she had refrained from sleeping with him until that day. She did not go back to the milking yard until 18th July 2014. As she was going to school she passed by the milking yard to see the appellant. He gave her money and she left for school. As she was leaving she saw her mother, who told her to stop but she ran away instead. She chased after her, caught up with her and took her to the local Assistant Chief. The appellant was later brought to the Assistant Chief's office. She confessed that she had been sleeping with the appellant, and the last time was 28th June 2014. The appellant was arrested and she was taken to hospital for examination. During cross-examination she said that she went to see the appellant on 18th July 2014 while on her way to school, but that she did not do anything that day. Her father saw her leaving the place and that was when he asked her where she was coming from. He took her to the Assistant Chief. She confirmed that she had sexual intercourse with the appellant on 28th June 2014.

5. PW2, TM, was the father of PW1. He had heard that PW1 was having an affair with an employee of [Particulars withheld] Secondary School, and he decided to investigate. He followed her on 18th July 2014 as she was going to school. He saw him leave the school, and when she saw him she started running away. He ran after her, and after catching up with her began to beat her up. He was restrained, and advised to take her to the Assistant Chief, which he did. The appellant was subsequently arrested. He took PW1 to hospital, where she was issued with a P3 form. He explained that it was PW1's schoolmates who told him about the affair. Eunice Mercyline Ilusa (PW3) was the Assistant Chief for [Particulars withheld] Sub-Location, to whom PW1 was taken by PW2 on 18th July 2014. She said that she had the appellant summoned but he denied defiling PW1. PW1 denied being denied by the appellant. PW3 handed the appellant over to the police.

6. PW4, PC Dogo Hama Dasa, who was the police officer investigated the matter. He narrated all the steps the police took from 19th July 2014 when the matter was reported at Shinyalu Police Station. Patrick Mambiri (PW5) was the clinical officer who produced the Police Form 3 that had been prepared by Dr. Kibet, who had attended to PW1. He stated that PW1 was brought to Kakamega County Referral Hospital on 18th July 2014, with a history of having been forcefully defiled whenever she went to collect milk. Upon examination the doctor did not find any physical injuries. A pregnancy test was negative, but a syphilis test was positive. No spermatozoa were found in PW1's vagina

7. The appellant was put on his defence. He gave an unsworn statement and did not call witnesses. He said that on the 28th July 2014 he was

at work as usual. He was summoned by PW3, where he was asked questions about defiling PW1. He denied the accusations and was arrested by the police. He said that he knew PW1 before the case was brought against him. But he denied defiling her.

8. After reviewing the evidence, the trial court convicted him of the alternative charge, and sentenced him as stated in paragraph 1 of this judgement.

9. Being dissatisfied with the conviction and sentence, the appellant appealed to this court and raised several grounds. He averred that the court convicted him when the prosecution had not established its case to the required standard, that there were material contradictions in the prosecution's case, that the complainant's evidence was not corroborated and did not disclose an offence, that the court did not properly analyse the evidence, the court did not give much consideration to the defence case and submissions, and that the trial court did not consider other options during sentencing.

10. Being the first appellate court, I have re-evaluated all the evidence on record. I have drawn my own conclusions, whilst bearing in mind the fact that I did not have the benefit of observing the witnesses as they testified. The Court of Appeal's decision in the case of ***Okeno vs. Republic*** **(1972) EA 32** has consistently been cited on this issue. In its pertinent part, the decision is to the effect that: -

> *"An appellant 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 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 conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can 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."*

11. Directions were given on 27th September 2018 that the appeal would be canvassed by way of written submissions. The appellant complied by filing written submissions through counsel on 14th November 2018. The state did not file written submissions. His case was that the trial court had found that the offence of defilement was not established against him, and flowing from that there was no evidence that he committed an indecent act with the complainant. He argued that there was no evidence to support a charge of indecent act with a child.

12. There was an oral hearing on 14th March 2019, necessitated by the fact that the state did not file its written submissions and urged that it be allowed to make oral submissions. The court acceded to request, that with the concurrence of the appellant's counsel. Mr. Ongige for the state submitted that the testimonies of the state witnesses were consistent and flowing, and that there were no contradictions. Mr., Mukavale for the appellant, submitted that no evidence was led to support the alternative charge upon which the appellant was convicted.

13. The appeal before me turns on only one ground, that the prosecution did not adduce evidence to support the alternative charge, and therefore the court upon dismissing the defilement charge ought to have dismissed the alternative charge too.

14. The principal charge was on defilement. In the judgement, the court found for a fact that the facts presented supported a case that PW1 was defiled. The court found that there had been penetration of PW1's vagina by the appellant and that she was a minor at the time. The reason the court declined to convict under the main charge was not that the penetration was not proved, or that it was not established that PW1 was not a minor, rather it had something to do with the provisions of the law under which the main charge was brought.

15. The main charge was premised on section 8(1) as read with section 8(4) of the Sexual Offences Act. Section 8 of the Sexual Offences Act, which defines and prescribes sanctions in respect of the offence of defilement, states as follows:

> *"(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.*
>
> *(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.*
>
> *(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.*
>
> *(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years."*

16. The main charge, as framed, stated that PW1 was fourteen years of age at the time of the alleged commission of the offence of defilement. Yet the provisions under which the charge was brought relates to minors aged between sixteen and eighteen years. The charge in respect of a child of fourteen ought to be brought under section 8(3), under which PW1's age fell,

17. The court found that the charge was defective, and the evidence adduced did not support the requirements in section 8(4) that the victim be aged between sixteen and eighteen. That was a proper finding.

18. After declining to convict under section 8(4), the court proceeded to convict the appellant under the alternative charge which was premised on section 11(1) of the Sexual Offences Act. An alternative charge is reverted to for conviction purposes in cases where the main charge fails. The main charge in the instant matter was dismissed and the court was properly entitled to consider whether it could properly convict the appellant under the alternative charge. The appellant argues that the evidence adduced by the state was geared to prove or establish the offence charged in the main charge, defilement, but not the offence charged in the alternative, indecent act with a child. It is on that basis that the appellant urges me that the trial court fell in error.

19. The provision in section 11(1) of the Sexual Offences Act states as follows:

> "*11. Indecent act with child or adult*
>
> *(1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years."*

20. What constitutes an indecent act is defines in section 2 of the Sexual Offences Act in the follows terms:

> ""*indecent 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 …"*

21. My understanding of section 11(1) is that the indecent act envisaged under that provision should not include an act which causes penetration. The elements of indecent act should be limited to the acts by the assailant which brings him or her into contact with the breasts or buttocks or the genital organs of the victim in such a manner that there is no penetration. It would include touching or caressing of the genital areas, so long as there is no penetration. That would mean that once penetration is established then an offence under section 11(1) would not have been disclosed.

22. The particulars of the alternative charge that faced the appellant, and upon which he was convicted, reads as follows:

> "GERALD MUKHATIA: On the 28th day of June 2014 at [Particulars withheld] Secondary School, milking yard, Shibuye Location, Kakamega East District, within Kakamega County, unlawfully and intentionally contacted his genital organ namely penis into the genital organ namely vagina of AM a girl aged 14 years."

23. As framed the alternative charge is defective. The particulars cannot possibly be said to be attuned to the definition of indecent act in section 2 of the Sexual Offences Act. The indecent act ought not include conduct causing penetration. Yet, the particulars in the alternative charge indicted the appellant with penetration into the vagina of PW1. The evidence that was adduced by the prosecution pointed to the penetration of the genital Organ of PW1 by the genital organ of the appellant. The trial court found that there was in fact penetration. Upon that finding, the trial court fell into error in convicting the appellant of an offence under section 11(1) in circumstances where the alleged indecent act amounted to penetration. In *John Irungu vs. Republic* [2016] eKLR, the Court of Appeal held that penetration having been proved the appellant in that case could not be convicted of committing an indecent act with a minor. The trial court should have considered convicting the appellant of the offence created in section 5 of the Sexual Offences Act, sexual assault.

24. In the end I find that the appeal herein has merits. I shall, therefore, quash the conviction of the appellant on the alternative charge and set aside the sentence. The appellant shall be freed from prison custody unless he is otherwise lawfully held.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 28TH DAY OF JUNE 2019

W MUSYOKA

JUDGE