



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 39 OF 2018

HAJI SHIBWABO NAMBWAYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence in Eldoret

Chief Magistrate's Criminal Case No. 5925 of 2015 by Hon. E.Kigen, RM,

delivered on the 26th day of January 2018)

JUDGMENT

1. This appeal arises from the conviction and sentence passed in **Eldoret Chief Magistrate's Criminal Case No. 5925 of 2015** wherein the Appellant, **Haji Shibwabo Nambwaya**, was charged with the offence of compelling an indecent act contrary to **Section 6(a)** of the **Sexual Offences Act, No. 3 of 2006**. The particulars of the Charge alleged that on the **10th October 2015** at Kipkaren Trading Centre in Eldoret West District within Uasin Gishu County, he intentionally and unlawfully caused **JK** to remove his long trousers with the intention of penetrating the genital organ, namely anus, of the said **JK** with his genital organ, namely penis.

2. The Appellant denied the allegations against him and in proof thereof, a total of 6 witnesses were called by the Prosecution. The Complainant, as **PW1** before the lower court, testified that he was attending to customers at his father's kiosk on the **10 October 2015** at about 8.00 p.m. when the Appellant, a neighbour of theirs, went there to buy soda, bread and cigarettes. That after ordering for the items, the Appellant required him to go with him to his house to collect the money; and that on entering the Appellant's house, which was dark, the Appellant required him to remove his trousers but he refused. He further testified that the Appellant then started removing his trousers forcefully, whereupon he screamed for help. To stop him from screaming the Appellant held him by the neck, thereby causing him actual bodily harm. His screams, nevertheless attracted the attention of his father as well as **B** and **D**, who were nearby. The matter was, thus, promptly reported to the area village elder, and thereafter to **Turbo Police Station**, and the Appellant was arrested and charged. The Complainant was then taken to hospital for treatment and a P3 Form accordingly filled.

3. The Complainant's father testified as **PW2**. He told the lower court that he was seated outside his kiosk on the **10 October 2015** at about 8.30 p.m. while the Complainant was serving customers at the kiosk. He stated that he saw the Appellant at the kiosk and that he had ordered for one bottle of soda, one loaf of bread and 4 sticks of cigarettes amounting to **Kshs. 110/=**; and that he asked the Complainant to go with him to collect the money from his house. According to **PW2**, shortly thereafter, he heard the Complainant scream and, on going there, he found **J** and **B** already at the scene. On shining a torch at the scene, they found the Complainant with his trousers lowered to his knees, while the Appellant had already removed his trousers and was half-naked. He then notified the village elder; and by the time the village elder arrived at the scene, the Appellant had locked himself inside his house. He consequently reported the incident to the Police the following day and took the Complainant, who was then aged 12 years, to hospital for purposes of medical examination and treatment.

4. **BA (PW3)** stated that he was at **PW2's** kiosk with **J** when the Appellant went there and ordered for 4 cigarettes, bread and a bottle of soda from the Complainant who was then serving customers at the kiosk; and that when the Complainant asked for the money, the Appellant asked him to accompany him to his house to collect the money. He added that shortly thereafter, he heard the Appellant screaming and they rushed to the Appellant's house to check what the problem was. **PW3** further stated that they found the child with his shorts pulled down to the knees; while the Appellant was half-naked. As the Complainant's father had joined them by them, they took the child outside before the Appellant locked himself inside his house. He was later asked to record his statement to the Police.

5. **PW4**, a Senior Clinical Officer at **Turbo Health Centre**, testified that she was on duty on **11 October 2015** when the Complainant was presented to her for examination and treatment. Upon examining the child, she noted some tenderness on the anterior side of his neck with pain on palpation for which she prescribed analgesics and antibiotics. She concluded that the Complainant had sustained harm; and thereafter

filled his P3 Form on **13 October 2015**. She added that she did not ascertain the allegations of sexual assault.

6. **JM** testified as **PW5**. He confirmed that on **10 October 2015** he was at a kiosk with **B (PW3)** when the Appellant went to the kiosk and ordered for a bottle of soda, bread and cigarettes. He further stated that the minor, who was then serving at the kiosk, gave the Appellant the items he had ordered for; and that the Appellant then asked the minor to follow him to his house to collect the money. **PW5** stated that the Appellant was well known to him, and that he lived not far from the kiosk. He added that shortly after the Appellant left with the minor, they heard screams from the direction of the Appellant's house; and that on rushing there, they found the minor with his trousers pulled down to his knees while the Appellant was similarly half-naked. He added that members of the public were attracted to the scene; and that the father of the minor thereafter reported the incident to the Police.

7. The last Prosecution witness was **PC Henry Wawire (PW6)**. He was then attached to **Turbo Police Post**. He confirmed that the incident in question was reported on **11 October 2015** by **PW2**; and that he booked the report and issued the Complainant with a P3 Form, after which he recorded witness statements and had the Appellant arrested and charged. He explained that the Appellant was initially charged with assault, but that the Charge was subsequently amended.

8. In his defence, the Appellant denied the allegations against him and told the lower court that his arrest and prosecution was prompted by a grudge that the father of the Complainant harboured against him on account of his business. According to him, **PW2** was intent on having him vacate the business premises at **Misembe Market** so he could give it to another tenant. He called two witnesses, namely **OC (DW2)** and **OOT (PW3)**. According to **DW2**, a member of the Community Policing team, the Appellant called him on that night and told him that he had a problem; and that on going to the scene, he found that the Appellant had locked himself up in his house. He then notified the Police and when they came, the Appellant opened the door and came out; and that he appeared drunk. The Appellant was then instructed to present himself to **Lumakanda Police Station** the following morning at 9.00 a.m.

9. **DW3** on his part told the lower court that he was passing near the Appellant's house on **10 October 2015** at about 8.00 p.m. when he saw a police vehicle parked outside the house; that he went there to check what had transpired and that on approaching the scene, he got to learn of the defilement allegations. He added that as the child was not injured or harmed in any way, the father of the Complainant was instructed to go and record a statement the following day; and afterwards, the Appellant was arrested and charged.

10. It was on the basis of the foregoing that the Learned Trial Magistrate found the Appellant guilty and convicted him of the offence of compelling an indecent act contrary to **Section 6(a)** of the **Sexual Offence Act** and sentenced him to 5 years imprisonment. Being aggrieved by his conviction and sentence, the Appellant preferred this appeal on the following grounds:

- a. That the learned magistrate erred in law and in fact in finding that the Appellant was guilty as charged;
- b. That the learned Magistrate erred in law and in fact in failing to consider the evidence of the accused person and his witnesses in her Judgment;
- c. That the learned Magistrate erred in law and in fact in failing to line up the real issues for determination in the case so as to support those issues with the evidence;
- d. That the learned Magistrate erred in law and in fact in failing to analyse the defence presented by the Appellant.

11. Accordingly, the Appellant prayed that the appeal be allowed; that the Judgment and sentence of the lower court delivered on **26 January 2018** in **Eldoret CMCRC No. 5925 of 2015** be overturned and the same be set aside and that he be set at liberty.

12. The appeal was urged by way of written submissions filed herein on **27 March 2019**. According to the Appellant, his prosecution before the lower court was based on hearsay, fabrications and speculations and therefore, it was a misdirection on the part of the learned trial magistrate to rely on such evidence. He took issue with what he termed as glaring contradictions in the evidence of the Prosecution witnesses, notably in respect of the date of the incident; and the correct name of the Complainant. He also complained that the trial court paid no attention to his defence, contending that his prosecution was precipitated by a grudge that **PW2** harboured against him; and added that no consideration was given to the evidence presented before the lower court by his two witnesses.

13. **Ms. Mumu**, Leaned Counsel for the State opposed the appeal, her contention being that the offence charged was proved beyond reasonable doubt by the 6 witnesses who testified in support of the Prosecution case. She stressed the point that the Appellant was found half naked in his house with the minor who was similarly half-naked. Counsel added that the Appellant was given an opportunity to defend himself; and that his defence did not overshadow the Prosecution case; but was dismissed as an afterthought. It was therefore the submission of Counsel that, since the sentence passed on the Appellant was a lawful sentence, the appeal has no merit and ought to be dismissed accordingly.

14. I have given careful consideration to the appeal. I have also taken into account the written and oral submissions made herein by the Appellant and Learned Counsel for the State in the light of the proceedings and Judgment of the lower court. 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, while keeping in mind that it did not have the benefit of hearing or seeing the witnesses. In **Okeno vs. Republic [1972] EA 32**, the Court of Appeal for East Africa had the following to say in this connection:

"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 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..."

15. The offence with which the Appellant was charged is provided for in **Section 6(a)** of the **Sexual Offences Act** thus:

A person who intentionally and unlawfully compels, induces or causes another person to engage in an indecent act with—

a. the person compelling, inducing or causing the other person to engage in the act;

... is guilty of an offence and is liable upon conviction to imprisonment for a term which shall not be less than five years.

16. The Judgment of the lower court shows that the Learned Trial Magistrate did frame the issues for determination; and that they included the questions whether the Complainant was subjected to an indecent act and whether the offence of compelling an indecent act had been proved. Here is how she reasoned on the matter:

“PW1 stated that the accused had asked him to accompany him to his house where he would give him money for the items he had bought, he had then asked the complainant to remove his trousers and when he refused he had forcefully held him by the neck and pulled down his trousers and showed him his penis. The minor had then screamed and his screams attracted PW2, PW3 and PW5 all of whom found the complainant in the accused’s house with his trousers removed to the knee. It is my finding that the accused had compelled the minor to remove his trouser and when he refused to do so he had held him by the neck and strangled him where he managed to take off his trousers...It is my finding that the prosecution has established its case beyond reasonable doubt by calling witnesses who were credible and corroborated the evidence of the minor complainant herein. It is for the above stated reasons that I find it safe to convict the accused for the offence of compelling an indecent act contrary to section 6(a) of the Sexual Offences Act No. 3 of 2006.”

17. It is noteworthy however that, for purposes of the **Sexual Offences Act**, “indecent act” is defined thus in **Section 2** thereof:

“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;

18. It is manifest therefore that the particulars supplied in the Charge Sheet and the facts relied on by the trial magistrate to base the conviction do not in themselves amount to indecent act. In the premises, the appeal succeeds, the Appellant’s conviction is hereby quashed and the sentence set aside. The Appellant is hereby set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 29TH DAY OF JULY, 2019

OLGA SEWE

JUDGE