



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CRIMINAL APPEAL NO. 66 OF 2018

TU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. C. M. Kamau Resident Magistrate in Rongo Magistrate's Criminal Case No. 582 of 2016 delivered on 10/12/2018)

JUDGMENT

1. The Appellant herein, **TU**, was charged with several offences under the **Sexual Offences Act** No. 3 of 2006 involving two minor boys. They were two counts of **Attempted Defilement** each with an alternative count of **committing an indecent act with a child** and two other counts on **Child Pornography**. The Appellant denied all the counts.
2. The Appellant was subsequently tried and found guilty of and convicted on one of the alternative offence of committing an indecent act. She was accordingly sentenced.
3. Five witnesses testified in support of the prosecution's case. **PW1** and **PW2** were the complainants aged 8 years and 10 years respectively. The mother of **PW2** testified as **PW3** and the Clinical Officer attached to Rongo Sub-County Hospital testified as **PW5**. The investigating officer one **No. 59061 PC Elphas Marete** attached to Kamagambo Police Station testified as **PW4**. The Appellant was partly represented by **Mr. Mudeyi** Counsel during the trial. For the purposes of this judgment I will refer to the witnesses according to the sequence in numbers in which they testified.
4. At the close of the prosecution's case the trial court placed the Appellant on her defence where the Appellant opted to remain silent and the court rendered its judgment on 10/12/2018 where the Appellant was found guilty of one alternative count of committing an indecent act relating to **PW2** and was convicted. She was sentenced to 10 years' imprisonment.
5. Being dissatisfied with the conviction and sentence, the Appellant timeously preferred an appeal by filing a Petition of Appeal on 20/12/2018 through **Messrs. Odondi Awino & Co. Advocates** and challenged the judgment on the following three grounds: -
 - (1) **Having found and held that the evidence by the victims was contradictory, the learned trial magistrate erred in law and fact by failing to extend the benefit of doubt in favour of the appellant as required by law.**
 - (2) **The learned trial magistrate erred in law and fact by convicting the accused on uncorroborated evidence of the victims by merely saying that the evidence were truthful and credible without recording reasons in the proceedings.**
 - (3) **The learned trial magistrate erred in law and fact by failing to appreciate that the accused was a child at the time of the commission of the alleged offence and ought not to suffer custodial sentence.**
6. Directions were taken and the appeal was disposed of by way of oral submissions. At the hearing of the appeal Counsel for the Appellant made an application for the Appellant to adduce additional evidence on appeal and upon grant of leave the Appellant further testified before this Court and produced her Certificate of Birth No. [xxxx] in confirmation of her age. Upon consensus of both Counsels that the Appellant was a minor in law at the time the alleged offences were committed and given that the law expressly prohibits imprisonment of minors the Appellant was released to her father upon compliance of some conditions pending this judgment.
7. Counsel for the Appellant further argued that there were unreconciled contradictions which were not credited to the Appellant and that the sentence was unlawful. Counsel for the Appellant prayed that the appeal be allowed, conviction quashed and sentence set-aside.

8. **Mr. Kimanthi**, Senior Principal Prosecution Counsel opposed the appeal and submitted that the offence was proved beyond any peradventure and prayed that the appeal on conviction be dismissed.

9. This being the Appellant's first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013) eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

10. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the offence of committing an indecent act with a child were proved and as so required in law; beyond any reasonable doubt. Needless to say, I have carefully read and understood the proceedings and the judgment of the trial court as well as the record before this Court and also the submissions.

11. **Section 11(1)** of the **Sexual Offences Act** states that:

11(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 not less than ten years.

Section 2(1) of the said **Act** defines an **'indecent act'** as follows:

'Indecent act' means an unlawful intentional act which causes: -

a. Any contact between any part of the body of a person with the genital organ, breast 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.

12. Therefore, the main ingredients of the offence of committing an indecent act with a child are: -

a. Proof that the victim is a child in law;

b. Proof that there was contact between any body part of the accused person with the genital organ, breast or buttocks of the child victim (but that act must not be an act that caused penetration) or proof of exposure or display of any pornographic material to a child;

c. Proof that the act(s) in (b) was/were intentional;

d. There should be no legal justification in the act(s) complained of.

13. The **age of PW2** is not contested in this appeal. The trial court properly settled the age of PW2 upon reliance on an Age Assessment Report whose contents were not challenged. PW2 was hence aged 10 years old and a minor of tender age in law.

14. As to whether there was any contact between any body part of the Appellant with the genital organ, breast or buttocks of PW2 which act however did not cause any penetration, I must revert to the record. PW2 testified that at one point the Appellant called PW1 and PW2 into her bedroom and locked the door from inside and undressed. That, she asked them to suck her breasts but they refused a result whereof she put a pornographic video on her phone and asked them to do likewise to her but again they refused. The Appellant then held PW2 by the neck and ran her hand from the neck to his penis before letting them leave her room. PW1 however gave a different version of the events inside the bedroom.

15. But the Appellant so denies and contends that the evidence is contradictory and unreliable and that having so found then the trial court could not still rely on such evidence to convict her. I have read the impugned judgment and it is true that at paragraph 2 on page 5 thereof the trial court declined the charges of attempted defilement on account of unreconciled contradictions between the evidence of PW1 and PW2. Without reconciling the contradictions, the trial court however went ahead and convicted the Appellant on the offence of indecent assault.

16. With tremendous respect to the learned the trial court, the court was under a duty to reconcile the differences which it had pointed out between the evidence of PW1 and PW2 and give reasons why it admitted the testimony of PW2 in finding the Appellant guilty of the offence of indecent assault. Be that as it may, I have independently reviewed the evidence of PW1 and PW2 and do agree with the trial court that there are contradictions on what exactly happened inside the bedroom of the Appellant which supports the offence of indecent assault. The contradictions cannot be deemed as minor. They include whether the Appellant fully or partly undressed, whether the Appellant touched the complainants' private parts, whether the complainants are reliable witnesses among several others.

17. Further, the evidence of PW2 that his private parts were touched by the Appellant was not corroborated. In such a case the trial court was to comply with the **proviso** to **Section 124** of the **Evidence Act, Cap. 80** of the Laws of Kenya by giving reasons why it was satisfied that PW2 was telling the truth before that sole and uncorroborated evidence could be a basis of finding guilt. The record is however silent on that. Respectfully, there is no basis upon which the finding of guilt can stand and I must therefore interfere with it. I hence find that the Appellant was wrongly found guilty. The conviction is hereby quashed.

18. On sentence, and as already stated, since the Appellant was a minor and given that the finding of guilt cannot stand in law aforesaid then

the sentence of 10 years' imprisonment must and is hereby set-aside.

19. As I come to the end of this appeal I must however state that save for the technical nature of the charge and the failure to reconcile the evidence aforesaid there is a high likelihood that the Appellant engaged the minors in inappropriate acts. This matter should therefore send the clearest of all signals to the Appellant not to engage in such acts in the future and to instead focus on her studies since she may not be that lucky next time.

20. The Appellant shall be set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 26th day of July 2019.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Mr. Awino, Counsel for the Appellant.

Mr. Kimanthi, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

Evelyne Nyauke – Court Assistant