



REPUBLIC OF KENYA

AT THE HIGH COURT OF KENYA

IN BUNGOMA

CRIMINAL APPEAL 175 of 2016

HENRY NANDASABA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An appeal from conviction and sentence in original SIRISIA CM Criminal No. 1061/2015

delivered on 6th July, 2016 by Hon. L. Kiniale (SRM)]

JUDGMENT

The appellant Henry Nandasaba was charged with the offence of attempted defilement of a child contrary to section 9(1)(2) of Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on the 11TH day of October 2015 at about 0230hrs at Mt.Elgon “A” dormitory at [particulars withheld] Girls Secondary School in Bungoma county he intentionally attempted to cause his penis to penetrate the vagina of RKA a child aged 15 years.

He also faced an alternative charge of committing indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006 based the same facts. The particulars of the alternative charge were that on the 11TH day of October 2015 at about 0230hrs at Mt.Elgon “A” dormitory at [particulars withheld] Girls Secondary School in Bungoma county he unlawfully caused his genital organ namely penis to touch the female genital namely vagina of RK a child aged 15 years with his Penis. The Appellant was convicted on alternative charge of committing an indecent act pursuant to section 215 CPC and sentenced to 10 years imprisonment.

As this is a first appeal, this court is required to review all the evidence and come to its own conclusion bearing in mind that it neither heard nor saw the witnesses testify in order to assess their demeanor. See **Okeno Vs Rep 1972E** I shall therefore set out the evidence as it emerged from trial court.

The evidence before the trial Court was that Pw1 RK the complainant stated she was at school sleeping in the dormitory at around 2.30am on 11.10.2015 she was woken up by someone touching her breasts and all over her body. She woke up her colleague who had a torch and she shone her torch and they saw a young man sleeping on the lower deck of the bed. They woke up other students and they started screaming and students from other dormitories including the watchman came to the scene of incident. The watchman apprehended and arrested the young man. She also recalls that she was in a night dress and did not know the appellant.

Pw2 Cyrus Wekesa Khaemba a watchman at [particulars withheld] Girls High School testified that on 11th October 2015 at around 2.30am he was on duty together with colleagues when they heard students screaming from the dormitory. They rushed to the dormitory and they found a young man who is the appellant. He recalls the they apprehended the appellant and informed the principal and reported the matter to the police.

Pw3 testified Aineah Sawa a watchman at [particulars withheld] Girls High School. He testified that on 11th October 2015 at around 2.30am they heard screams from one of the dormitory. He went to the scene of incident and found students surrounding a young man they apprehended him and the principal called police to arrested him. He recalls they interrogated the appellant and he said he did not know how he entered the school the appellant was working for one of the teachers in school.

Pw4 is the Police Officer Naphtali Dhado based at Sirisia Police Post testified that on the 11th October 2015 at around 2.00am he received a report that there was a male person found in the dormitory at [particulars withheld] Girls High School he went to the scene and re-arrested the appellant and took him to the station. He recalls that the accused was found touching one of the girls aged 15 years. He produced photocopy of the birth certificate as Exhibit 1.

The appellant gave unsworn testimony and did not call any witness. He stated that on the material day he left home and went to the market and people accosted him and police officer arrested him and took him to Sirisia Police Station, his fingerprints were taken and he was taken to court and charges read to him that he knew nothing about them and he denied the charges.

It is upon the above evidence that the trial magistrate found the appellant guilty of the offence of committing an indecent act contrary to Section 11(1) of the Sexual Offences Act and sentenced the appellant to 10 years imprisonment.

Being dissatisfied with that decision the appellant has preferred this appeal on the following grounds that;

- a) **he was not accorded a fair trial under article 49 and 50 of the constitution of Kenya;**
- b) **the trial court erred in law and fact when it failed to consider that evidence in this case was not watertight but speculative and contradictory;**
- c) **the trial court erred in law and fact he failed to note that evidence of doctor, Pw1 and Pw2 differed from each other thus showing that prima facie case was not established well; the trial courts failed to notice that the charge sheet does not match with the evidence produced in chief and on cross examination.**

The appellant filed written submissions in court which briefly expounded on the grounds of appeal. He submitted that he was not given fair trial under article 49 and 50 of Constitution of Kenya as he was convicted on a case that was not properly investigated in that evidence of Pw1 and Pw2 differed each other thereof evidence against him was not watertight but speculative and contradictory. He further submitted that Pw1 testified that she was alone in the dormitory but at time of incident but at the same time she claims she was with her colleague who they used her torch to identify the appellant at the scene but the said colleague or vital witness or other students were not called to testify in the case. The appellant also submits there was discrepancy on time when the incident occurred, it is not clear whether it was at 2.30p.m or 2.30a.m and further submitted that he was not properly identified in the case as the one who committed the offence relying on a number of authorities.

M/s Njeru Felistus for the state opposed the appeal and submitted that the appellant was given fair hearing under article 49, she also submitted that the investigation was properly done and complaint and two guards gave evidence. She further submitted that there was no inconsistency in evidence on ground that a doctor did not testify in this case.

The issue that this court need to determine is whether the conviction of the Appellant was based on satisfactory evidence for committing an indecent act against Pw1?

Section 11(1) of the Sexual Offences Act which creates the offence of committing indecent Act provides as follows:

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.

Section 2 of the Sexual Offence Act,2006 defines, "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 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." (Emphasis added).

The evidence of Pw1 is that she was a sleep in the dormitory when she felt somebody touching her on the breast and all over her body. She asked her colleague for a torch and on shining it saw it was a young man who had been touching her. They woke up other students and surrounded the appellant. The screams attracted the watchman who came and found the appellant surrounded by students. They arrested him and handed him over to police.

The accused in this defence testified on his arrest which he stated occurred when he was from the market. The obviously is not true as he was arrested at the school at night.

Upon considering the appeal and submission I am satisfied that the prosecution established that the complainant was aged 15 years, that she was touched on her breasts and all over the body by the appellant who was arrested at the scene. The prosecution proved all the ingredients of the offence of indecent act on a child. The appellant's conviction was proper and sentence of 10 years imposed lawful. This appeal is hereby dismissed.

Dated and Delivered at Bungoma this 24th day of July, 2019.

S.N. RIECHI

JUDGE