REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIMINAL CASE NO. 17 OF 2018

GEORGE MBUGUA NGENDO.....APPELLANT

=VRS=

THE STATE.....RESPONDENT

{Being an appeal against the Conviction and Sentence by Hon. J. Oseko – CM Kiambu

dated and delivered on the 15th day of December 2016 in the original Kiambu

Chief Magistrate's Court Criminal Case No. 1776 of 2015}

JUDGEMENT

1. The appellant was charged with sexual assault contrary to Section 5 (1) (a) (1) of the Sexual Offences Act the particulars being that on 21st December 2014 at Kiambu County he unlawfully used his fingers to penetrate the vagina of FW a child of 13 years.

2. He faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act where it was alleged that on 21st December 2014 at Kiambu County the appellant intentionally and unlawfully touched the vagina and breasts of FW a child of 13 years.

3. After hearing evidence of six prosecution witnesses and the testimony of the appellant the court found him guilty and convicted him on the main charge, and subsequently sentenced him to twenty (20) years imprisonment.

4. Being aggrieved by the conviction and sentence the appellant preferred this appeal. The appeal is premised on the amended petition which raises seven grounds as follows: -

> **"1. THAT, the learned trial magistrate erred in matters of law and fact by failing to note that that penetration was not proved by evidence.**
>
> **2. THAT, the learned trial magistrate erred in matters of law and fact by failing to find that the medical report lacked authenticity for non-compliance with the laid down statutory framework.**
>
> **3. THAT, the learned trial magistrate erred in matters of law by failing to adhere to section 200 of the C.P.C as required.**
>
> **4. THAT, the learned trial magistrate erred in matters of law and fact by failing to consider my defense, which underpinned an existing grudge between the accused person and the mother to the victim.**
>
> **5. THAT, the learned trial magistrate erred in matters of law and fact by failing to adhere to the statutory frame work of sentencing when the court found the accused person guilty on the alternative count.**
>
> **6. THAT, the learned trial magistrate erred in matters of law and fact by exceeding the minimum statutory sentence. Thus the 20 years imprisonment sentence is harsh and un-proportionate.**
>
> **7. THAT, in default of acquittal, I apply to invoke Section 333 (2) of the C.P.C. and have the time spent in legal custody considered in the calculation of the sentence."**

5. The appeal which is vehemently opposed was canvassed partly by way of written submissions and partly orally in court. on his part the appellant relied on written submissions where he stated that whereas he was convicted on the charge of sexual assault, penetration which is an essential ingredient of the charge was not proved; that the Magistrate who wrote the judgement did not comply with the provisions of Sections 200 of the Criminal Procedure Code and hence the trial should be declared a nullity; that his defence was ignored, that the trial court shifted the burden of proof to him and did not give cogent reasons for believing the evidence of the complainant. Further, that in sentencing him the trial Magistrate misapplied Section 11 (1) of the Sexual Offences Act and that the sentence was harsh and excessive. The appellant further stated that the court erred by not considering the period of more than a year he had been in remand custody when sentencing him. He urged this court to allow the appeal in its entirety, quash the conviction and set aside the sentence or to reduce the sentence to the statutory minimum or further to take into account the period he spent in remand custody.

6. Prosecution Counsel Ms. Maundu however urged this court to find that the charge against the appellant was proved beyond reasonable doubt and that the sentence imposed was not excessive given that the victim was mentally challenged and therefore dismiss the appeal in its entirety.

7. As the first appellate court I am obligated not to just consider the submissions of the parties but also to analyse and re-evaluate the evidence so as to arrive at my own independent conclusion while bearing in mind that I did not see or hear the witnesses who gave evidence and therefore did not unlike the trial Magistrate observe their demeanour **(see Okeno v Republic [1972] EA 32).** That however is not to say that I have ignored the submissions.

8. Section 5 defines the offence of **Sexual Assault** as follows: -

> **1. Any person who unlawfully –**
>
> > **a. Penetrates the genital organs of another person with –**
> >
> > > **i. Any part of the body of another person or that person; or**
> >
> > > **ii. An object manipulated by another person or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;**
> >
> > **b. Manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault.**

9. In **John Irungu v Republic [2016] eKLR** the Court of Appeal stated as follows concerning the offence: -

> **"…… The offence is constituted by committing an act which causes penetration of the genital organs of any person by any part of the body of the perpetrator or of any other person or by an object manipulated to achieve penetration. Thus, for purposes of sexual assault, the penetration is not limited to penetration of genitals by genitals. It extends to penetration of the victims genital organs by any part of the body of the perpetrator of the offence, or of any other person or even objects manipulated for that purpose."**

10. In this case it is alleged that the appellant committed the offence by penetrating the genital organ of the complainant with his fingers. However, in her evidence the complainant did not allude to this fact. Her evidence was that the appellant touched her breasts and did something to her private parts. Although it was proved that she suffers a mental disability the complainant was very coherent and knew what she was saying. The fact that she did not state there was penetration means just that. Indeed, the history recorded by the doctor who completed the P3 Form in that respect was that: -

> **"Mother report that child was found in bed with stranger child reported that the stranger touched her breast and her private parts."**

11. Touching and penetration are two distinct acts which give rise to different offences under the Sexual Offences Act. Whereas even partial insertion also amounts to penetration there was no evidence of penetration of any nature in this case: whether complete or partial or whether with any part of the perpetrator's body or an object as could prove the offence of sexual assault. In my view the facts of this case render themselves to the offence of indecent act with a child as provided in **Section 11 (1) of the Sexual Offences Act.** As defined in **Section 2** of the **Act** "**indecent act"** means **an unlawful 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) ……."**

12. In cross examination the complainant was categorical that the perpetrator touched her on the breasts and the part between her legs (meaning her genitalia). Medical examination by Dr. Nectarious Obaso but whose findings were produced by a colleague (Pw4) revealed that the complainant's labia minora appeared inflamed with a perineal tear and were red and swollen. She also had a foul smelling discharge. Whereas corroboration of the evidence of a victim of a sexual offence is not required **(see Section 124 of the Evidence Act)** the medical evidence confirms that something was done to the complainant in her private parts. That evidence corroborates her evidence that the perpetrator touched her genitalia or to use her language her part between the legs. Her evidence was also corroborated by Lucy Njoki (Pw3) and Anne Wangare (Pw4) who testified that they saw her coming from the perpetrator's house with the zipper of her trouser open and her t-

shirt upturned meaning that she had been up to something in that house. I am satisfied that the evidence although it did not prove the offence of sexual assault, proved beyond reasonable doubt the alternative charge of indecent act with a child contrary to Section 11 (1) of the Sexual Act.

13. What about the identity of the perpetrator? The appellant maintains that he did not commit the offence but was framed when he made a demand for his pay for a comedy performed at the behest of the complainant's parents. I am however satisfied that he was positively identified by the complainant as the perpetrator of the offence. Firstly, the complainant knew him very well a fact which he himself admitted; secondly, the offence occurred during the day and hence in broad daylight and thirdly the complainant was seen leaving his house from which he himself emerged albeit after a while. It was also Pw5's evidence that she had peeped into the house and seen him lying in the bed. Since the offence occurred in broad daylight and the complainant and the other witnesses knew him the circumstances were very favourable for a positive identification. It was free of error and I am satisfied there was no possibility of mistaken identity. His defence juxtaposed with this very cogent evidence is not convincing at all.

14. The appellant did not raise an alibi. He merely stated that he was coming from work when he was arrested. He did not state where that work **"was undertaken"**. In my view his defence was a general statement but not an alibi and the prosecution would not have been required to investigate such an allegation in order to dislodge it. As for the allegation that he was framed for nagging the complainant's mother to pay him, it was an afterthought otherwise it should have been put to her (Pw2) during cross examination.

15. It is my finding that the evidence that the appellant committed an indecent act with the complainant is watertight. A birth certificate was produced to prove that she was thirteen years old as was a certificate to prove she is mentally challenged.

16. The appellant contends that the Magistrate who convicted him did not comply with **Section 200 of the Criminal Procedure Code**. That is far from the truth. On 15th June 2016 he himself is on record as stating – ***"I need to proceed with the case where it stopped."*** This was not the first time he was required to make the election as on 22nd February 2015 another Magistrate had put the provisions of Section 200 (3) of the Criminal Procedure Code to him. On that occasion he stated: - **"To proceed where it had reached before Court No. 3"**. He was therefore well aware of his rights under that Section and understood what he was telling the court was that he did not require the witnesses to be recalled.

17. I have given reasons as to why I believed the evidence of the complainant the reasons being that she struck me as a credible and reliable witness. Whereas she is a young child who suffers mental disability, she was very coherent and consistent even in the face of cross examination. I have also stated that her evidence received a lot of corroboration from the evidence of the other witnesses. I have also given my reasons for not believing the defence.

18. As an appellate court, I am alive to the principle that I can convict the appellant for the alternative charge which in this case was treated as a lesser offence to Sexual Assault which I have found was not proved as there was no evidence of penetration. In **John Irungu v Republic [2016] eKLR** the Court of Appeal citing the cases of **James Maina Njogu v Republic Criminal Appeal No. 38 of 2004 (Nyeri)** and **Robert Mutungi Muumbi v Republic Criminal Appeal No. 5 of 2013** stated: -

> **"We have ultimately come to the conclusion that the evidence on record discloses the offence of sexual assault, which is a cognate and minor offence of the offence of defilement with which the appellant was charged. We accordingly allow the appeal, quash the conviction for the offence of committing an indecent act with a child contrary to Section 11 of the Act and set aside the sentence of 15 years. In lieu thereof we substitute a conviction for the offence of sexual assault contrary to Section 5 (1) of the Act and impose a sentence of 10 years imprisonment from the date of sentence by the High Court. It is so ordered."**

19. The appeal in the court of appeal was a second appeal against the judgement of the High Court which had quashed the conviction for the offence of defilement contrary to Section 8 (2) of the Sexual Offences Act and substituted it with a conviction for the offence of indecent act with a child contrary to Section 11 (1) of the Act.

20. Taking cue from the Court of Appeal, I hereby quash the conviction for the offence of sexual assault and set aside the sentence of twenty (20) years and in lieu thereof substitute it with a conviction for the offence of indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act and taking into account the period the appellant spent in remand custody hereby sentence him to ten (10) years imprisonment from the date he was sentenced by the lower court. it is so ordered.

Signed and dated this 23rd day of September 2019.

E. N. MAINA

JUDGE

Dated and delivered in Kiambu this 26th day of September 2019.

C. W. MEOLI

JUDGE