



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO. 47 OF 2018

DAUDI BARISA LOLO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Principal Magistrate Court at Mpeketoni Criminal Case No. 74 of 2017 by Hon. C.N. Sindani (SRM) dated 23rd August 2017)

JUDGMENT

1. The Appellant was charged with attempted defilement contrary to section 9 (1) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 4th April 2017 at around 0830hrs a West District within Lamu County, the Appellant intentionally attempted to cause his penis to penetrate the vagina of M.W a child aged 6 years old.
2. He faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars were that on 4th April 2017 at around 0830hrs West District within Lamu County, the Appellant intentionally and unlawfully touched the vagina of M.W a child aged 6 years old with his penis.
3. The prosecution called four witnesses in support of their case. The M.W (PW1), the complainant, after voire dire examination the court directed that she give an unsworn statement due to her age. She told the court that on the said date, the Appellant, whom she knew, came to their home and asked her to give him water. That the Appellant held her buttocks but he did not undress her. That the complainant's mother (PW2) found the Appellant holding PW1's buttocks and started beating the Appellant. That afterwards PW1 and PW2 went to Mama Chiru, the Appellant's mother, and they talked. They later went to the police where she narrated what had happened. She was then taken to hospital where she was examined.
4. S.W (PW2), the complainant's mother, told the court that on the 4th April 2017 at around 8:00am she left her children in the house and went to a neighbour's house to look for fresh water. On her way back home, she passed by her brother-in-law's house which was along the way. While at her brother-in-law's home, she saw someone seated on a chair in her house.
5. PW 2 further said that when she got to the house she saw that the Appellant caressing the complainant's buttocks. She attacked the Appellant with a piece of firewood and he managed to escape. That she proceeded to report the matter to the village elder and the Appellant's stepmother and brother. Thereafter, she reported the matter to the police. She testified that the complainant was 6 years having

been born on 5th March, 2011. She produced the complainant's birth certificate (Pexh 3).

6. Fadhili Salim Hamisi (PW3) was the chairman of the community policing. He told the court that he knew both the complainant and the Appellant as they were all residents of Sendemke. That on the 4th April 2017 while at a meeting he was informed of an incident that had happened at Sendemke. Later that evening at around 8:30pm while at home, he was informed that members of the public had arrested a person in connection with the incident. He rushed to the place and found the Appellant about to be lynched. He called the police who rescued and arrested the Appellant.

7. Mohammed Hamisi (PW4) was the clinical officer at Witu Health Centre. He told the court that he examined the complainant and found that the genitalia was normal, the hymen was intact and tests indicated that there was no infection. He concluded that there was no penetration. He produced the medical notes (PEXh. 1) and the P3 form (PEXh 2)

8. At the close of the prosecution case, the learned trial magistrate found that the charge of attempted defilement had not been proved and acquitted him on the charge. He however found that the alternative charge had been established and placed the Appellant on his defence.

9. The Appellant gave a sworn statement in his defence. He told the court that PW2 was his neighbour and that on the material day he had passed by the complainant's home to ask for water but he denied committing the offence. He told the court that he had differed over land with PW2 and that PW2 framed him so that she could sell his family's land. He also stated that he did not have a grudge with PW2.

10. At the end of the trial, the learned magistrate found the Appellant guilty and sentenced him to 10 years imprisonment.

11. The Appellant was aggrieved by the conviction and sentence and lodged his appeal on 31st January 2018 on seven grounds. Subsequently, on the 24th October 2019, he lodged an amended petition of appeal on two grounds and also filed written submissions. His two grounds of appeal were that the charge of attempted defilement was not proved, and; that the trial magistrate had failed to consider his defence.

12. When the matter came up for hearing on 23rd October, 2019, the Appellant relied on his written submissions in support of his appeal. His submissions were to the effect that the evidence of PW1 and PW2 was fabricated and had no evidentiary value in the case. He relied on section 163 of the Evidence Act. He claimed that the trial magistrate amended the charge sheet in his judgment denying the Appellant his constitutional rights under Article 50(2)(b) of the Constitution. He argued that if the charge of attempted defilement failed then the alternative charge should also have failed. Finally, the Appellant submitted that he had a strong defence which the Respondent failed to rebut. He asked the court to allow the appeal.

13. Mr. Mwangi, counsel for the Respondent, opposed the appeal in its entirety through oral submissions. He submitted that the Appellant was given an opportunity to defend himself but he failed to tender any evidence of the grudge he alleged to have existed between him and the complainant's mother. He further submitted that the prosecution had discharged its burden of proof as the Appellant was caught in the act. Finally, counsel submitted that the sentence was lawful and that had the Appellant crystallized his intentions the repercussions would have been critical.

14. This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluate and analyse it and come to its own conclusions. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanour of the witnesses and the Appellant during the trial and can therefore only rely on the evidence that is on record. See **Okeno v R (1972) EA 32, Eric Onyango Odeng' v R [2014] eKLR.**

15. I have considered the grounds of appeal, the respective submissions, and the record. The only issue for determination in this appeal is whether the prosecution proved its case beyond reasonable doubt.

16. On the main charge, the evidence on record does not point to an attempt to cause penetration. The Appellant did not try to remove the complainant's clothes, nor was there any evidence adduced that he had removed his trouser. From this evidence it is clear that there was no evidence to support the charge. The trial court rightly acquitted the Appellant on the main charge.

17. With respect to the alternative charge of committing an indecent act with a child contrary to section 11 (1) of the SOA, section 2 of the Sexual Offence defines an indecent act as:-

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. The complainant (PW1) told the court that the Appellant held her buttocks but he did not remove her clothes. PW2 stated that from a distance she saw, the Appellant holding the complainant's private parts but when she went closer to the house, she saw him caressing PW1's buttocks.

19. From the evidence of PW1 and PW2 restated above, and contrary to the appellant assertion, the evidence supports the alternative charge. The act of the Appellant holding the buttocks of PW1 a minor falls within the definition of an indecent act above. Her evidence corroborated that of her mother PW1, I have no hesitation in finding that the alternative charge of committing an indecent act with a child was proved.

20. The victim was proved to be 6 years old. Her mother S.W (PW2), produced the complainant's birth certificate (Exh 3) which indicated her date of birth to be 5/3/2011 making the complainant 6 years old at the time the offence occurred and therefore a minor. I find that the age of the victim was proved.

21. The final issue is whether the Appellant was positively identified. There are clear guiding principles upon which the court must analyse evidence of identification. As a rule, the best evidence of identification is that of recognition. See **Francis Muchiri Joseph – V- Republic [2014] eKLR**.

22. In this case, the complainant stated that she knew the Appellant as Barisa while PW2 told the trial court that the Appellant was her neighbour. The Appellant on his part admitted that PW2 was his neighbour and claimed that PW2 occasionally used to leave her children with him. Furthermore, PW2 knew the Appellant's stepmother and brother as she reported to them what he had done to the complainant. She had caught him in the act. In light of the evidence given this was a clear case of identification by way of recognition.

23. In addition, the circumstances of the Appellant's arrest also corroborates the identification evidence given by the victim and her mother. PW3 testified that he was informed of an incident of attempted defilement and that in the evening he learnt that an angry mob had accosted and were trying to lynch him when he (PW3) intervened by calling the police who went to arrest the Appellant. I find that the Appellant was positively identified and that there was no risk of mistaken identity.

24. The Appellant contended that his defence was not considered. It was his defence that he had been framed by PW2 over a dispute over land where he accused PW2 of plotting to sell his family's land.

25. The trial magistrate in his judgment considered the Appellant's defence and found that the Appellant did not elaborate or provide evidence of a grudge between him and PW2. He further found that the Appellant had admitted to being at the scene of the offence and held that his defence lacked merit and dismissed it.

26. With respect to the allegation that the Appellant was framed, I have looked closely at the entire evidence. The Appellant did not attempt to explain why the victim's mother would desire to grab his land.

The Appellant chose not to cross-examine PW2. This was the opportunity he had to raise the issue of a frame up. The Appellant did not also cross-examine PW3 who was the chairman of the local community policing. PW3 knew both the complainant and the Appellant and would have been in a position to shed light on the allegation

27. In this appeal, the Appellant similarly raised the issue of frame – up and land. Just like in the trial court, he did not attempt to explain why the victim’s mother (PW2) would desire to grab his or their family land. He did not state whether they were related and how his incarceration would lead to his land being grabbed. The victim’s mother (PW2) said in her testimony that she reported to the Appellant’s step mother and the Appellant’s brother meaning that even if PW2 got him incarcerated, it was unlikely that she would grab his land as his relatives lived close by. It is my conclusion therefore that the issue of land was an afterthought intended to divert the attention of the court from the charge at hand.

28. In the final analysis, I find no merit in the appeal against conviction and consequently dismiss it. I would however, considering the circumstances of the case, reduce the sentence to 5 years imprisonment. The Appellant shall serve 5 years imprisonment from the date of conviction and sentence.

29. Orders accordingly.

Judgment delivered, dated and signed at Malindi this day of 27th November, 2019.

R. LAGAT KORIR

JUDGE

In the presence of:

S. Pacho Court Assistant

The Appellant in person

Mr. Nyoro holding brief for Mr. Mwangi for the Respondent