REPUBLIC OF KENYA

IN THE HIGH COURT

AT KIAMBU

CRIMINAL APPEAL NO. 95 OF 2017

BETWEEN

NAOMI BONARERI ANGASA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against the original conviction and sentence dated

30th December 2016 in Criminal Case No. 1721 of 2014 at Thika

Chief Magistrates Court before Hon.T.Murigi, CM)

JUDGMENT

1. The appellant, **NAOMI BONARERI ANGASA**, was charged with defilement contrary to **section 8(1)** and **(2)** of the ***Sexual Offences Act***. The particulars of the offence were that on 4th February 2014 and 5th April 2014 [particulars withheld] Estate Juja area within Kiambu County, she intentionally and unlawfully committed an act which caused her vagina to be penetrated by the penis of PCN, a boy aged 7 years. She also faced an alternative charge of committing an indecent act with a child contrary to **section 11(1)** of the ***Sexual Offences Act*** based on the same facts.

2. The appellant faced a third charge of deliberate transmission of a life threatening transmitted disease contrary to **section 26(1) (c)** of the ***Sexual Offences Act***. The particulars of the charge were that on diverse days between 4th February 2014 and 5th April 2014 at [particulars withheld] Estate Juja within Kiambu County, having actual knowledge that she was infected with life threatening sexual transmitted disease, she intentionally knowingly and willfully committed an act which caused her vagina to be penetrated by the penis of PCN, a boy aged 17 years old which she knew or ought to have reasonably known will infect the said PCN with sexual transmitted disease namely *Chlamydia Trachomatis* and *Wisteria Gonorrhea*.

3. The appellant was convicted for the offence of defilement and sentenced to life imprisonment. She now appeals against conviction and sentence on the grounds set out in the petition of appeal dated 13th July 2017. The appellant contended that the offence against her was not proved beyond reasonable doubt and that the child's testimony was not corroborated. She pointed out that the trial magistrate relied on medical evidence including the P3 form and treatment notes which were not produced by the makers thereof and were therefore inadmissible. The appellant assailed the judgment on the grounds that there gaps and inadequacies in the evidence which undermined the conviction. Further, that the child's mother testimony was unreliable, untrue and could not be relied upon to support the conviction. The appellant contended that her defence was not assessed and given due consideration. These points were highlighted in oral submissions by her counsel Mr Onyinkwa, who submitted that the conviction was unsafe and ought to be quashed.

4. Mr Kinyanjui, counsel for the respondent, supported the conviction and sentence. He submitted that all the evidence on record supported the conviction and that the prosecution proved all the elements of the offence.

5. As this is a first appeal, I am required to review all the evidence and come to my own conclusion bearing in mind that I neither heard nor saw the witnesses testify in order to assess their demenour. In order to deal with the grounds of appeal I shall set out the evidence as it emerged from the trial court.

6. After a *voire dire*, the complainant (PW 1), gave sworn testimony. He recalled that on the material day, the appellant, who was the house help and to whom he referred to as auntie did, *"bad things"* to him in the bedroom. He recalled that when his mother, PW 2, had gone to work, she took him to her room, placed him on the bed, removed her skirt, took his penis and inserted it in her private parts while he was

lying on his back. When her mother came in the evening, she told her what the appellant had done. Her mother later took him to see a doctor after he complained he was feeling pain. When cross-examined, PW 1 stated that the appellant did bad things to him three or four times. He also stated that he told his mother twice before she believed him.

7. PW 2 recalled that on 10th April 2014, when she went home, she found PW 1 having a fever. When she took him to the doctor, PW 1 complained that he was having pain in his penis and when the doctor examined him, he found that the child was suffering from a sexually transmitted disease. When she inquired, PW 1 told her that the appellant had been sexually assaulting him. By that time the appellant had left to go to her home and was arrested when she returned.

8. PW 4 is the doctor who produced the P3 medical report on behalf of his colleague who had left the public service. The P3 medical report confirmed that PW 1 was examined on 7th May 2015 and at the material time, he was in fair condition and that there was foul smell from the penis and a discharge from the urethral opening and a rash. He concluded that there was evidence of sexually transmitted infection.

9. In her unsworn testimony, the appellant denied the offence. She admitted that she was employed as a house help by PW 2. She told the court that on 4th February 2014 before she was employed, PW 2 took her for an HIV test which confirmed she was in good health. On 4th April 2014, PW 2 allowed the appellant to go to her rural home as she was proceeding on a safari. The appellant remained at her rural home for a month until she was called to resume work. When she returned from Kisii on 1st May 2014, PW 2 and her husband assaulted her and accused her of stealing and then took her to the police station where she arrested and arraigned.

10. The main issue for determination in this case is whether the prosecution established a case of defilement against the appellant beyond reasonable doubt. In order to prove defilement, the prosecution must show that the accused did an act that amounted to penetration of a child. *"Penetration"* under **section 2** of the ***Act*** means, *"the partial or complete insertion of the genital organs of a person into the genital organs of another person."*

11. Mr Onyinkwa submitted that it was not possible for a boy aged 7 years to cause an act of penetration or to penetrate a vagina with his penis. **Section 2** of the ***Sexual Offences Act*** is gender neutral because what constitutes the offence is the act of causing the partial or complete insertion of genital organs of a person into the genital organs of another person. It does not require a voluntary sexual act on the part of both parties. The offence is complete by the act causing the partial or complete insertion of the genital organ. In this case, PW 1 testified about what happened as follows, *"She took my penis and inserted (it) in her private parts."* What is clear is that it is the appellant who did the act that caused insertion in her private parts.

12. The testimony of the child does not require corroboration under the proviso **section 124** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)***. It is complete and can support a conviction if, for reasons to be recorded the trial magistrate believes the child is telling the truth. In this instance, the magistrate who wrote the judgment is not the one who heard testimony of PW 1 hence she could not comment on his demenour but this is not the requirement of the law that the demenour is the only way to ascertain whether the child is telling the truth. The court is entitled to look at the record, the veracity and consistency of the testimony both in examination in chief and in cross-examination and the surrounding circumstances in order to be satisfied that the child is telling the truth. In this case the trial magistrate held that the child was intelligent, gave consistent evidence and had no reason to frame the appellant.

13. The corroborative evidence comprises the testimony of PW 1's mother, PW 2, and the medical evidence. As regards the testimony of PW 2, Mr Onyinkwa submitted that the evidence was unbelievable and unreliable. In his view, PW 2 behaved in a manner inconsistent with the that of a mother who knew what was going on with her son. He pointed to the record which showed that PW 1 told his mother what had taken place when she was in the bedroom and she did nothing. I have read and re-read the record and the answer PW 2's behavior is to be found in the response PW 1 gave when cross-examined. He stated that he told PW 2 twice before she believed him. Further, in his evidence, he told the court that that the when he reported to his mother on the evening of the incident, she was in the bedroom. The testimony of confirmed that PW 2 realized that her son was being sexually assaulted when he started getting sick and she took him for treatment. The son then disclosed what had happened several times to him.

14. Whether the P3 medical form was admissible depends on whether it is produced by the maker thereof or under **section 77** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)***. The doctor who examined PW 1 and prepared the P3 form was not called. **Section 77** of the ***Evidence Act*** allows a person other than the one who prepared a report such as the P3 forms in issue to produce it provided the presumption of authenticity is met. The section provides as follows:

> *77. (1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.*
>
> *(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.*
>
> *(3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.*

15. Once the presumption of authenticity under **section 77(2)** aforesaid is met the document is admissible but the trial court may, *suo moto* or upon request by the accused person, call for the maker of such document to appear in court for cross-examination on the form and content of the report. In ***Joshua Otieno Oguga v Republic*** **KSM CA Criminal Appeal No. 183 of 2009 [2009]eKLR** the Court of Appeal considered the same issue and held that:

> *That in short means that if the appellant wanted the medical report to be produced by a doctor, he had to apply to the court to summon the doctor who prepared the report, otherwise there was nothing wrong in law in the P3 form being produced by PC. Ann*

Wambui as she did.

16. In this case, the prosecution did not lay any basis for the admission of the document. PW 4 only testified that the doctor or vouch for his qualification or even confirm that he was familiar with his handwriting and signature. He only stated that the doctor who prepared the report had left public service. The medical evidence was therefore inadmissible.

17. PW 3, the investigating officer, testified that the he took the appellant to Thika Level 5 Hospital where she was examined and found to have a sexually transmitted disease. PW 3 could not produce the medical notes nor testify on behalf of the doctor who examined the appellant as he was not the maker of the report. At any rate the medical notes were only marked for identification and not produced. As there is no proof the nature of the appellant's diseased, the trial court could not sustain a conviction on Count 2.

18. The appellant's defence suggested that she was framed. She also put forward an alibi that at the time the incident took place she was in Kisii. In her own words she was employed by PW 2 and was at PW 2's home between 4th February and 4th April 2014 when the incident subject of the charge took place. PW 1 recalled that after sexually assaulting him, she left while PW 2 recalled that she left employment on 6th April 2014. When weighed against the testimony of PW 1 and PW 2, the defence does not hold any weight as she was clearly working for PW 2 when the incident subject of the charge took place.

19. Mr Onyinkwa complained that the trial magistrate did not deal with the alternative charge and the second count in the judgment hence the appellant was prejudiced in the sense that had the trial magistrate considered the alternative charge, she would have come to a different conclusion on the matter. From the judgment, it is clear that the trial magistrate failed to comply with the requirements of **section 169 of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*** which provides as follows:

> *169(1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, shall contain the point or points for determination, the decision thereon and the reasons, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it*.
>
> *(2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.*
>
> *(3) In the case of an acquittal, the judgment shall state the offence which the accused person is acquitted, and shall direct that he be set at liberty.*

20. **Section 169** aforesaid encapsulates an important principal in the delivery of justice and that is the duty to give reasons for a decision. Such a duty is not merely statutory but constitutional. Apart from the appellants being denied an opportunity to know why they were convicted, it is difficult for the appellate to determine whether the trial magistrate erred and if so, how. The trial magistrate failed to comply with **section 169(2)** of the ***Criminal Procedure Code***. She did not state or specify the counts on which the appellant was found guilty and convicted yet he faced two principal counts and an alternative charge. However, I am of the view that the appellant was not prejudiced. I am guided by the view expressed by the Court of Appeal in ***James Nyanamba v Republic*** **[1982 – 88] 1 KAR 1165 [1983]eKLR** as follows;

> *Again the magistrate transgressed subsection (2) of section 169 of the Criminal Procedure Code which requires that in the case of a conviction, the judgment must specify the offence of which and the section of the Penal Code or other law under which the accused person is convicted. Since in his opening statement of the judgment, the magistrate did not state which accused was charged alone in which count of the counts 3 and 4 it cannot be said that the omission to comply with section 169(2) (ibid) did not occasion the appellant injustice. In the circumstances of this case that omission is not cured by section 382 of the Criminal Procedure Code.*

21. In conclusion, I find and hold that the PW 1 gave clear evidence of the fact that the appellant molested him. Since the trial magistrate did not have the benefit of assessing the demeanour of PW 1 and PW 2 and taking into account that the medical evidence was inadmissible, I am prepared to give the appellant the benefit of doubt. What is clear from the testimony of PW 1 is that the appellant touched his penis not once but several times. Under **section 2** of the ***Sexual Offences Act***, *"Indecent act"* means *"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."*

22. The totality of the findings I have made is that I acquit the appellant on the principal charge of defilement and convict her of the offence of committing an indecent act with a child. The second count of transmitting a threatening disease was not proved and I therefore acquit her. The mandatory minimum sentence for the offence of committing an indecent act under **section 11(1)** of the ***Sexual Offences Act*** is 10 years' imprisonment hence she is sentence accordingly.

23. The appeal is therefore allowed to the extent that the conviction and sentence is quashed and substituted with a conviction for committing an indecent act with a child contrary to **section 11(1)** of the ***Sexual Offences Act***. She is sentenced to 10 years' imprisonment. The term of the sentence shall commence from the date of the sentence in the subordinate court.

DATED and DELIVERED at KIAMBU this 21st day of February 2018.

D.S. MAJANJA

JUDGE

Mr Onyinkwa, Advocate for the appellant.

Mr Kinyanjui, Prosecution Counsel, instructed by the Director of Public Prosecutions for the respondent.