REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.135 OF 2017

(An Appeal arising out of the conviction and sentence of Hon. E Juma – SPM delivered on 17th January 2017 in Nairobi CMC. SO. Case No.51 of 2014)

BARTON MURUTHI MUREITHI ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

The Appellant, Barton Murithi Mureithi, was charged with the offence of **attempted defilement** contrary to **Section 9(1)** as read with **Section 9(2)** of the **Sexual Offences Act**. The particulars of the offence were that on 15th May 2014 at [particulars withheld] House along Mandera road in Kileleshwa within Nairobi County, the Appellant unlawfully and intentionally touched the private parts namely vagina of N V K, a girl aged five (5) years. He was in the alternative charged with **committing an indecent act with a child** contrary to **Section 11(1)** of the same **Act**. The particulars of the offence were that on the same date and in the same place, the Appellant unlawfully and intentionally touched the private parts namely vagina of N V K, a girl aged five (5) years. When he was arraigned before the trial court, he pleaded not guilty to the charges. After full trial, he was convicted on the alternative offence of **committing an indecent act with a child** and was sentenced to ten (10) years imprisonment. The Applicant was aggrieved by his conviction and sentence and duly filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He faulted the trial court for failing to find that there were discrepancies in the testimony of the witnesses given in court and the testimony in their witness statements. He complained that the trial court based its judgment on erroneous assumptions from the evidence tendered in court. The Appellant also claimed that the trial court erred in importing extraneous facts into the judgment to shift the burden of proof and thereby finding him guilty. He averred that the trial court erred in failing to set out the issues for determination in the case. He also averred that the trial court failed to evaluate evidence on record as a whole and therefore reached the wrong conclusion. The Appellant also stated that the trial court misconstrued **Section 124** of the **Evidence Act** and in so doing failed to consider the evidence of the prosecution witnesses as a whole. He faulted the trial court for failing to weigh the reliability of evidence received after *voire dire* examination. Finally, the Appellant was aggrieved that crucial witnesses were not called to testify in the case. On the strength of the above grounds, the Appellant urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, learned counsel, Mr. Swaka appeared for the Appellant. Ms. Aluda, the Learned State Counsel represented the Respondent. Mr. Swaka submitted that the prosecution failed to adduce sufficient evidence to prove that the Appellant had the necessary *mens rea* to commit the offence. He explained that if the Appellant indeed committed the offence, then the same was done inadvertently. He submitted that the Appellant did not go to the house with the intention of having sexual contact with the complainant but was there to simply pay a visit to the family who were his close friends. He submitted that the trial magistrate rightly noted this at pages 71-72 of her judgment, but still went on to convict the Appellant. Counsel submitted further that there were material inconsistencies in the evidence of the prosecution witnesses rendering their evidence unsatisfactory. He pointed out that while the complainant testified that he reported the incident immediately to PW3, the evidence of PW1 was that PW3 did not tell her about the incident. The Appellant's counsel also wondered why complainant's grandparents together with her father were not called to testify in the case. He averred that no independent investigations were undertaken as the investigating officer only relied on the prosecution witnesses' police statements. Counsel for the Appellant contended that the Appellant offered a credible defence which the trial magistrate ignored. He also submitted that there were discrepancies in the evidence of the prosecution witnesses in as far as it related to the length of time that the offence was alleged to have been committed. Nonetheless he argued that the short time frame could not have allowed for the commission of the offence. Lastly, he submitted that there was need for the trial magistrate to compare prosecution witnesses' evidence in court and their police statements given that there were discrepancies in the evidence. He therefore urged the court to allow the Appellant's appeal.

Learned Counsel for the State Ms. Aluda opposed the Appellant's appeal. She made submissions to the effect that the prosecution proved its case against the Appellant to the required standard of proof beyond any reasonable doubt. According to learned State Counsel, all the essential elements requiring proof beyond reasonable doubt in the offence were proved. She submitted that the prosecution led evidence

during trial to show how the Appellant sexually assaulted the complainant. She contended that prosecution witnesses adduced consistent and corroborated evidence. She therefore urged the court to disallow the Appellants' appeal.

The facts of the case as presented by the prosecution witnesses are as follows: The complainant in this case is PW2, N V K. She was aged five (5) years during trial and was a pre- unit pupil at [particulars withheld] Kindergarten. Her age was confirmed by her mother through her birth certificate produced into evidence as ***prosecution's exhibit no. 1***. On the day in question, the complainant was at home with her nanny PW3, A M and her grandparents. At around 5.00p.m - 6.00 p.m, the Appellant arrived at the complainant's home. He entered the house through the kitchen. He found PW3 at the kitchen and introduced himself. He told her that he was a friend of the complainant's parents. The complainant who had been doing her school assignment at the dining area saw the Appellant also identified him to PW3 as a friend of her mother, PW1. She knew him very well having been introduced to him earlier by PW1. PW3 therefore allowed the Appellant inside the house. He proceeded to the dining area and sat at the dining table with the complainant.

PW3 testified that the Appellant was intoxicated at the time. She did not want him to disturb the complainant's grandparents who were in their room upstairs. She followed him to the dining room and asked him to write his name on a piece of paper. The complainant testified that the Appellant wrote his name in big funny letters. PW3 took the paper and went back to the kitchen. She called PW1 on phone and informed her about the Appellant's presence in the house. PW1 testified that PW3 called to inform her that the Appellant was in her house and that he was intoxicated and disorderly. She asked PW3 to do all she could to get him out of the house.

PW3 testified that she went back to the dining area and found the complainant sitting on the Appellant's laps. She asked the complainant to go back to her seat and do her homework and she did. She also persuaded the Appellant to leave the house. He left. PW3 escorted him to the gate and locked it. She testified that the Appellant was in the house for about an hour. When she returned back to the house, the complainant told her that the Appellant had put his hands inside her trousers touched her genitals when she sat on his laps. PW3 testified that the complainant had a trouser and a T-shirt on at the time. The evidence of the complainant was that the Appellant put his hand inside her trouser and touched her *"pee"*. She tried to stop him by pulling his hand out. Although she testified in her examination in chief that PW3 saw what the Appellant did to her, she clarified in her cross-examination that she did not. PW3 testified that she reported the incident to the complainant's grandparents.

The complainant reported the incident to PW1 when she returned home that evening. PW1 testified that the complainant reported that the Appellant had inserted his hand inside her trouser and touched her private parts. She testified that she examined her genitals and found them to be normal. PW1 called her husband, the complainant's father and informed him what the Appellant had done. She also reported the incident to Kileleshwa Police Station on the same day. The Appellant was arrested at Kileleshwa Police Canteen by PW4 PC Henry Wanyonyi later that night. PW5 PC Doris Marete was assigned to investigate the case. After concluding her investigations, she concluded that a case had been established against the Appellant and charged him with the offences he was convicted. In her testimony during trial, PW1 testified that the Appellant had a drinking problem. She stated that he was their good friend and that she did not think he was capable of molesting a child. She also stated that she was of the view that if the Appellant indeed committed the offence that he did so out of being intoxicated at the time.

When he was put on his defence, the Appellant denied committing the offences. He claimed that he was framed with the offence. He attributed his woes to the strained relationship he had with PW1 since she got married to the complainant's father, who is his childhood friend. The Appellant testified that PW1 has been apprehensive over his relationship with her husband as she felt that he was the one who kept him away from their home. He testified that on the day in question, he went to the complainant's home as he normally did and was ushered inside the house by PW3. He stated that he proceeded to the living room and sat there. The complainant was at the dining table doing her homework while PW3 remained in the kitchen. He testified that he exchanged pleasantries with the complainant and asked her for a piece of paper for him to write a note for her father. He got the paper and wrote down his name. He testified that he was at the house for about 5-10 minutes before he left and went back to his house. He later went to Kileleshwa Police Canteen where he met with the complainant's father for a drink. He testified that he was arrested that night and charged with the present offence.

This being a first appeal, it is the duty of this court to re-evaluate and to reconsider the evidence adduced before the trial court before reaching its own independent determination whether or not to uphold the decision of the said court. In doing so, this court is required to always keep in mind that it neither saw nor heard the witnesses as they testified and therefore give due regard in that respect. (See **Njoroge – vs- Repubic [1987] KLR 19**). The issue for determination by this court is whether the prosecution proved its case on the charge brought against the Appellant of **committing an indecent act with a child** contrary to **Section 11(1)** of the same **Act** to the required standard of proof beyond any reasonable doubt.

This court has re-evaluated the evidence adduced before the trial court. It has also considered the grounds of appeal presented by the Appellant and the submissions made on behalf of the Appellant and the State. The Appellant was convicted of **committing an indecent act with a child** contrary to **Section 11(1)** of the **Sexual Offences Act**. An indecent act is defined in **Section 2** of the said **Act** as ***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."***

The onus is therefore upon prosecution to prove that the Appellant committed the *actus reus* of the offence charged with the necessary *mens rea*. The prosecution's case was that the Appellant went to the complainant's home while intoxicated. He introduced himself to PW3 as a friend of the family and was therefore allowed into the house. The complainant saw him and confirmed to PW3 that she knew him having been introduced to him by her mother PW1. He went and sat at the dining table where the complainant was doing her school assignment. The complainant's grandparents were also in the house but in their rooms upstairs. PW3 did not want the complainant to disturb the grandparents because he was intoxicated and disorderly. She asked the Appellant to write his name on a piece of paper and returned to the kitchen to call PW1 on phone to let her know that the Appellant was in the house. PW1 asked her remove the Appellant from the house. PW3 went back to

the dining area and found the complainant sitting on the Appellant's laps. She asked the complainant to go back to where she had been sitting at the dining table. She managed to persuade the Appellant to leave the house and escorted him out of their compound. When she returned, the complainant told her that the Appellant had put his hands inside her trousers touched her genitals. The complainant was wearing a trouser and a t-shirt. The complainant testified that the Appellant put his hand inside her trouser and touched her *"pee"* when she sat on him. She testified that she tried to stop him by pulling his hand out. She reported the incident to PW1 who later reported the same to the police.

The Appellant denied committing the offence. He testified that he went to the complainant's home to check on her father who he has been friends with since their childhood. He stated that they had been friends for a long time such that he would pop in their house at any time without prior notice. The Appellant stated that on the day in question, he went to visit him but he was not there. He found the complainant together with PW3 in the house and asked for a piece of paper to write a note for the complainant's father. He thereafter left. The trial magistrate in her judgment considered the evidence of the prosecution witnesses and in convicting the Appellant stated thus;

> **"In this case for the three reasons stated above mainly**
>
> ***i) That the complainant has clearly given a detailed account of the events of that day.***
>
> ***ii) Considering the age of the complainant combined with the nature of the offence, the complainant was not capable to stage manage the event.***
>
> ***iii) There is no doubt that the accused was at the scene at the mentioned time and had the opportunity to privately commit the offence away from the view of PW3 who was in the house at the said time."***

What should be noted in the above case is that there was evidence that the Appellant was drunk at the material time. This was confirmed by the complainant, PW1 and PW3. PW1 in her evidence in chief admitted that the Appellant at the time had a drinking problem. Although the Appellant did not raise intoxication as a defence, the evidence on record reveals that the Appellant had been intoxicated at the time. **Section 13(1)** of the **Penal Code** provides as follows as concerns the defence of intoxication;

> ***"13. (1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.***
>
> ***(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and-***
>
> ***(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or***
>
> ***(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such commission.***
>
> ***(3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this Code and of the Criminal Procedure Code relating to insanity shall apply.***
>
> ***(4) Intoxication shall be taken into account in determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.***
>
> ***(5) For the purpose of this section, "intoxication" includes a state produced by narcotics or drugs."***

Under **Section 13(4) of the Penal,** the evidence of the Appellant's intoxication was crucial in determining whether the Appellant was capable of forming the necessary *mens rea* to commit the offence. The trial court did not take into account this provision.

For the offence of **committing an indecent act with a child** under **Section 11(1)** of the **Sexual Offences Act,** the specific intention required to prove the offence is malice afterthought. In the instant case taking into account that the Appellant had a drinking problem and was drunk at the time and considering that the offence was allegedly committed in broad daylight when there were people in the house, it would not be safe for this court to find that the Appellant was capable of forming the necessary intent at the time he allegedly committed the offence. PW1, the mother of the complainant in her evidence during trial stated that the Appellant was their good friend and that she did not think he was capable of molesting a child. She also stated that she was of the view that if the Appellant indeed committed the offence that he did so out of his being intoxicated at the time.

On re-evaluation of the evidence, this court is unable to reach the irresistible conclusion that indeed the Appellant intentionally indecently assaulted the child. The only evidence that was adduced in regard to the commission of the act is that of the child. The child was five years of age at the time of the alleged incident. Although **Section 124** of the **Evidence Act** states that the court can convict on the basis of the sole evidence of a victim in sexual assault, in the present appeal, the complainant's testimony did not convince the court that the incident indeed occurred. From the foregoing, this court finds that the prosecution failed to adduce sufficient evidence to prove that the Appellant had the necessary *mens rea* to commit the offence.

The upshot of the above reasons is that the appeal lodged by the Appellant has merit. It is hereby allowed. His conviction is quashed. The sentence imposed upon him is quashed. The Appellant is ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 21ST DAY OF MARCH 2018

L. KIMARU

JUDGE