



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.95 OF 2014**

*(An Appeal arising out of the conviction and sentence of Hon. JUMA –SPM delivered on 20<sup>th</sup> July 2014 in Kibera CMC. CR. (SO) Case No.58 of 2013)*

**ISAAC MUTUA KALONDU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Isaac Mutua Kalondu was charged with **defilement** contrary **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**. The particulars of the offence were that on diverse dates between 9<sup>th</sup> and 16<sup>th</sup> November 2013 in Kajiado County, the Appellant intentionally caused his penis to penetrate the vagina of I M C, a girl aged 5 years. He was alternatively charged with **committing an indecent act with a child** contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars of the charge were that on the same date and in the same place, the Appellant intentionally touched the private parts, namely vagina and buttocks of I M C, a child aged 5 years with his penis and fingers. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, the Appellant was convicted of the alternative charge of committing an indecent act. He was sentenced to serve 15 years imprisonment. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of evidence that was full of discrepancies, was contradictory and inconsistent. He faulted the trial magistrate for relying on the evidence of the complainant yet her evidence was not credible. The Appellant was of the view that he was convicted against the weight of evidence that dictated otherwise. The Appellant faulted the trial magistrate for failing to take into consideration his cogent and uncontroverted defence which answered the charges brought against him by the prosecution. The Appellant was aggrieved that the trial court had convicted him on the basis of the prosecution's case which had not established his guilt to the required standard of proof beyond any reasonable doubt. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, the Appellant presented to court written submission in support of his appeal. He also made oral submission urging the court to allow his appeal. He was of the view that the evidence adduced by the prosecution, especially that of the complainant failed to establish that he was the perpetrator of the offence. On her part, Ms. Atina for the State opposed the appeal. She submitted that the Appellant was properly convicted by the trial court on the basis of cogent and strong evidence that was adduced by the prosecution witnesses. She urged the court to dismiss the appeal.

This court shall revert to the arguments made on this appeal after briefly setting out the facts of the case. The complainant in this case was at the material time a child aged 5 years. She told the court that the Appellant worked for a neighbour whose child by the name M was her friend. From the evidence adduced, it was apparent that M and the complainant were age mates. The complainant testified that she used to go and play in the house of her friend's parents. She testified that on 19<sup>th</sup> November 2013 she went to her friend's house and found the Appellant. The Appellant undressed her and touched her vagina using his fingers. She stated that the Appellant used his index finger to insert it into her vagina. After the incident, she warned her not to tell anyone. Several days later, as her mother PW1 M N K was bathing her, she realized that the complainant's private parts was tender to touch. The complainant told her that a neighbour had inserted his fingers in her private parts. She demonstrated how the act was done. She immediately took the complainant to Nairobi Women Hospital where she was examined and a post rape care form filled. She reported the incident to the police. She was issued with a P3 form. The same was filled and was produced as an exhibit into evidence. She testified that the complainant was born on 24<sup>th</sup> March 2008. She produced her birth certificate as an exhibit in the case.

PW3 Angela Kirimba testified that she was a children's doctor at Nairobi Women's hospital, Ongata Rongai Branch. The complainant was examined at the said hospital on 23<sup>rd</sup> November 2013. On examination, she established that the hymen was broken. There were no

lacerations nor was there a vaginal discharge. She concluded that the complainant had been defiled. The complainant was put on medication. The post care rape form was produced as an exhibit in the case. The complainant was on 22<sup>nd</sup> November 2013 further examined by PW5 Dr. Kizzi Sheikh based at the Nairobi Police Surgery. He noted that that the hymen was normal. There was hyperemia tear at 1.00 O'clock. There was no discharge noticed. He produced the P3 form which he had filled. He observed that the tear may have been caused by a blunt object being inserted in the vagina.

When the Appellant was put on his defence, he denied committing the offence. He attributed his troubles with the parents of the complainant to a disagreement that he had with the father of the complainant. He testified that he trained a dog for the complainant's father who failed to pay him. When he demanded to be paid, the father of the complainant became aggressive and threatened to teach him a lesson. He denied ever having been in contact with the complainant though he conceded that the complainant used to visit a son of his employer called M. He told the court that he had been framed with the charge.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced during trial so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. As was held by the Court of Appeal in **Njoroge –Vs- Republic [1987] KLR 19 at P.22:**

***“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwala v R [1957] EA 570)”.***

The issue for determination by this court is whether the prosecution established to the required standard of proof beyond any reasonable doubt the charge of **committing an indecent act** contrary to **Section 11(1)** of the **Sexual Offences Act** brought against the Appellant.

In the present appeal, the Appellant vehemently denied that he had committed the offence. For the prosecution to establish the charge that was brought against the Appellant, it was required to establish that the Appellant indecently assaulted the complainant, that the complainant was a child within the meaning ascribed to the term under **Section 2** of the **Children Act**, and finally, that he was the perpetrator of the indecent assault. From the evidence adduced in this case, it was clear that there was evidence that indeed the complainant had been indecently assaulted. Medical evidence established that she was so assaulted. The issue that came to the fore for determination is who perpetrated the offence. From analysis of the evidence, it was clear that the only evidence that was adduced to connect the Appellant with the commission of the offence was that of the complainant.

The complainant was a child aged 5 years at the time of the incident. Although the proviso to **Section 124** of the **Evidence Act** allows the court to convict an accused for a sexual offence if the court forms the opinion that the complainant is telling the truth, in the circumstances of this case, and on re-evaluation of the evidence, this court is unable to find that the evidence adduced by the complainant clearly pointed to the Appellant and no one else as the perpetrator of the offence. There were contradictions in the evidence adduced by the prosecution witnesses. It was not clear from their testimony on what date the act was committed. The examination by the two doctors clearly pointed to assault that may have taken place much earlier than the date of examination.

Further, it was not clear from the evidence what instrument may have been used to perpetrate the offence. The trial court was in a dilemma on how to consider this evidence. This is what the trial court said:

***“In the course of hearing many defilement cases children of tender years have occasionally referred the offending object as a “stick”. The complainant in this case could be referring the offending object as a finger but without any clear interpretation for the witness who interacted closely with the complainant especially the mother (PW1). This honourable court will take in evidence on face value and conclude that the accused abused the complainant using his finger.”***

From re-evaluation of the evidence adduced, it was clear that it was only the evidence of the complainant that pointed to the Appellant as the perpetrator of the offence. There was no other evidence that was adduced to corroborate her evidence. This court is aware that if not properly considered, reliance on evidence of a child of such a tender age may cause miscarriage of justice. This is more so where the child herself tells the court that part of what she told the court may have been what she was told by her mother.

There are various decisions by superior courts warning the court to be cautious when treating evidence of children of such tender age. This is because, such children are impressionable and are liable to be influenced by adults having authority over them because of the high regard they have for them. Taking into consideration the totality of the evidence adduced, this court is not convinced that the complainant identified the Appellant to the exclusion of any other person as the perpetrator of the offence. The issue of time that the indecent assault may have been committed was not properly evaluated by the trial court. This court finds that this element is crucial in determining whether indeed it was the Appellant who perpetrated the offence.

In the premises therefore, this court holds that the prosecution failed to establish, to the required standard of proof beyond reasonable doubt, that it was the Appellant and no one else who could have committed the offence. The issue of the time when the sexual assault is said to have taken place was not established to place the Appellant as the perpetrator. The Appellant's appeal therefore has merit and is hereby allowed. The Appellant's conviction by the trial court is quashed. He is acquitted of the charge. He is ordered set at liberty and released from prison forthwith unless otherwise lawfully held. It is so ordered.

**DATED AT NAIROBI THIS 23<sup>RD</sup> DAY OF MAY 2018**

**L. KIMARU**

JUDGE