



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.91 OF 2012**

*(An Appeal arising out of the conviction and sentence of HON. G. ADHIAMBO –*

*(RM) delivered on 18<sup>th</sup> May 2012 in Kapsabet PM CR. Case No.3559 of 2011)*

**ROBERT KIBIWOT KORIR.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Robert Kibiwot Korir 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 20<sup>th</sup> November 2011 in Nandi County, the Appellant unlawfully and intentionally attempted to cause his penis to penetrate the vagina of EC (the complainant), a child aged nine (9) 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 offence were that on the same day and in the same place, the Appellant unlawfully and intentionally caused his penis to come into contact with the vagina of the complainant. The Appellant pleaded not guilty to the charge. After full trial, the Appellant was convicted of the alternative count of **committing an indecent act with a child** contrary to **Section 11(1)** of the **Sexual Offences Act**. He was sentenced to serve twenty (20) years imprisonment. The Appellant was aggrieved by his conviction and sentence. He 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 in the absence of evidence to support the charge. He accused the trial court of disregarding his evidence in his defence. He was of the view that the trial court had convicted him in the absence of direct or circumstantial evidence to corroborate the evidence of the complainant. He was aggrieved that the trial court had ignored medical evidence which in fact supported his case that he had not indecently assaulted the complainant. The Appellant faulted the trial magistrate for disregarding his mitigation and sentenced him to serve a manifestly excessive sentence. He was finally aggrieved that he had been convicted without proper identification being made. 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, this court heard rival submission made by Mr. Sambu for the Appellant and Ms. Oduor for the State. Mr. Sambu submitted that the trial court failed to make a finding on the main charge and instead convicted the Appellant on the alternative charge without ascribing any reason thereof. In that regard, learned counsel submitted that the judgment was incompetent. He relied on the decision in **Samuel Mwaura Kamau –vs- Republic [2016] eKLR**. Learned counsel submitted that the evidence adduced by the prosecution witnesses was not sufficient to sustain a conviction. He pointed out that *voire dire* conducted before the complainant testified did not conform to the law. He relied on the case of **J.G.K. –vs- Republic [2015] eKLR**. He further submitted that the evidence adduced by the prosecution witnesses was contradictory and did not support complainant's testimony that she had been sexually assaulted.

As regard the evidence that the panties of the complainant were torn, he submitted that there was no evidence to show where the panties were recovered. The fact that the panties were presented to police a day after the alleged sexual assault, points to the fact that the incident was contrived to frame the Appellant. He questioned why the panties did not have blood stains as claimed by the complainant if indeed it was true that she bled from her vagina after the sexual assault. Learned counsel submitted that medical evidence did not support the complainant's assertion that she had been defiled. Taken in the context of the entire evidence, the trial court should not have substituted the charge to that of **indecent assault**. As regard punishment, the Appellant submitted that there were no aggravating circumstances to justify the custodial sentence that was imposed. He urged the court to allow the appeal.

Ms. Oduor for the State opposed the appeal. She submitted that the prosecution had adduced sufficient culpatory evidence which established the charge that the Appellant was convicted of to the required standard of proof. The Appellant was placed at the scene of crime. Evidence was adduced how the Appellant lured the complainant to his house and was found literally in the act when the complainant's mother found the complainant emerging from the Appellant's house. She was crying and told her mother that she had been defiled. Her panties were torn.

The same was produced into evidence. She urged the court not to interfere with the decision of the trial court and dismiss the appeal.

This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced so as to arrive at its own independent determination whether or not to uphold the conviction of the Appellant. In reaching its verdict, this court is required to always bear in mind that it neither saw nor heard the witnesses as they testified and therefore give due allowance in that regard. (See **Okeno –vs- Republic [1972] EA 32**). In the present appeal, the issue for determination by this court is whether the prosecution adduced evidence that established the Appellant's guilt on the charge of **indecent assault** contrary to **Section 11(1)** of the **Sexual Offences Act** to the required standard of proof beyond any reasonable act.

This court has carefully re-evaluated the evidence adduced before the trial magistrate's court. It has also considered the rival submission made by the parties to this appeal. For the prosecution to establish its case, it was required to prove that the Appellant indecently assaulted the complainant. **Section 2** of the **Sexual Offences Act** defines indecent act to:

*“mean 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.”*

In the present appeal, the complainant testified that on 20<sup>th</sup> November 2011 at around 4.00 p.m., the Appellant called her to his house, removed her panties and then slept on her. The Appellant used his penis to insert into the complainant's vagina. The complainant cried. After the act, the Appellant gave the complainant Kshs.20/- and told her to leave his house. While the complainant was in the Appellant's house, PW2 CC, the complainant's friend was looking for her. While passing the Appellant's house, she heard the complainant crying inside the house. She was asking for her mother. PW2 rushed to the nearby complainant's home and informed PW3 LC, the complainant's mother. PW3 accompanied PW2 to the Appellant's house.

On reaching the house, she noticed the house had been locked from the inside. Shortly thereafter, the door was opened and the complainant came out. She was carrying a Kshs.20/- coin. PW3 disciplined the complainant. It was then that the complainant told her that she had been sexually assaulted. The Appellant, on hearing the complainant explain to the mother what had happened, slapped PW3. PW3 made a report to Nandi Hills Police Station where she was referred to Nandi Hills District Hospital. On examination by the doctor, nothing remarkable was seen. The torn panty that the complainant wore at the time she was sexually assaulted was produced into evidence. The complainant's clinic card was produced. It indicated that she was nine (9) years old at the time of the sexual assault.

When the Appellant was put on his defence, he denied sexually assaulting the complainant. Other than narrating the circumstances of his arrest, he did not say anything connected with the evidence that was adduced against him.

On re-evaluation of this evidence, it was clear to this court that the evidence adduced by the complainant, her friend and that of her mother established to the required standard of proof that the Appellant lured the complainant to his house and then indecently assaulted her. The prosecution's evidence to the effect that the Appellant tore the complainant's panties points to no other conclusion that the Appellant intended to defile the complainant but was prevented from doing so by the intervention of the complainant's friend and her mother.

There is no plausible reason why the Appellant would be interested in the complainant's panties if he had no intention of indecently assaulting her. The Appellant had no other business in touching the complainant's genitalia other than satisfying his sexual urges. The identity of the complainant is not in doubt. The Appellant was known to the three prosecution witnesses prior to the sexual assault. The age of the complainant was established to the required standard of proof. As stated earlier in this judgment, the Appellant did not adduce any evidence to dent the otherwise strong culpatory evidence that was adduced against him by the prosecution witnesses. His appeal against conviction lacks merit and is hereby dismissed.

On sentence, the Appellant is on firmer ground. **Section 11(1)** of the **Sexual Offences Act** provides the minimum sentence for a person who has been found to have committed an indecent act with a child to be ten (10) years imprisonment. The Appellant was sentenced to serve twenty (20) years imprisonment. This court agrees with the Appellant that there existed no aggravating circumstances to make the trial court sentence him to serve a custodial sentence other than the minimum one. The Appellant was a first offender. The circumstances in which the offence was committed did not disclose any aggravating circumstances that would militate against the court sentencing the Appellant to serve the minimum custodial sentence. In the premises therefore, the custodial sentence of twenty (20) years imprisonment is set aside and substituted by a sentence of this court sentencing the Appellant to serve ten (10) years imprisonment. The sentence shall take effect from 18<sup>th</sup> May 2012 when the Appellant was convicted and sentenced by the trial court. It is so ordered.

**DATED AND SIGNED AT NAIROBI THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2018**

**L. KIMARU**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 31<sup>ST</sup> DAY OF OCTOBER 2018**

**HELLEN OMONDI**

JUDGE