REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIM. APPEAL NO. 115 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

SAMWEL KINGA GITHIRI.....APPELLANT

(Being an appeal from the conviction and sentence Hon M. W. Kinyanjui Senior Resident Magistrate in Gatundu CMCRC 198 of 2014)

JUDGMENT

A. INTRODUCTION

1. Samwel Kinga Githiri ("Appellant") was presented before the Chief Magistrate's Court in Gatundu in Criminal Case NO. 198 of 2014 charged with a single count of defiling RNM, a child aged fourteen years contrary to section 8(1) and (2) of the Sexual Offences Act No. 3 of 2006. The allegations were that the Appellant had, on 10/02/2014, at [particulars withheld] Primary School in Gatundu South defiled RNM by causing his penis to penetrate the vagina of RNM.

2. In the alternative, the Appellant faced a charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars are that on 10/02/2014, at [particulars withheld] Primary School in GatunduSouth he intentionally touched the breasts of RNM, a child aged fourteen (14) years with his hands.

3. The Prosecution called seven witnesses to prove its case and after the Prosecution closed its case, the Learned Trial Magistrate put the Appellant on his defence. The Appellant gave a sworn statement and did not call any witness. At the conclusion of the trial the Learned Trial Magistrate found that the Prosecution had proved the main charge beyond reasonable doubt and sentenced the Appellant to twenty (20) years imprisonment. The Appellant is aggrieved and has appealed to this Court.

4. I will, first, set out the standard of review and briefly rehash the facts of the case as it emerged from the lower court.

B. THE DUTY OF THE FIRST APPELLATE COURT

5. As the first appellate Court, I am duty bound to re-evaluate and reconsider all the evidence adduced during the hearing afresh and come to my own conclusions about all the elements of the crimes charged. In doing so, I am to be guided by two principles. First, I must recall that I must make appropriate allowance for the fact that I did not have a chance to see or hear the witnesses. This means that I must give due deference to the findings of the Trial Court on certain aspects of the case. Second, in re-evaluating and re-considering all the evidence, I must consider the evidence on any issue in its totality

and not any piece in isolation. This principle constrains me to reach my own conclusions on the totality of the evidence as opposed to merely using the Trial Court's findings as a foil to endorse or reject its findings. See ***Okeno v Republic*** **[1973] E.A. 32**; ***Pandya vs. R*** (1957) EA 336, ***Ruwala vs. R*** (1957) EA 570.

C. THE EVIDENCE PRESENTED IN THE TRIAL COURT

6. The evidence that emerged in the Trial Court was as follows.

7. RNM testified that she was a pupil in Standard eight at [particulars withheld] Primary School. The Appellant was her Science teacher and was on duty in the week of 10/02/2014. On that day – 10/02/2014 – the Appellant went in to teach RNM's class from 7:00 – 8:30pm during school preps. At around 8:00pm, RNM says that the Appellant instructed her, as the Class Prefect, to take some papers to the Staff Room. RNM says she obliged. Unbeknownst to her, the Appellant was hiding by the door of Class 6. This meant that RNM was now ahead of him heading to the Staff Room with the result that RNM entered the Staff Room before the Appellant who trailed her into the Staff Room.

8. RNM then testified that the Appellant went into the Staff Room and locked the door. He then asked to have sex with RNM. When RNM refused, the Appellant proceeded to rape her after first unzipping his trousers, pulling down the wrap skirt RNM was dressed in and inserted his penis into RNM's vagina. RNM says he felt pain but did not scream because the Appellant threatened her menacingly by grabbing her neck and saying he would strangle her.

9. This was on 10/02/2014 at around 8:00pm in the night. The RNM testified that she then went to class and informed her friend, R, what had happened. R advised her to tell their teacher, J, the following day. They did this and Teacher J eventually told the Head Teacher who began investigations.

10. R was the friend who RNM said she talked to about the sexual assault. In her testimony she said that RNM had told her about being raped on 13/02/2014 at around 6:00pm and that she suggested that RNM reports to a teacher she was free with. Since that turned out to be Teacher J, they both went and reported to Teacher J the next day – 14/02/2016.

11. On her part, Teacher J recalled that the two girls went to see her on 13/02/2014. R went first. R was apparently concerned because RNM was "boasting" among her peers that she was having a sexual relationship with the Appellant. Unsure whether RNM's story was true, R thought it serious enough to report to Teacher J. According to Teacher J, RNM had told R about the sexual relationship on 10/02/2014 and she reported it to Teacher J on 13/02/2014. Teacher J called RNM and then made R repeat the story in RNM's presence. RNM ultimately, albeit, after hesitation, conceded that she was having a relationship with the Appellant. There was no mention of violent sexual assault during this conversation. However, Teacher J reported the matter to the Head Teacher.

12. The Head Teacher confirmed the report by Teacher J. She testified that upon receiving the report she started investigating and made tentative conclusions that RNM was having inappropriate contacts with teachers. She called RNM's father on 16/02/2014 and informed him about the issue and asked him to come to school. It was not until 22/02/2014, however, that RNM's father – accompanied by RNM's mother and RNM's paternal grandfather made it to the school.

13. The discussion on 22/02/2014 between the Head Teacher and RNM's parents and grandparent did not go too well apparently. RNM's father, apparently, already knew about the allegations of sexual assault. Hence, it would appear that he did not take very kindly the Head Teacher's view that RNM appeared to have an "ulterior motive" in making the allegations. The Head Teacher apparently told RNM's parents that RNM had only been fondled and that the concerned teacher had been fired. Since the Head Teacher was of the view that RNM was fueling inappropriate relationships with male teachers, the Head Teacher suspended her for two days also.

14. There are differing accounts about what happened next but it would seem that RNM's father got

tipped off that the Appellant was still in the school compound and had not been "fired" as alleged. The Head Teacher and one other witness say that RNM's father had come with a group of people who then attacked the Appellant and beat him badly before he was arrested and taken to the Police. RNM's father insists that it was the Appellant who attacked him and then an enraged mob attacked him. Suffice it to say that the Appellant was attacked by a mob, beaten badly and was subsequently arrested and charged with the offence of defilement.

15. Against this prosecution version of events, the Appellant's theory is one of simple denial backed up by a conspiracy theory. He denied every defiling RNM and specifically on that day. He believes that this is a frame-up concocted by Teacher J who was a professional rival because he had consistently out-performed her in terms of students' exam results. The Appellant finds it quite odd and not coincidental that RNM did not report the matter to her class teacher as would have been more appropriate or the Guidance and Counselling Teacher – but to a teacher who had no institutional relationship with RNM.

D. <u>ANALYSIS OF APPEAL</u>

16. After hearing all the evidence presented, the Learned Trial was persuaded that the Prosecution had proved its case beyond reasonable doubt. In particular, the Learned Trial Magistrate found RNM to be a truthful and consistent witness. She was impressed by RNM's testimony. She found thus:I find the evidence of PW1 flowing and consistent. This was a girl aged 14 years and her evidence flowed and never sounded couched (sic). She had no reason to frame the accused. She was new in school. The school had boys and male teachers so I see no reason for her to frame the accused. Medical evidence supported her evidence. She was defiled and I have no reason to doubt her.

17. What about the Appellant's defence? The Learned Trial Magistrate was unimpressed. She found the Appellant's defence untruthful and an afterthought. She analysed it thus:

> [Appellant] in his defence said a teacher had said he would make them be fired and indeed he was given the two class eight classes to teach. He believed he was framed for this. This clearly amounts to an afterthought. Accused never raised this issue to PW4 and PW5 who were the owners of the school. Further, [the Appellant] said he was with the watchman that night but never bothered to call him as a witness.

18. I begin my analysis by pointing out that in that last remark and inference, the Learned Trial Magistrate came quite close to shifting the burden of proof to the Appellant. It is trite that in a criminal trial the Accused Person does not bear any burden of proof; it is for the prosecution to prove all the matters beyond reasonable doubt. With regard to an Accused Person's defence, the Accused Person only has an evidential burden to produce evidence to properly raise an issue. Once an Accused Person does that, the Prosecution, then, bears the burden to prove, beyond reasonable doubt, that that issue does not avail the defendant. (See ***Sheldrake v DPP[2004] UKHL 43, [2005] 1 AC 264, [2005] 1 All ER 237, [2004] 3 WLR 976 (14 October 2004), House of Lords***).

19. Like in many cases of defilement and other sexual offences, this case turned on the credibility of the witnesses and whether the Court believed the version of the story told by the Prosecution witnesses or the Defence. In this case, as reproduced above, the Learned Trial Magistrate believed the Prosecution's version of events and disbelieved that of the Appellant.

20. There are, however, some problems which can be discerned. I note two particular problems which give me pause. The first one is that while the Learned Trial Magistrate found the Prosecution case persuasive, there was, in fact, more than one prosecution narratives. It would appear that the narrative of RNM which was categorical that she was (violently) sexually assaulted by the Appellant on 10/02/2014 at around 8:00pm in the Staff Room was not corroborated by any of the other witnesses. Indeed, it would appear that it was positively contradicted by at least two, and possibly three of the other witnesses.

21. RNM testified that the sexual assault happened on 10/02/2014 and that she immediately told R. R testified that RNM told her about the incident on 13/02/2014 after noting that RNM had become

withdrawn and asked what the matter was. RNM testified that she told R immediately – meaning after 8:00pm and before the slept on the day the sexual assault happened. R testified that RNM opened up to her about the sexual assault on 13/02/2014 at around 6:00pm. The Learned Trial Magistrate was a little troubled by these inconsistences but ultimately dismissed them as a product of young minds and the stigma associated with sexual assault.

22. While it is true that minor discrepancies and inconsistencies in the Prosecution case can be ignored (see ***Erick Onyango Ondeng' v Republic [2014]*** **eKLR** ***CRIMINAL APPEAL NO. 5 OF*** 2013), I am unable to agree with the conclusion of the Learned Trial Magistrate. These are not just minor inconsistencies. While one might explain away the discrepancies about dates – the one about the time is substantial. The importance of the time is that R is supposed to have been the first person who RNM informed about the sexual assault. RNM testified that: "I went back to class [and] I found R, my friend, and told her what happened." According to RNM, therefore, after the assault, she went straight to class and then told R – before she went to bed.

23. But if the sexual assault happened during preps (after 8:00pm), it seems odd and implausible that R would put the time at which RNM reported him as 6:00pm to be a mistake. This is made even more worrisome by the fact that R testified that RNM had been withdrawn for a while when she decided to draw her out. It, therefore, seems implausible that this could have been the same day that RNM says the sexual assault happened.

24. These inconsistencies assume even larger significance when one considers that there appears to be a second Prosecution theory or narrative that came out from PW3, PW4 and PW2 to some extent. The theory appeared to be that the Appellant had an on-going relationship with RNM but none of them was sure how "far" that relationship had gone. Of particular concern is the evidence of PW3 – Teacher J – who is the teacher whom RNM and R approached to report the sexual assault.

25. According to RNM, R suggested that they approach Teacher J and tell her about the sexual assault and they did this the following day. Even excusing the conflict in dates (since Teacher J testified that the two girls went to see her on 13/02/2014), there is a problem: RNM testified that she went to Teacher Joyce accompanied by R to report the sexual assault. However, Teacher J testified that it was not even RNM who approached her first but R who was worried about RNM's "boast" that she (RNM) was having a relationship with a teacher. So, as reported to Teacher J,there was no sexual assault – only an inappropriate relationship which RNM, upon confrontation, admitted to. It was this inappropriate relationship that Teacher J reported to the Head Teacher – and it was the same inappropriate relationship that the Head Teacher was investigating. Neither Teacher J nor the Head Teacher testified to knowing or being told about the events of 10/02/2014 as told by RNM and R (to some extent). Teacher J testified that she learnt of the sexual assault only on 22/02/2014 – the day that RNM's father went to the school and the Appellant was attacked by a mob.

26. The Learned Trial Magistrate appears to have rationalized this material discrepancy by proferring the theory that the self-interest of the owners of the school (PW4 and PW5) led them to want to protect the image of the school: the argument is that the PW4 and PW5, as the owners of the school, were committed to a narrative which would conclude that there was no sexual assault in the school so as to protect the reputation of the school. That explanation, however, would not extend to Teacher Joyce who is the one who reported the incident in the first place. Teacher J was quite categorical in her testimony that she knew nothing about the alleged (violent) sexual assault of RNM on 10/02/2014 and that, certainly, neither RNM nor R reported the sexual assault to her. This is a major problem because it introduces reasonable doubts about the veracity of the version of events as told by RNM. If, in fact, it is in doubt whether RNM informed R about theassault on the day it happened and it is also in doubt whether she informed Teacher J about it afterwards – and that, in fact, it was not even RNM that approached Teacher J but R, then reasonable doubts would be raised in reasonable people's minds as to the truth of what exactly happened.

27. In my view, therefore, when all is said and done, I find that the material contradictions in the testimonies of Prosecution Witnesses coupled with the seeming implausibility of some of the narratives lead me to the conclusion that it is not possible to say that the charges against the Appellant in this case

were proved beyond reasonable doubts. There are too many un-answered questions left for the conviction to be said to be safe.

E. CONCLUSION, DISPOSAL AND ORDERS

28. In the end, therefore, this Court, after re-considering and re-evaluating all the evidence and the entire trial court record concludes as follows:

a. For the reasons stated above, the appeal is allowed

and the conviction of the Appellant in Gatundu Principal Magistrate's Criminal Case No. 198 of 2014 is hereby quashed.

b. The sentence imposed by the Trial Court of twenty years imprisonment is hereby set aside.

c. Consequently, the Appellant shall be set free forthwith unless he is otherwise lawfully held in custody.

29. Orders accordingly.

Dated and delivered at Kiambu this 27th day of January, 2017.

JOEL NGUGI

JUDGE