REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 63 OF 2016

E O O …..... APPELLANT

VERSUS

REPUBLIC …..... RESPONDENT

[Being an appeal against the conviction and sentence of the Principal Magistrate's Court at Winam (Hon. J. Mitey RM) dated the 31st October 2016 in Winam PMCCRC No. 850 of 2014]

JUDGMENT

The appellant in this case was initially charged with attempted defilement Contrary to Section 9(1)(2) of the Sexual Offences Act and in the alternative Indecent act with a child Contrary to Section 11(1) of the Sexual Offences Act. The main count was afterwards substituted with one of attempted incest contrary to Section 20(2) of the Sexual Offences Act.

The particulars of the Main Count were that on 23rd May 2014 at [Particulars withheld] Estate in Kisumu County being a male person the accused attempted to cause his genital organ to penetrate the genital organ of Q A O who was to his knowledge his daughter.

In the alternative charge it was alleged that on 23rd May 2014 at [Particulars withheld] Estate in Kisumu County the accused intentionally and unlawfully touched the genital organ of W A O a child aged 9 years.

He pleaded not guilty to both charges. After hearing and evaluating the evidence by both sides the trial magistrate found the appellant guilty on the alternative count and sentenced him to ten years imprisonment. His appeal is against the conviction and sentence.

His grounds of Appeal are -

"1. THAT the learned Trial Magistrate failed to appreciate each of the elements of the charge facing the appellant and therefore reached a bad and unreasonable decision by convicting the accused when the charge against the appellant was apparently defective on the record.

2. THAT the learned Magistrate misdirected herself on several material facts which led her to arrive at the wrong decision by giving so much weight of the evidence of, PW1, PW2 and PW3.

3. THAT the learned Trial Magistrate erred in her valuation of the probative value of the

evidence before her by giving undue weight to some facts which were adequately traversed by the accused while ignoring other important and potent facts which were not traversed at all and which exonerated the appellant from the said charge.

4. THAT the judgment was contrary to the weight of the evidence before the Learned Magistrate.

5. THAT the learned trial magistrate relied on contradicted evidence to convict the appellant.

6. THAT the learned magistrate erred in both law and fact in failing to appreciate that the evidence tendered by the prosecution witness was insufficient to be the basis of sound conviction.

7. THAT the sentence is harsh, vindictive and excessive given the fact that the case was not proved against the appellant."

Mr. Okungu represented the appellant both at the trial and in this appeal. He submitted firstly, that the charge was defective. Secondly, that there was no medical evidence to prove that the appellant did "bad things" to the complainant as was alleged and thirdly that the trial magistrate ought to have convicted the appellant on the principal count but not on the alternative count. Further he wondered how the appellant could indecently assault the victim using her own hand. He contended that the irregularity in the charge was obvious and urged this Court to be guided by **Yongo V. Republic [1983]KLR.** He further submitted that the prosecution's case was not proved beyond reasonable doubt and that the appellant's defence was erroneously rejected. On this he relied on **Okethi Olale V. Republic [1965] EA 55.** He urged this Court to find that the appellant was convicted on insufficient evidence.

The appeal was vehemently opposed. Mr. Muia, Prosecution Counsel started by submitting that the appellant understood the charge and the proceedings and that the charge was not defective. He contended that both the principal count and the alternative count carried the same sentence save that Incest has an element of relationship between the accused and the victim. He stated that the reason medical evidence was not produced was because the appellant tore the P3 form. He contended that there was no requirement to prove penetration and that the evidence on record was sufficient to prove the charge. He further submitted that the victim's evidence was clear and that there was sufficient lighting for her to see the appellant. He stated that the victim reported the matter to her mother and the appellant dissuaded her from reporting to the police; that the fact that the appellant even cried imputes his guilt. Further that the victim's birth certificate placed her age at 8 years. He urged this Court to uphold the conviction and sentence and stated that the appellant's defence had also been considered.

As the first appellate court I have considered and evaluated the evidence in the trial court all the while bearing in mind that I did not have the benefit of observing the demeanour of the witnesses. I am satisfied that the charge against the appellant was proved beyond reasonable doubt and that he was properly convicted. This is because I believed the victim.

The victim who was eight years old at the material time vividly described what transpired on that day. She was home alone with the appellant as her mother had gone out to look for food. The house was a small single room and she was lying on a bed.

There were no lights electricity having gone off. The appellant removed his pants as well as hers and lay on her and using his genital organ made contact with her genital organs. She described this as "doing tabia mbaya". She screamed out in pain but nobody went to her rescue. She did not put on her pant after that and when her mother returned she asked her why she was not wearing her pant. She told her mother the appellant had removed it and then narrated what he had done to her. The mother was shell shocked and did not know what to do. In fact it was not until two weeks later that she took the child to hospital. Thereafter she did not report the matter to the police and it took the intervention of the Assistant Chief (PW3) to do so. The accused's defence that he was framed by the victim's mother because he refused to

take her to meet his forks cannot therefore be true. Indeed it is evident that she did all she could to cover up for him and would not have reported him were it not for the Assistant Chief.

Section 124 of the Evidence Act has a proviso that does away with the need for corroboration in sexual offences and it is enough if the court believes the victim and records the reason. Medical evidence is adduced to corroborate the evidence of the victim and it was therefore not necessary in this case.

That no medical evidence was tendered in this case therefore does not vitiate the guilty finding. In any event how would the prosecution have produced the medical evidence when the appellant had torn the P3 form into pieces. The trial magistrate found him guilty on the charge of indecent act and I agree with that finding because is not very clear from the evidence whether the appellant penetrated the complainant. I am however satisfied beyond reasonable doubt that the appellant committed an indecent act with the victim. An Indecent act is defined in Section 2 of the Sexual Offences Act as *"any contact between any part of the body of a person with the genital organs, breast or buttocks of another but does not include and act of penetration"*. The victim in this case stated that the appellant lay on top of her and made contact of her genital organ with his genital organ . That is an indecent act. I do not agree that the charge was defective but it could have been framed better but it definitely did not occasion prejudice to the appellant who was ably represented by Counsel at the trial. He understood from the right from the beginning that he was accused of committing an indecent act with the child. The evidence tendered proved the charge of indecent act beyond reasonable doubt. The trial magistrate considered the appellant's defence but did not find it convincing. I have stated that I do not find it credible either. In the premises there is no merit in this appeal and it is dismissed. The sentence which is the minimum provided by the law is also upheld.

Signed, dated and delivered at Kisumu this 31st day of May 2017

E. N. MAINA

JUDGE

<u>In the presence of</u>:-

Mr. Muia for the state

Miss Kagoya for the appellant (holding brief) for Mr. Okungu

Court Assistant – Serah Sidera

The accused Person