



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NO.65 OF 2016**

*(An Appeal arising out of the conviction and sentence of Hon. E. Michieka - SRM delivered on 11<sup>th</sup> February 2016 in Kikuyu SPM. S.O. Case No.6 of 2014)*

**ANTHONY MWATHI WANJA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Anthony Mwathi Wanja, was charged with the offence of **attempted defilement** contrary to **Section 9(1)(2)** of the **Sexual Offences Act**. The particulars of the offence were that on 19<sup>th</sup> of July 2014 along Uthiru-Kikuyu road in Kiambu County, the Appellant intentionally attempted to cause his penis to penetrate the vagina of S N K, 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 same **Act**. The particulars of the offence were that on the same date and in the same place, the Appellant intentionally touched the vagina of S N K, a child aged nine (9) years with his hands. When the Appellant was arraigned before the trial court, he pleaded not guilty to the charges. After full trial, he was convicted on the alternative charge of **committing an indecent act with a child** and sentenced to serve ten (10) years imprisonment. The Appellant 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 was aggrieved that his conviction was based on uncorroborated evidence of the complainant. He was also aggrieved that the trial magistrate failed to comply with the requirements of **Section 124** of the **Evidence Act**. Finally, the Appellant complained that the trial court erred in sentencing him without considering all mitigating factors. In his amended grounds of appeal filed without leave of court (this court will however consider them), the Appellant faulted the trial magistrate for convicting him yet the prosecution had not established its case to the required standard of proof beyond any reasonable doubt. He raised an issue regarding the lapse of time from the time the complainant made the report to the police to the time he was arrested. He also faulted the trial magistrate for failing to find that the prosecution carried out shoddy investigations before reaching the decision to charge him with the offence. The Appellant also took issue with the fact that the complainant recorded her statement with the police after he was arrested. He faulted the trial magistrate for failing to comply with the provisions of **Sections 169 & 198** of the **Criminal Procedure Code**. Finally, he was concerned that the prosecution's medical evidence was unreliable as the complainant was medically examined twelve (12) days after the incident. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, the Appellant presented to the court written submission in support of his appeal. He further made oral submission in support of his case. A response to the Appellant's submission was made by the Learned State Counsel, Ms. Sigei. The Appellant made submission to the effect that prosecution's case was a fabrication to falsely implicate him with the offence. He argued that it was highly improbable that the complainant and her mother would wait for twelve (12) days to have him arrested when they knew where to find him if indeed he had committed the offence. He further argued that it was even more improbable that they would wait that long to record their statements with the police. According to the Appellant, the inference to draw from such delay is that there was no evidence to implicate him with the alleged offence.

He further argued that the complainant's version of events was not reasonably true for the reason that it was improbable that he would openly sexually assault the complainant in broad daylight and in the presence of other children and within the reach of teachers inside the bus and not attract their attention. He submitted that it was also unlikely that complainant would allow him to openly sexually assault her and not raise alarm. The Appellant contended that the fact that none of the children who sat next to the complainant was called to shed more light on the incident impacted negatively on the prosecution's case. He complained that PW5, the investigation officer conducted shoddy investigations on the case as she only relied on the complainant's statement to prefer the charge against him without undertaking independent investigations. In concluding his submission, the Appellant took issue with the fact that the trial magistrate did not give any reasons why he found that the prosecution had established its case against him to the required standard of proof nor did he show which evidence he considered and found to support the prosecution's case.

In response to the Appellant's submission, the Learned State Counsel opposed the appeal. She submitted that the prosecution had established, to the required standard of proof, that indeed the Appellant committed an indecent act on the complainant. She further submitted that the age of the complainant was satisfactorily established. Regarding the identification of the Appellant, the Learned State Counsel submitted that the complainant pointed the Appellant out to PW2 and PW4 as the person who had sexually assaulted her. She reiterated that the trial Magistrate had satisfied the requirements of **Section 124** of the **Evidence Act** before reaching the decision to convict the Appellant. It is on the basis of the above facts that the State urged the court to find the appeal without merit and dismiss it.

The facts of the case as presented by the prosecution witnesses are straight forward. The complainant in this case is PW1, S N. At that time of the trial, the complainant was said to have been aged nine (9) years old and was a pupil at Damacrest School. Her age was confirmed through her birth certificate which was produced into evidence as **Prosecution's Exhibits No. 1**. The birth certificate indicated that she was born on 25<sup>th</sup> March 2005. The prosecution's case is that on the material day of 19<sup>th</sup> July 2014, pupils from the complainant's school visited [particulars withheld] aboard a bus christened "**Spike**". The conductor of the bus was the Appellant. The complainant was amongst the pupils who went for the trip. She testified that on the day in question, she sat next to the window as they returned from the trip. Two other pupils sat next to her on the same seat. It was the complainant's testimony that when they reached Uthiru area on their way back from the trip, the Appellant asked her to offer him her seat but she declined. She testified that the Appellant therefore forced her out of the seat and she in turn sat on his lap. She testified that the Appellant then began to touch her breasts after she sat on him and told her not to tell anyone. He then progressed to touch her private parts with his hands. She testified that she asked the Appellant to stop when she began to feel his penis rubbing against her. They reached the school and she alighted from the bus. During her cross examination by the Appellant, the complainant confirmed that a teacher had accompanied them during the trip and that he sat at the back of the bus when the incident happened.

PW2, M W, the complainant's mother was at the school waiting for the complainant to return from the trip. She testified that the complainant appeared disturbed when she alighted from the bus. She testified that the complainant disclosed to her that the Appellant had touched her breasts and private parts inside the bus. PW2 therefore reported the matter to PW4 P N, the teacher who had accompanied the pupils on the trip. PW4 testified that the complainant told him the Appellant had touched her vagina when she sat on him. He testified that he called the Appellant and the driver of the bus and asked the complainant to repeat what she had told him in their presence and she did. The incident was thereafter reported to Kikuyu

Police Station. The complainant was later taken to Wangige Sub-County Hospital for medical examination.

At the hospital, the complainant was examined by PW3 Shadrack Ngatia, a Clinical Officer on 31<sup>st</sup> July 2014. PW3 testified that the complainant presented herself at the hospital with a history of having been sexually assaulted. He testified that he carried out a vaginal examination on the complainant and found nothing remarkable. He filled his findings on a P3 Form which he produced into evidence as **Prosecution's Exhibit No.2**. PW5 Corporal Pamela Karimi was assigned to investigate the case. After concluding her investigations, PW5 concluded that a case had been established against the Appellant and charged the Appellant with the offence. When the Appellant was put on his defence, he denied committing the offences. He testified that the reason that the complainant sat on his lap on the day in question was because they were stopped by the police on their way back and he did not want them to find the complainant standing inside the bus.

This court has carefully evaluated the evidence adduced by the prosecution witnesses before the trial court. It has also considered the defence that was put forward by the Appellant. The court has also considered the grounds of appeal that the Appellant relies on in support of his appeal and the submissions made by both the Appellant and the State. This being a first appeal, it is the duty of this court to subject the evidence adduced before the trial court to a fresh evaluation with the objective of ascertaining whether the conviction of the Appellant ought to stand. In doing so, this court must take cognizance of the fact that it neither heard nor saw the witnesses as they testified and must therefore give due regard in that respect (see **Okeno –vs- Republic (1972) EA 32**). The issue for determination by this court is whether the Appellant was correctly convicted and sentenced on the charge of **committing an indecent act with a child** contrary to Section **11(1)** of the **Penal Code**.

It was the prosecution's case that the Appellant was a conductor in a bus that had transported pupils from [particulars withheld] School on a trip to [particulars withheld]. On their way back from the trip, the complainant sat with two other pupils on the same seat in the bus. She sat next to the window. The pupils were accompanied by a teacher, PW4 who sat at the back of the bus. The complainant testified that when they reached Uthiru area, the Appellant asked her to give him her seat but she declined. He therefore forced her out of the seat and she in turn sat on his lap. She testified that Appellant touched her breasts as she sat on his lap and asked her not to tell anyone. He also touched her vagina. She asked him to stop when she felt his penis rubbing against her. When they arrived at the school, she alighted from the bus and revealed what had happened to her mother, PW2, who had been waiting for her at the school. The incident was reported to PW4 who confirmed that the complainant repeated her allegations in the presence of both the Appellant and the bus driver. The matter was then reported to Kikuyu Police Station. The complainant was taken to Wangige Sub-County Hospital for medical examination. She was examined by PW3 Shadrack Ngatia, a Clinical Officer on 31<sup>st</sup> July 2014. PW3 examined her genitalia and found nothing remarkable. He filled his findings on a P3 Form which he produced into evidence as **Prosecution's Exhibit No. 2**.

In his analysis of the evidence adduced by the prosecution, the trial magistrate found that the prosecution had established a case against the Appellant. The trial magistrate accepted the evidence adduced by the prosecution which according to him was overwhelming. He believed the complainant's evidence. He was satisfied that the Appellant had been positively identified by the complainant and therefore proceeded to convict the Appellant on the alternative count of indecent assault.

In his judgment, the learned Senior Resident Magistrate found as follows:

***"I am not convinced that the case laid out by the prosecution proves that the accused attempted to defile the complainant. I hereby return a verdict of not guilty and acquit the accused of count one under Section 215 of the CPC.***

***Whether the accused committed an indecent act with a child?***

***The evidence of the complainant was that the accused made her sit on his lap. He then***

*proceeded to touch her breasts and touch her vagina. She could feel his erect penis against her as she sat on him. The complainant's mother and PW3 confirmed that she looked disturbed after she alighted from the bus. She told them what the accused had done and pointed at him. There was no eye witness that was called to testify despite the fact that the complainant stated in her evidence that she was sitting with 2 other pupils when the accused told her to sit on his lap. However, the evidence of the complainant though not corroborated by independent witness was consistent. I will warn myself of the danger of relying on the evidence of a sole witness but the evidence was overwhelming. The complainant had never met the accused before, she had no reason to lie and I formed the opinion that she was telling the truth. I believe her. Her mother confirmed that she informed her soon after she disembarked from the bus and repeated her allegations in front of the accused, the driver and the teacher. The accused in his defence says he was shocked that he was charged with the offence. He admitted that their bus transported the children on the material day and when he was arrested. All the witnesses confirmed that an issue arose when the children were dropped off which the accused curiously omitted in his evidence. I formed the opinion that he was not truthful. His evidence does not controvert that of the prosecution. The complainant's age was proved to be 9 years by the birth certificate and I so find. The upshot is that I find the accused misconducted himself with a child in a manner that was indecent by touching her vagina. I hereby enter a finding of guilty as against the accused person in respect of count two and convict him accordingly under Section 215 of the Criminal Procedure Code."*

The complainant testified that she was defiled when she was with other children. None of the children was called to give evidence in the case. **Section 124** of the **Evidence Act** allows the court to admit the evidence of a child in a sexual assault case without the necessity of corroboration provided that the court is persuaded that the complainant is telling the truth.

In the present appeal, the trial magistrate was of the view that the complainant was truthful. According to him, the complainant had no reason to lie as she had not met the Appellant before. He believed that the complainant was telling the truth more so because she disclosed the incident to her mother immediately she disembarked from the bus and also repeated her allegations in front of the accused, the driver and the teacher. In his defence, the Appellant denied the allegations made against him by the Appellant. He argued that the complainant's version of events was not reasonably possibly true for reason that it was improbable that he would openly sexually assault the complainant in broad daylight and in the presence of witnesses and not draw their attention. He also argued that it was even more improbable that complainant would allow him to openly sexually assault her and not raise alarm. According to the Appellant, the fact that none of the other children were called to give evidence in the case impacted negatively on the prosecution's case.

This court agrees with the Appellant in this regard. Although **Section 124** of the **Evidence Act** allows the court to admit the evidence of a child in a sexual assault case without the necessity of corroboration, this is one of those cases that corroboration, from the circumstances in which the alleged sexual assault is said to have occurred was necessary. There is no reason given why the children who sat next to the complainant could not be called as witnesses to shed light on the incident. Their evidence would have lent credence or otherwise to the prosecution's case. The complainant's behaviour during the alleged sexual assault was curious in that she did not raise alarm or alerted her teachers and other pupils despite the fact that they were in close proximity. It was improbable that the incident took place without the other pupils seeing it. The prosecution's case as presented cannot therefore be said to have been established to the required standard of proof beyond any reasonable doubt.

Taking into consideration the totality of the facts of this case, this court finds that the grounds of appeal put forward by the Appellant challenging his conviction have merit. Reasonable doubt was raised in the evidence adduced by the prosecution witnesses and the defence offered by the appellant. The doubts are resolved in favour of the Appellant. In the circumstances therefore, this court holds that the prosecution failed to establish the alternative charge of **committing an indecent act** contrary to **Section 11(1)** of the **Sexual Offences Act** to the required standard of proof beyond any reasonable doubt. The Appellant's appeal has merit and is hereby allowed. The Appellant's conviction is quashed. The custodial sentence

imposed on the Appellant is set aside. The Appellant is ordered set at liberty and released from prison forthwith unless otherwise lawfully held. It is so ordered.

**DATED AT NAIROBI THIS 16<sup>TH</sup> DAY OF JUNE 2017**

**L. KIMARU**

**JUDGE**