REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL 18 OF 2017

ANTHONY MUSYIMI MUTETI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal arising out of the judgment and sentence in Criminal Case No. 194 of 2014 at the Chief Magistrate's Court at Machakos delivered on 1st December 2016 by Hon. C.K. Kisiangani RM)

JUDGMENT

The Appeal

The Appellant was convicted of the offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act in a judgment delivered on 1st December 2016 and sentenced to serve ten years imprisonment on 10th February 2017 for. The Appellant had been charged with the offence of defilement of a child Contrary to Section 8 (1) read with Section 8(2) of the Sexual Offences Act, Act No. 3 of 2006. The particulars are that on 25th day of January, 2014 at [particulars withheld] in Machakos County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of C.W.W a child aged 8 years.

In the alternative, the Appellant was charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act, particulars being that on 25th day of January, 2014 at [particulars withheld] in Machakos County, he intentionally and unlawfully touched the thighs of C.W.W a child aged 8 years. The trial magistrate found that while the main charge had not been proved, the alternative charge was proved beyond reasonable doubt.

The Appellant is aggrieved by the judgment of the trial magistrate, and has preferred this appeal against the conviction and sentence. The grounds of appeal are in a Memorandum of Appeal on 23rd February 2016, filed by his Advocate, Ambrose Mulandi Advocate, who also filed submissions dated 2nd June 2017. The grounds raised by the Appellant are as follows:

a) That the Learned Trial Magistrate erred in law and in fact in convicting the Appellant for the offence charged when there was no sufficient evidence to prove the charge of indecent act.

b) That the Learned Magistrate erred in law and in fact in convicting the Appellant when crucial ingredients of the offence were never established and the Prosecution did not discharge their duty and prove the case beyond the required standard.

c) That the Learned Magistrate erred in law and in fact in convicting the appellant when there was no corroboration to support the Count of Indecent Act.

d) That the Learned Magistrate erred in law and in fact when she requested the Accused person to produce a School leaving Certificate so as to determine his age two months after judgment had been passed thus putting the burden of proof on the Accused person.

e) That the Learned Magistrate erred in law and in fact when she sentenced the Accused to ten (I0) years imprisonment without taking into account the number of days the accused had spent in custody pending sentencing.

f) That the Learned Magistrate erred in law and in fact by not considering the contradiction s in the number of age of the Accused as reported by both the probation officer and the School leaving certificate.

g) THAT the Learned Magistrate erred in law and in act in not considering the report of the probation officer while sentencing the accused person despite requesting the same to be filed.

h) That the Learned Magistrate erred in law and in fact by failing to consider that the Accused was a first time offender and therefore he required a lenient sentence. ·

i) That the sentence of the Court is manifestly excessive considering all the circumstances.

The Appellant submitted that the alternative charge of indecent act could not sustain a conviction as the definition of an indecent Act under in Section 2 of the Sexual Offences Act does not include the word "thighs" which was the one in the charge sheet, and therefore the fundamental ingredients for an offence of indecent Act with a child as anticipated under Section 11(1) of the Sexual offences Act were never met.

Furthermore, that the trial Court did not allow the Appellant's Advocate to cross examine the complainant. It was urged that the trial Court had conducted *voire dire* examinations and established that the complainant was knowledgeable and that she was able to answer questions, and she should therefore have been cross examined by the Appellants Advocate. Reliance was placed on the decision by the Court of Appeal in **Mark Oiruri Mose vs Republic Kisumu Criminal Appeal No. 295 of 2012** for the position that the conviction should thus be quashed.

In addition that the trial Court had erred in law by ordering the Appellant to produce his birth certificate long after delivery of judgment, and that the Court ought to have determined the issue of age before the trial commenced so that it could be sure that the Accused can stand trial as an adult. Lastly, that the sentence issued to the Appellant was excessively high given the fact that there were grey areas which the Court did not clarify.

Ms Mogoi Lillian, the learned prosecution counsel, also filed written submissions dated 25th July 2017. It was indicated therein that the Prosecution would not be respond to the grounds as raised or submitted on in the instant appeal, due to a noticeable normality on the face of the proceedings of the trial Court. The learned counsel explained that from the record, the trial Court conducted *voire dire* examinations on PW2, who was the complainant, and PW3 a key witness who were both minors. Further that after the examination, it made a finding that the two possessed reasonable knowledge hence could testify. It however directed that they give unsworn testimony since they both did not understand the meaning of an oath.

However, that after the unsworn testimony of PW2 and PW3, the Appellant or his advocate were not given a chance to cross-examine the two in contravention of the appellant's rights as an accused person. From the record, it was also not indicated whether the Appellant was given a chance to cross-examine the two witnesses but opted to remain silent. Reliance was in this regard placed on Section 302 of the Criminal Procedure Code which provides that the witnesses called for the prosecution shall be subject to cross examination by the accused person or his advocate, and to re-examination by the advocate for the prosecution.

In view of the foregoing, the Prosecution prayed for a re-trial in view of the fact that the Appellant has just been in custody for only 5 months having been sentenced on 10th February, 2017 and that he is not likely to suffer any prejudice. Reliance was placed on the decision in **S K K vs Republic [2016) eKLR** in support of the request for re-trial . It was also submitted that that the evidence in respect of this matter especially the evidence of PW2 (the complainant) is sufficient, overwhelming and it would be in the interest of justice that the victim in this matter gets her justice too .

The Determination

As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

Four witnesses testified for the prosecution. PW1 who was the complainant's mother, PW2 who was a minor and the complainant, and PW3 who was also a minor and the complainant's sister, testified as to the events of 25th January 2014 when the alleged offence occurred. PW4 was Dr. John Mutunga who produced the P3 form filled on 6th February 2014 with the result of the complainant's medical examination. The Appellant gave sworn testimony in his defence and did not call any witnesses.

Upon consideration of the grounds of appeal, submissions made and evidence in the trial Court, I find that the substantive issues raised in this appeal are firstly, whether the Appellant's conviction for the offence of committing an indecent act with a child was based on a defective charge and proceedings; secondly, if not, whether the Appellant was convicted on the basis of sufficient evidence; and lastly, whether the sentence meted on the Appellant was excessive.

The offence of committing an indecent act with a child is provided in section 11 (I) of the Sexual Offences Act as follows:

> "**(1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years."**

An indecent act is further defined in section 2 of the Sexual Offences Act as

> **"indecent act" means 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;**

The Appellant's argument is that the charge sheet indicated that he intentionally and unlawfully touched the thighs of C.W.W a child aged 8 years, yet the ingredients of the of the offence requires that the parts to be touched should be the genital organs, breasts or buttocks.

The Court of Appeal sitting at Nairobi held in **Peter Ngure Mwangi v Republic, [2014] eKLR** that there are two limbs to the issue of a defective charge sheet. The first one deals with the issue as to whether the charge sheet is indeed defective, whereas the second one deals with the issue as to whether even if a charge sheet is defective, that defect is curable or not.

The first question as to whether a charge is defective is to be examined in light of the requirements of the law as regards the framing of charges as stated in section 134 of the Criminal Procedure Code which provides as follows:

> **"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."**

In addition it was held in **Sigilani vs Republic, (2004) 2 KLR, 480** that:

> ***"The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence."***

In this appeal I am in agreement that there was a defect in the charge sheet for the alternative charge of indecent act with a child for the reasons advanced by the Appellant and in light of the definition of the offence of an indecent act reproduced in the foregoing. This finding notwithstanding, I still need to address the second limb as to whether the irregularity in the charge sheet is curable. Section 382 of the Criminal Procedure Code provides as follows in this regard:

> **"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."**

In the instant appeal, I note that the evidence adduced in the trial Court by PW2 was that the Appellant inserted his stick or thing in between her legs which constitutes the offence of an indecent act, and therefore no prejudice was caused to the Appellant, and the error in the charge sheet is therefore one that is curable under section 382 of the Civil Procedure Code.

On the issue of the defective proceedings, I have perused the trial Court record, and note that the proceedings on 24th July 2014 during the examination of PW2 and PW3 who were minors were as described by the prosecution in its submissions. The two witnesses were not cross-examined, and there is no indication on the record if the Appellant declined to ask PW2 and PW3 any questions in cross-examination or if he was called upon by the trial Court to cross-examine the said witnesses.

It was incumbent upon the trial court to inform the Appellant of the right of cross-examination, and if the Appellant did not have any question to put to the witness, it should have recorded that fact. Thus, the failure by the trial court to do so was an error. It is also my finding that this error that prejudiced the Appellant as the evidence of PW2 who was also the complainant was central in the Appellant's conviction.

In addition, the issue of cross-examination of children of tender years who give unsworn testimony was settled *by the Court of Appeal in* **Nicholas Mutula Wambua v Republic, MSA CRA No. 373 of 2006** *where it quoted with approval the decision of the Supreme Court of Uganda in* **Sula v Uganda [2001] 2 EA 556** *that:*

> ***"The second point we wish to discuss is whether or not a child witness, who gives evidence not on oath is liable to cross-examination. There appears to be a widespread misconception that a child witness who is allowed to give evidence without taking oath because of immature age, should not or cannot be cross-examined.... It would appear that misconception arises from a view that because accused persons are not cross-examined whenever they make unsworn statements in the defence, child witnesses who did not take the oath should be treated in the same way. Such a view is oblivious of the peculiar protection given to an accused person in the form of a right to make an unsworn statement with no liability to be cross-examined".***

I am of the view that the ground of failure to afford the Appellant an opportunity to cross-examine PW2 and PW3 is on its own sufficient to dispose of the appeal. In addition, it will not be prudent for this Court to proceed with a determination of the outstanding issues, as the same will entail and evaluation of the evidence adduced in the trial Court, which would be prejudicial in the event that a retrial is ordered.

The only outstanding issue therefore is whether I should acquit the Appellant or order a retrial. The principles governing whether or not a retrial should be ordered were summarized the case of **Muiruri vs. Republic (2003) KLR 552**, the court considered a similar situation and held as follows, inter alia:

> **"Generally whether a retrial should be ordered or not must depend on the circumstances of the case. It will only be made where the interest of justice require it and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely the prosecution making or not."**

In this appeal the victim was a minor then aged 8 years, and the offence took place in 2014, and it would therefore not be difficult to secure the witnesses. The Appellant was also released from custody on cash bail during trial and on bond pending appeal, and sentenced in 10th February 2017, and has therefore not served a substantial term of the sentence. Balancing all the interests, I am of the view that justice demands that the case be re-heard in the trial court.

I accordingly allow the appeal, and quash the conviction and sentence of the Appellant by the trial Court. I direct that the Appellant shall be retried on the same charge before a Magistrate of competent jurisdiction other than Hon. C. K. Kisiangani, and for that purpose he shall remain in custody and shall be taken before a Senior Resident Magistrate at the Machakos Chief Magistrate's Courts, on **3rd January 2018** to plead to fresh charges.

It is so ordered.

DATED AND SIGNED AT MACHAKOS THIS 20TH DAY OF DECEMBER 2017.

P. NYAMWEYA

JUDGE