REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 300 OF 2011

SAMUEL GICHOBO NG'ENDO……..……..APPELLANT

VERSUS

REPUBLIC……..……....…….RESPONDENT

(An appeal from the judgment of Hon. C. Oluoch (Mrs.), SRM, Senior Resident Magistrate in the Chief Magistrate's Court at Kiambu in Criminal Case Number 1131 of 2010 delivered on 7th June, 2011.)

JUDGMENT

The Appellant was charged with two counts of offences of defilement contrary to Section 8(1) of the Sexual Offences Act. The particulars of the charge in the first count were that on 9th May 2010 in Kiambu District within Central Province, the Appellant committed an act with his genital organ, namely his penis, which caused penetration into the vagina of A.W.(identity concealed) a girl aged 61/2 years. He also faced an alternative charge of committing an indecent act contrary to Section 11(1) of Sexual Offences Act.

The particulars to the second count were that on 19th May 2010 in Kiambu District within Central Province, he committed an act with his genital organ namely penis which caused penetration into the genital organs namely vagina of L.W. (identity concealed), a girl aged 6 years and 8 months. In the alternative he was charged with committing an indecent act contrary to Section 11(1) of the Sexual Offences Act.

On the first count, the Appellant, was convicted on the on the alternative charge of indecent act and sentenced to ten (10) years' imprisonment in accordance with Section 11(1) of the Sexual Offences Act, while on the second count, he was convicted of the offence of defilement and sentenced to serve life imprisonment in accordance with Section 8(2) of the Sexual Offences Act. The trial court ordered the sentences to run concurrently.

Dissatisfied with the decision of the trial court, the Appellant appealed against the sentence and conviction. From the Petition of Appeal, the grounds relied upon in the appeal are mainly three-fold:

a) That the charges were not proved beyond reasonable doubt.

b) That the Appellant was not accorded a fair trial.

c) The sentence was manifestly excessive.

Both the Appellant and the Respondent filed their respective written submissions. The Appellant submitted that there were material contradictions in the evidence of PW2 and PW4 and further that the medical evidence adduced did not support the charges. He also contended that the alternative charge cited in the conviction in the first count did not exist. The Appellant also cited failure by the prosecution to call critical witnesses. He submitted that Section 211 as read with Section 210 of the Criminal Procedure Code was not complied with. He urged this court to quash the conviction and set aside the sentence.

Through its written submissions, the Respondent submitted that the Appellant was properly convicted and sentenced as there was overwhelming evidence to support the case. The Respondent also submitted that the contradictions raised by the Appellant were a result of an apparent misreading of the facts in the record. The Respondent asked the court to dismiss the appeal and uphold the conviction and sentence.

However, when addressing this court during the highlighting of submissions the prosecution counsel, Miss. Njuguna, made an application to withdraw the written submissions and conceded to the appeal. The basis for this concession was that the Appellant was convicted for a non-existent charge that he did not plead to, and further that the medical evidence did not support the charges which fact was supported by other contradictions.

This being a first appeal, the court is under an obligation to weigh the evidence as a whole and reach its own independent conclusion. This was set out in the case of ***Okeno Vs Republic*** **(1972) EA 32 where the court stated:**

> ***"An Appellant on first appeal is entitled to expect the evidence as a whole to be submitted to fresh and exhaustive examination (Dinkerrai Ramkrishan Pandya Vs Republic (1957) EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion (Shanlal M Ruwala Versus Republic (1957) EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions;. It must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses''.***

From the consideration of the evidence and submissions of both parties, the main issues for consideration are: first, whether the charges were proved beyond reasonable doubt; secondly, whether the Appellant was accorded a fair trial and finally, whether the sentence meted out was appropriate.

I first delve into the question of whether the provisions of Section 211 of Criminal Procedure Code were properly dealt with. This Section requires that*:*

> ***"(1) At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any)."***

From the record it is clear that on 22nd March, 2011 after considering the evidence adduced by the prosecution the court was satisfied that a *prima facie* case had been made to warrant the accused to be put to his defence in both counts. The accused was not in court contrary to his bail terms prompting the court to issue a warrant for his arrest.

On the 24th of March, 2011 the accused appeared in court and gave the reason for his non-attendance. His explanation was found acceptable and the trial court proceeded to explain Section 211 of the Criminal

Procedure Code. Having verified from the record of proceedings, this court is satisfied that the provisions of Section 211 were complied with and therefore there was no violation of the Appellant's constitutional rights to a fair trial.

The other issue that was raised by the Appellant and conceded to by the Respondent was that the Appellant was convicted of a charge to which he didn't plead. This issue arose from the judgment of the trial court where the Appellant was convicted of the alternative charge under the first count, while he was convicted of the main charge of defilement in the second count.

A reading of the charge sheet that forms part of the record of appeal shows that in the first count, the Appellant was charged with defilement of A.W., a girl aged $6^{1/2}$ years and an alternative charge of committing an indecent act to a child. In the second count he was charged with the offence of defilement of L.W., a girl aged 6 years and 8 months with an alternative charge of indecent act. The charges in the first count are in respect of A.W, whilst the second count concerns L.W.

The proceedings make reference to the alternative charge in respect of the first and not the second count. It shows that the Appellant pleaded to the charges as follows:

> ***Count 1 – it is not true***
>
> ***Alternative -it is not true***
>
> ***Count 2 -it is not true***

The trial court proceeded to convict the Appellant on the alternative count of indecent act on the first count and defilement in the second count. First, it would appear that the concern by the Appellant as conceded by the learned prosecution counsel, arose from the seeming non-existence from the charge sheet of an alternative charge to the first count in respect of A.W. However, an examination of the record shows that the original charge sheet as contained in the proceedings from which the record of appeal originates, contained an overleaf with the alternative charge of indecent act in the first count.

Secondly, it also appears that the trial court erred by interchanging the sequence of charges as they appear in the charge sheet. Thus, the content of the judgment refers to L.W. as the complainant in count 1 while count 2 is referred to in respect of A.W. Nevertheless, I make an observation that the interchange did not occasion any change in the content and particulars in each charge. Therefore, no prejudice has been occasioned to the Appellant. All along the Appellant was facing the charges of defilement, the particulars of which were well set out.

From the above citation, it cannot be therefore, deduced that the Appellant pleaded to non-existent charges. It is not in doubt that the Appellant was charged with the offence of defilement in each count. It is only upon consideration of the evidence that the trial court found that the evidence in the first count established the lesser offence of indecent act while the second count of defilement was found to have been proven. I find therefore, that no prejudice has been occasioned to the Appellant. Therefore, the fact that a plea was not taken on the alternative charge in one of the counts does not of itself occasion a failure of justice. Whether or not there was an alternative charge to any of the counts, the court is nevertheless, within the law, to convict on a lesser charge based on the evidence presented in line with **Section 179** of the Criminal Procedure Code which provides that:

> ***‘(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.***
>
> ***(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.’***

This finding is buttressed by the provisions **Section 382** of the Criminal Procedure Code that:

> ***"Subject to the provisions herein before 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."***

The next issue is whether the charges were proved to the required standard. The Appellant submitted that the evidence did not support the charges and further that there were contradictions in the prosecution evidence.

The main evidence relied upon by the prosecution was the evidence of the complainants and the medical evidence. The two children, L.W., and A.W., testified as PW1 and PW3 respectively. The Appellant in his defence stated that he did not understand the charges, and added that he did not commit the offence.

PW1 and PW3 were together at the material time. They both stated that the Appellant gave them money to buy sweets. He took them to his house where he proceeded to defile them. The two children were taken through a *voire dire* examination after which the trial court concluded that they did not appreciate the solemnity of an oath and therefore gave unsworn testimony. Even though of young age, the complainants were consistent. However, I must consider too the medical evidence. PW5, Dr. Mitahi Sylvia of Kiambu District Hospital produced the P3 Form in respect of PW3 that was prepared and signed by Doctor. Njoroge on 14th July 2010. The report indicated that the hymen was intact, while there were bruises around the vaginal area. PW5 also produced another P3 Form in respect of PW1 which was prepared by Doctor. Ndolo. The report indicated that there was no bruising and the hymen was intact.

From the accounts by PW1 and PW2, the Appellant was well-known to them. They referred to the Appellant by his name and positively identified him in court. Further, they described what happened on the material date. However, in order to prove the offence of defilement, one of the key ingredients is penetration of the genital organ. From the evidence, it is not certain that there was penetration. The medical evidence indicated that there were bruises around the vaginal area in respect of PW3 while no bruises were noted with respect to PW1. I am persuaded that both minors were speaking the truth when they testified that the Appellant undressed them, and that there was contact between his genital organ with the genital organs of the complainants. Their accounts were supported by the testimonies of PW2, the mother to PW1 and PW4, who is PW3's mother, to whom the children first reported the incidents.

The proviso under **Section 124** of the Evidence Act, gives the court power to find a conviction on the sole unsworn testimony of a victim of a sexual offence where, for reasons to be given, the court believes that the victim is telling the truth. This Section provides that:

> ***"Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that Section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.***
>
> ***Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."***

I have no reason to doubt the account by the two children in this case.

From the evidence provided, I find that the evidence fell short of proving the charges of defilement but sufficiently proved the offences of indecent act in respect of both counts to the required standard. The offence of indecent act with a child is provided for under **Section 11(1)** of the Sexual Offences Act as follows;

> ***"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."***
>
> **Section 2 on the other hand** defines indecent act as:
>
> ***"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."***

Effectively, find the Appellant guilty of the alternative counts of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act and I convict accordingly**.**

The last issue is with respect to the sentence. According to Section 11(1) of the Sexual Offences Act, the sentence for the offence of indecent act with a child is an imprisonment term of not less than 10 years. The complainants in this case, PW1 and PW3 were minors. According to the charge sheet, PW1 was 6 years and 8 months old whilst PW3 was 61/2 years old. Their age was established through the production of their health cards as exhibits P3 and P4 by Police Constable Caroline Mitia. I accordingly sentence him to serve ten years imprisonment in respect of both counts.

The remaining issue is whether the sentences should be served concurrently or consecutively. It is this court's opinion that the Appellant shall serve 10 years for each of the counts. These sentences shall then run consecutively from the date of sentencing by the trial court.

DATED and **DELIVERED** at **NAIROBI** this **22nd** day of **February,** 2016.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Mr. Karoki ***for the Appellant***

2. M/s Wario ***for the Respondent***