REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 78 OF 2015

JACINTER AKOTH...APPELLANT

-VERSUS-

REPUBLIC ....RESPONDENT

(Appeal arising from the judgment of M.M. WACHIRA, RM in Migori Chief Magistrate's Criminal Case No. 537 of 2015 delivered on 04/11/2015)

JUDGMENT

1. The Appellant herein, **JACINTER AKOTH,** was arraigned before the Chief Magistrate's Court at Migori in Criminal Case No. 537 of 2015 on 14/07/2015 and was charged with the offence of sexual assault contrary to Section 5(1)(a)(ii)(2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 12/07/2015 at [particulars withheld] Village in Migori County in the Republic of Kenya the Appellant unlawfully penetrated the vagina of D.A. with a stick manipulated by her.

2. She denied the charge and the trial was later on conducted. Judgment was delivered on 04/11/2015 where the Appellant was found guilty as charged, convicted and sentenced to 10 years imprisonment. The right of appeal was explained.

3. Being aggrieved by the said conviction and sentence, the Appellant preferred an appeal and raised several grounds challenging the conviction and sentence. The appeal was eventually heard where the Appellant tendered oral submissions. She contended that the prosecution's evidence was marred with contradictions and inconsistencies thereby making it unsafe to sustain a conviction. She also took issue with the evidence of the Doctor that the same did not support the charge.

4. The appeal was opposed. It was submitted that the prosecution evidence was water-tight and that the Appellant was properly convicted and sentenced.

5. As this is the Appellant's first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs R (2013)eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

6. I shall begin by looking at the law creating the offence of sexual assault. **Section 5(1)(a)(ii)** of the Sexual Offences Act, Chapter 62A of the Laws of Kenya provides that any person who unlawfully penetrates the genital organs of another person with an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes is

guilty of an offence termed as sexual assault. I have however noted that the charge was drafted as sexual offence contrary to Section 5(1)(a)(ii)(2) where sub-section 2 is the sentencing section. Whereas that issue was not raised in this appeal, I wish to briefly deal with it due to the need of having a proper charge before court upon which competent proceedings can sprout from. There is no section in the Sexual Offences Act known as Section 5(1)(a)(ii)(2). That was a clear misdirection of the section creating the offence. It hence appears that the proper charge ought to have been **Sexual Assault contrary to Section 5(1)(a)(ii) as read with Section 5(2) of the Sexual Offences Act**. It can however be seen that the intention of the drafters was clear and the defect in the charge sheet was minor and a purely technical one which did not prejudice the Appellant and there was no miscarriage or failure of justice. The Appellant understood the charge and fully participated in the proceedings up to tendering her defence. I will therefore call upon the provisions of **Section 382 of the Criminal Procedure Code Chapter 75 of the Laws of Kenya** to cure that defect. The charge was therefore not defective. (See the Court of Appeal judgment in ***Nyamai Musyoka versus Republic (2014) eKLR***).

7. Turning back to the law upon which the charge was based on, it seems that for the prosecution to successfully sustain a conviction in a charge of sexual assault there has to be evidence of penetration of the genital organ of one person by another person using an object either manipulated by that person or another one without any legal justification. Borrowing from the definition of 'penetration' in **Section 2** of the Sexual Offences Act, the 'penetration' contemplated under Section 5(1)(a)(ii) of the Sexual Offences Act would mean that:

> ***'it is the partial or complete insertion of an object either manipulated by that person or another person into the genital organ of another person.'***

8. It therefore means that the penetration need not be deep inside the genital organ of the victim but as so long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated. In this case the victim was a D.A., girl aged 15 years old and who testified on oath as PW1. (hereinafter referred to as **'PWI'**).

9. PW1 stated that as she was washing some clothes at a river in her [particulars withheld] village on 12/07/2015 at around 08:00a.m., the Appellant approached her and requested to go with her to the nearby bush so as to assist her to lift some firewood to the Appellant's head. PW1 obliged. As they reached the bush the Appellant instead pounced on PW1 and fell her on the ground accusing her of having an affair with her husband. She sat on her abdomen as PW1 faced upwards, removed her underpant and painfully inserted a stick into PW1's vagina. PW1 raised alarm and some people including fishermen came to her rescue and arrested the Appellant.

10. The evidence of PW1 was corroborated by PW2 one A.A., a minor also aged 15 years old. PW2 stated that she was at the river with PW1 on the fateful day when the Appellant came and asked PW1 to go and assist her lift some firewood to the Appellant's head in the nearby bush. The Appellant and PW1 then left leaving her at the river. After a short while, PW2 heard some screams from the bush and rushed to the direction of the screams. PW2 shouted and some three fishermen who were also at the river immediately came to the rescue of PW1. PW2 found PW1 bleeding from her private parts as the Appellant was carrying an underpant which was identified as PW1's. The fishermen arrested the Appellant and took her to the police together with PW1. PW2 then rushed to inform PW1's grandmother whom PW1 used to stay together.

11. PW1 was later on taken to hospital where she was examined. The medical personnel who examined PW1 about four hours after the ordeal partly recorded the observations in the treatment notebook as follows:

> ***'....there is slight bleeding from labia manora where there is evidence of stick prick..... No active bleeding.'***

The P3 Form which was filled in on 13/07/2013, that is one day after the alleged ordeal, indicates the probable type of weapon used as a stick and classified the injury as harm. It can therefore be safely

deduced that there was sufficient evidence to find that PW1's vagina was penetrated with a stick.

12. ***But was the Appellant the one behind the said penetration?***

Both PW1 and PW2 knew the Appellant well as they were all from the same village. Further the incident took place during daytime and no evidence was tendered to show that visibility was hindered in anyway. The Appellant did not deny that she was known by and also knew PW1. When PW1 raised alarm, it was PW2 who rushed the scene and saw the Appellant and PW1. The two had just left the river a short while ago leaving her behind. PW2 did not see any other person at the scene apart from the Appellant and PW1. However PW2 did not see the Appellant insert the stick in PW1's private parts. She was only told so later on by PW1.

13. This court notes that the although PW1 and PW2 alleged that the Appellant was at the river and left with PW1 into the bush, it is only the evidence of PW1 which tends to suggest that the Appellant inserted a stick into PW1's private parts. This Court is hence enjoined to treat that evidence with caution. The trial court had an opportunity of seeing the witnesses testify before it. It also noted their demeanors. When the court was analysing the evidence in its judgment it stated that it was convinced that the witnesses were truthful. This court has not been favored with any evidence to be able to find that the trial court erred in making that finding and as such that finding stands. This court therefore affirms the trial court's finding that it was the Appellant who inserted a stick into PW1's vagina.

14. As to whether the Appellant was justified in doing so, there is no evidence that the Appellant undertook the insertion on medical grounds or for purposes of professional hygiene. Infact the record reveals that the Appellant inserted the stick as proved since she suspected PW1 to have had an affair with her husband. The Appellant therefore knew that she was going to instead harm PW1 by inserting a stick in her private parts and was not truthful when she requested PW1 to accompany her to the nearby bush and assist her lift some firewood to her head. The Appellant hence intended to commit the offence well in advance and as the trial court observed the Appellant was possessed of sufficient criminal intent to commit the offence. There was therefore no legal justification on the part of the Appellant to insert a stick into PW1's vagina.

15. The upshot is that the offence was proved and that the Appellant was properly convicted. On sentencing, **Section 5(2) of the Sexual Offences Act** provides for a minimum sentence on conviction of 10 years old which sentence can be enhanced to life imprisonment. The sentencing court clearly stated and so granted the minimum sentence in law and the Appellant ought to be grateful that the prosecution did not appeal against that sentence.

16. Consequently the appeal has no merit and has to fail. It is hereby dismissed accordingly.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 28TH DAY OF APRIL 2016

A. C. MRIMA

JUDGE