REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO.13 OF 2014

BETWEEN

VINCENT WAFULA SIMIYU ………………....………………..APPELLANT

AND

REPUBLIC ……………………………………………………RESPONDENT

(Being an appeal from the conviction and sentence in Kakamega CMCR. Case No.9 of 2013 delivered by Hon. S.M. Shitubi CM on 06/02/2014)

J U D G M E N T

Introduction

1. The appellant was tried, found guilty and convicted of the offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No.3 of 2006. The particulars thereof being that on the 2nd day of February 2013 at [particulars withheld] village in Kakamega Central District within Western Province he unlawfully and intentionally touched [the] on breasts of M.K with his hand without her consent. Upon conviction, the appellant was sentenced to 10 years imprisonment as by law prescribed.

The Appeal

2. Being aggrieved by both conviction and sentence, the appellant filed his Petition of Appeal on 13/02/2014 in which he set out 8 complaints against the judgment of the learned trial Magistrate: That the charge sheet was defective, the age of the complainant was not ascertained and also that the evidence adduced against him was uncorroborated, fabricated, malicious and far-fetched. The appellant also complained that his constitutional rights under Chapter four of the Constitution were violated because he was not produced before Court within 24 hours of his arrest. It was the appellant's complaint that the trial Court rejected his defence for no good reason. The appellant prays that the appeal be allowed, conviction quashed and sentence of 10 years imprisonment set aside.

3. As this is a first appeal. This Court is under a duty to rehear the appellants case with a view to reaching its own conclusions in the matter, remembering however that it has no opportunity of seeing and hearing the witnesses who testified during the trial. In this regard, I am duly guided by the Court of Appeal decision in the case of **Ngui –vs- Republic [1984] KLR 729** where the Court stated, inter alia that "The first appellate Court must reconsider the evidence, evaluate it itself and draw its own conclusions in order to satisfy itself that there was no failure of justice it is not sufficient for it to merely scrutinize the evidence to see if there was some evidence to support the trial Courts' findings and conclusions." Also see **Okeno –vs- Republic [1972] EA 32**. I shall now proceed to reconsider and evaluate the evidence

afresh.

The Prosecution's Case

4. The Prosecution called 5 witnesses and from their testimonies the prosecution case is as follows: On 02/02/2013 at about 2p.m the complainant herein, M.K who testified as PW1 was sent by her father, A O to buy airtime (bamba) from the appellant's kiosk which was about 200 metres away. On arrival at the kiosk M.K found the rear door thereof open and appellant being present. M.K stretched out her hand to greet the appellant who had operated the kiosk for about 5 days, but instead of merely returning the greeting the appellant pulled M.K into the kiosk and closed the door behind them. He pulled her into the second room which he used as a bedroom. M.K screamed but the appellant warned her to keep quiet. The appellant then held her breasts.

5. In the meantime, Moses Amayi Alucho, PW3, was passing by the appellant's kiosk and could hear M.K.'s voice saying "leave me, leave me". PW3 rushed to inform A A PW2 who is father to M.K. The two of them rushed back to the kiosk and established that the cries of M.K. saying "leave me leave me" were still going on. They pushed the door open and they both entered with PW2 entering first. They found the appellant and M.K engaged in a struggle. They separated them and took them outside. The matter was reported to the village elder Samson Amayi (not called as a witness) and later to the nearby AP camp and later on to Kakamega Police Station. The report at Kakamega Police Station was received by Number 75104 Cpl Njuguna Kinuthia, PW5, who also investigated the case and subsequently charged the appellant. The police issued M.K with a P3 form and referred her to Kakamega Provincial General Hospital for examination and treatment.

6. Kennedy Njoya a clinical officer at the above stated hospital examined M.K during which examination he found that she had bruises on the neck posterioly swollen tender left occipital ……… and also had bruises on the right lower arm, posterioly . Accordingly to Kennedy Njoya who testified as PW4 the offence that was reported was attempted rape. PW4 also established that the hymen was not intact but with no present signs of sexual activity. PW4 also concluded that a blunt object was the probable weapon used to inflict the injuries found on M.K.

The Defence Case

7. The appellant testified under oath as DW1 and he also called a witness. He denied committing the offence. He stated that he was arrested for no good reason at about 5.00pm on the material day and beaten by members of the public before being taken to Kakamega Police Station. That on the following day PW2 tried to extort some kshs.20,000/= from him as a way of letting him off the hook. When he failed to produce the money, he was charged with the offence. During cross examination the appellant stated that he had no grudge with PW2 and that OW2 had therefore no reason to manufacture a case against him.

8. DW2 was Christopher Mwanga Atela who testified that he had known the appellant for a year before the day in question. He supported the appellant's contention that there were attempts by PW2 to have the matter resolved out of Court but that the OCS, Kakamega Police Station overruled them. He stated during cross examination that PW2 wanted to be refunded the cost of hospital treatment and transport.

The Law

9. Crimes committed under the SOA No.3 of 2006 carry strict offences depending on the age of the child. Section 2 of the SOA defines "child" as having the meaning assigned thereto in the Childrens Act, No.8 of 2001. Section 2 of the Childrens Act defines "child" as "any human being under the age of 18 years". This therefore means that any charge under SOA must of necessity specify the age of the victim for purposes of sentencing. It must be established by evidence that the victim of a sexual offence falls within the meaning of "child" as defined in the Children's Act, 2001.

Section 2 of the SOA also defines "indecent act" to mean "an unlawful and 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) ……………………..

Analysis and Determination

10. After carefully reconsidering and evaluating the evidence on record, and after carefully considering the judgment of the learned trial Magistrate as well as the appellant’s complaints as set out in the Petition of appeal the issue that arises for determination is whether the prosecution proved its case against the appellant beyond any reasonable doubt; namely whether it is true that the appellant touched M.K’s breasts and whether it was proved that M.K was a child within the meaning of the Act.

11. Starting with the issue of whether the prosecution proved that M.K was a child within the meaning of the Act, I am of the considered view that the age of the complainant was not proved. Counsel for the respondent submitted that M.K’s age was proved through the testimony of PW2, and that M.K also gave her age. PW2 told the Court that M.K was 16 years old while M.K herself stated that she was 17 years old. After the testimony of PW2, who had told the Court that there was a birth certificate for M.K, the prosecutor informed the Court that he could be recalling PW2 to identify the birth certificate. That was never done until the prosecution closed its case. Although the P3 form was produced – Pexh 1 – that document is not a document in support of proof of age. In the circumstances, it is not clear to this Court whether M.KI was a child or an adult, and if a child, what her actual age was. For the above reasons, I do find and hold that M.K’s age was not established by the prosecution.

12. The next issue is whether the appellant touched M.K’s breasts. It is not lost to this Court that such an act is difficult to prove, and especially in view of the fact that there was no eye witness. But as rightly stated by the learned trial magistrate, M.KI’s evidence on the matter would be sufficient and would require no corroboration if the trial Court was satisfied that the child was telling the truth. In her judgment, the learned trial Magistrate stated in part, “This is evidence of a single witness……….It is admissible under Section 124 of the Evidence Act. However, I have to warn myself of the possibility. That it could be lies, the question is whether the complainant can be believed. She gave a sworn statement. She struck me as an honest witness. Her testimony remained consistent and unshaken”. Those are the words of the trial Magistrate who saw and heard M.K and was satisfied that she spoke the truth. I have no reason to think otherwise. The conclusion I have reached is that the appellant touched M.K’s breasts.

13. Another issue raised by the appellant is that the learned trial Magistrate rejected his defence and that of his witness. I have myself carefully read through the judgment of the learned trial Magistrate and find that the appellant’s complaint is unfounded.The learned trial Magistrate clearly considered the defence when she said “there is nothing in the defence that can create any doubt on my mind.” Even if it was true that the learned trial Magistrate had not considered the appellant’s defence, I have myself done so and find nothing in the said defence that shakes the prosecution evidence as to what happened on the day in question.

14. Regarding the alleged defect in the charge sheet, I find that the same did not contain age of complainant.

15. Having reached the above conclusions and particularly the fact that the age of the complainant was not proved, the appeal therefore succeeds. The conviction is quashed and the sentence of 10 years imprisonment is set aside. However, by the powers conferred upon me by Section 179 of Criminal Procedure Code and noting that M.K suffered blunt force injuries on her head, hands and leg, I do find the appellant guilty of the offence of assault causing actual bodily harm contrary to Section 251 of the Penal Code. I accordingly convict him and sentence him to the period he has already served in prison. Unless otherwise lawfully held, the appellant shall be released from prison forthwith.

16. Orders accordingly.

Judgment delivered, dated and signed in open Court at Kakamega this 18th day of August 2016.

RUTH N. SITATI

J U D G E

In the presence of:

…………Present in person……………………..........for Appellant

…………Mr. Ngetich (present)……………………….for Respondent

…………Mr. Lagat ……………………………..........….Court Assistant