REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 248 OF 2011

JULIUS MAINA MUTHANGA……..........………………APPELLANT

VERSUS

REPUBLIC…………………………………………..RESPONDENT

(Appeal against conviction and sentence in Karatina Senior Principal Magistrates' Court Criminal Case No. 111 of 2011 (Hon. L. Mbugua) in a judgment delivered on 20th December, 2011)

JUDGMENT

The appellant was charged with the main count of attempted defilement contrary to **section 9 (1) (2)** of the **Sexual Offences Act No 3 of 2006;** it was alleged in the particulars of offence that on the 16th January 2011 at Karatina township within Mathira East District within Nyeri County, the appellant intentionally attempted to cause his penis to penetrate the vagina of C N W a child aged 15 years.

In the alternative count, the appellant was charged with the offence of an indecent act with a child contrary to **section 11(1)** of the **Sexual Offences Act** the particulars being that on the 16th day of January, 2011 at Karatina township of Mathira East District within Nyeri County, the appellant intentionally touched the vagina of C N W a child aged 15 years with his penis.

The appellant pleaded not guilty to the charges but at the conclusion of his trial he was convicted of the principal count and sentenced to 10 years imprisonment; he now appeals against the conviction and sentence and has raised only three grounds in his amended grounds of appeal. He has faulted the learned magistrate in law and in fact in relying on what the appellant has described as doubtful evidence; he has also faulted the learned magistrate's decision for convicting him on charges that were not proved to the required standard and finally, the learned magistrate is claimed to have erred both in law and in fact in rejecting the appellant's defence.

He filed written submissions in support these grounds; I gather from the submissions that in the appellant's view, the complainant's evidence ought not have been believed and in any event there was no independent evidence to support her allegations; in other words the appellant has urged that there was no corroboration of the complainant's evidence and to this extent he cited the Court of **Appeal decision in Criminal Appeal No. 86 of 1994 Abel Monari Nyanamba & Others versus Republic** that evidence requiring corroboration cannot itself provide corroboration for other evidence.

The appellant has also urged that by ignoring his defence which was not challenged by the prosecution the learned magistrate flouted the provisions of the **Criminal Procedure Code, Cap. 75.** Ms Maundu for

the state opposed the appeal and urged that **under section 124** of the Evidence Act, the trial court was entitled to rely on the evidence of the complainant without the need for corroboration. Counsel also urged that there was no question of mistaken identity as the appellant was well known to the complainant long before the incident. On the question of defence, the learned counsel for the state urged that the trial court considered it but found it to be unworthy.

I have considered the trial record and it is of useful to consider the evidence afresh and make my own conclusions though I am aware that it is only the trial court that had the advantage of hearing and seeing the witnesses.

The complainant's version of events was that on the 16th November, 2011 at 8.30 pm she met the appellant on her way home at Gathungu; she sought fare from the appellant to enable her travel home since the night fell while she was still at Karatina where she had come to buy paraffin. Rather than give her the fare she was looking for the appellant opted to give her a place to sleep that night; he took her to some room where he asked her to sleep. After a while, the appellant came back and undressed the complainant; he also removed his trouser and "slept" on the complainant. For almost one hour the appellant attempted to defile the complainant without much success. The complainant escaped when he left the room.

The complainant went to sit next to another watchman; she testified that she did not tell him what happened to her but strangely, the watchman allegedly called another woman and told her what had happened to her. Based on this information, the other woman took the complainant to Karatina police station and reported the matter. According to her evidence she was then taken to Karatina hospital where she was treated and given medicine.

The appellant himself was a watchman at a petrol station at Karatina town he was on duty when complainant encountered him. According to the complainant she found him with another watchman **Corporal Kibet (PW2)** from Karatina police station testified that the complainant was brought to the station by a Good Samaritan on 16th January, 2011 at 11 pm; the officer took the complainant to hospital after booking her complainant at the station. She was treated and discharged, apparently, on the same night. The officer and his two colleagues from the station police constables Faith and Winnie visited the scene of crime the following day where they recovered the complainant's shoes. He exhibited the pair of shoes in court; for some unexplained reason the court allowed him to produce the medical card and the P3 form.

The complainant's mother**, M W (PW3)** also testified and produced a baptismal card showing that the complainant was born on 2nd December, 1995.

The appellant gave a sworn testimony and denied the allegations levelled against him. He admitted that he was a watchman at Uchumi and that he was on duty on 16th January, 2011 and that he worked till 8.30 pm. He saw the policemen at his place of work the following day and that he worked till 20th of January, 2011 when he proceeded on leave. It was his evidence that if he was had committed any offence, he would have been arrested immediately but it was not until the 6th February, 2011 that he was arrested and charged.

The appellant testified that he was related to the complainant's grandfather; he said that he had lent him Kshs 10,000/= which he had declined to refund. It was the applicant's case that he was implicated by the complainant and her family because of the grudge between him and the complainant's grandfather over the money the money the latter owed him.

The appellant admitted that he knew the complainant because they both hailed from the same village; he was also aware that she lived with mother and grandparents.

One of the watchmen who worked with him, P M M **(DW2)** testified that he knew the appellant and that on the material night they were together; however he did not witness any incident.

One thing which I have noticed stands out prominently from the record is that there is no evidence to support the particulars as stipulated in the charge sheet. According to the particulars of the offence the appellant is alleged to have intentionally touched the vagina of C N W with his penis; however, nowhere in her evidence did the complainant ever mention that the appellant touched her vagina with his penis. All she said was that the appellant slept on her without stating how the appellant did this and how his genital organs could probably have been positioned in relation to her genital organs.

Since this is a question of evidence that has to be proved beyond all reasonable doubt, it could not be left to the court to speculate that the appellant slept on the complainant in any particular manner. There are no doubt various ways in which a person may possibly sleep on the other and not all of them can be said to constitute an offence under **section 9(1)** and **(2)** of the **Sexual Offences Act**.

In the **Court of Appeal Criminal Appeal No. 47 of 1995, Isaac Omambia versus Republic,** the appellant was charged with the offence of indecent assault. The particulars of offence stated that he "touched the complainant's private parts". At the trial it was established that the appellant had not touched the private parts of the complainant as alleged but that he had touched her bottom and pushed his penis between the complainant's buttocks.

While allowing the appeal, the Court held though the evidence adduced showed there was offence of indecent assault, that evidence was inconsistent with the particulars given in the charge sheet. The Court stated:-

> ***These particulars that the appellant touched the private parts of the complainant mean and can mean nothing else, than the appellant touched with his hand the "private parts" of the complainant which to give the well-known and ordinary meaning of that phrase, means genitalia of the complainant and to no other part of her body, or as defined in the shorter Oxford English Dictionary, the "pudenda" or "external genital organs".***

The court held further that it was in error in law for the learned judge who heard the first appeal to hold that the buttocks of the complainant which were the only parts of her body mentioned at the trial were the "private parts" alluded to in the particulars of the offence and thereby concluding that the particulars of offence had been established.

In the trial against the appellant, not even buttocks were mentioned let alone any contact between the complainant's genitalia or the appellant's genitalia.

Lest we forget, **section 134** of the **Criminal Procedure Code** reminds us that the offence with which one is charged and the particulars thereof must be certain if not for anything else, to put the accused person on notice of the kind of case against him; it states:-

> ***134. Offence to be specified in charge or information with necessary particulars 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***

Where the evidence adduced is at variance with the particulars, such trial does not only flout this provision of the law but in such case it is also lawful and logical to conclude that there is no evidence to support the charge against the accused person; this appears to have been what happened in the trial against the appellant.

It is also worth noting that although the complainant testified that the appellant attempted to defile her for almost one hour there was trace of such attempt. If the appellant attempted to cause his penis to penetrate the complainant's vagina as suggested in the particular of offence there should have been some form of trace considering the amount of time that the appellant is alleged to have been struggling with the complainant; the complainant was only aged fifteen in the hands of an adult who could easily have subdued her.

Although both **corporal Kibet (PW2)** and the complainant testified that the complainant was treated and discharged on the same night of the alleged assault, there is no evidence of such treatment on record. All I gather from the record is what I suppose to be a futile attempt by corporal Kibet to produce the treatment card and the P3 form in respect of the alleged examination and treatment of the complainant. For some reason the learned magistrate purported to admit these documents in evidence though they were not produced by the doctor or the medical officer who is alleged to have treated the complainant and filled the P3 form. This was obviously misdirection in law on the part of the learned magistrate because the opinion of the doctor or medical officer who treated or is alleged to have examined the complainant or treated her and filled the P3 form could only be given as direct evidence under **section 63 (d)** of the **Evidence Act, Cap. 80**. Corporal Kibet could not be cross-examined on the contents of the documents he purported to produce and this obviously prejudiced the appellant's fair trial.

Thus I have given what I think are sufficient reasons why this appeal is merited. I hereby allow it and quash the appellant's conviction and set aside the sentence meted out against him by the court below. He is set at liberty unless he is lawfully held.

Signed, dated and delivered this 8th day of August, 2016

Ngaah Jairus

JUDGE