



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.317 OF 2011

(An Appeal arising out of the conviction and sentence of Mrs. Nyakundi – PM delivered on 16th November 2011 in Kibera CM. CR. Case No.4311 of 2010)

SAMUEL MWAURA KAMAU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Samuel Mwaura Kamau was charged with the offence of **defilement** contrary to **Section 8(2)** of the **Sexual Offences Act**. The particulars of the offence were that on 12th September 2010 at *[particulars withheld]* village in Mutuini within Nairobi County, the Appellant committed an act of inserting his male genital organ (penis) into the female genital organ (vagina) of G M N, a girl aged five (5) years which caused penetration. He was in the alternative charged with **committing an indecent act** with a child contrary to **Section 11(1)** of the same **Act**. The particulars of the offence were that on the same day and in the same place, the Appellant committed an indecent act by placing his male organ (penis) on the surface of the female organ (vagina) of G M N. When the Appellant was arraigned before the trial court, he pleaded not guilty to the charges. After full trial he was convicted on the alternative charge of **committing an indecent act with a child** and sentence to serve fifteen (15) years imprisonment. The Appellant was aggrieved by his conviction and sentence and duly filed an appeal in this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. The Appellant was aggrieved that the trial court erred in law and in fact in convicting him on insufficient evidence. He was aggrieved that the prosecution failed to prove the case against him to the required standard of proof beyond any reasonable doubt. The Appellant also raised an issue regarding the time frame of his arrest after the complainant made the report to the police. Lastly, the Appellant was concerned that his defence had been ignored. In his amended/supplementary grounds of appeal filed without leave of court (the court will however consider them), the Appellant was aggrieved that his conviction was unfounded and not supported by evidence on record. He was further aggrieved by the fact that crucial witnesses had not been called to testify in the case. In the premises therefore, the Appellant urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, the Appellant presented to court written submission in support of his appeal. A response to the Appellant's submission was made by Ms. Akunja for the State. In his written submissions, the Appellant contended that the trial court misdirected itself when it convicted him on the alternative count without first making a finding on the main count thereby rendering the judgment incompetent. He further contended that **Section 150** of the **Criminal Procedure Code** was not complied with. He submitted that while the complainant testified that her brother J N witnessed the sexual assault, the State failed to call him as a witness. He submitted that the failure by the prosecution to call the said witness created an inference on the prosecution's case. The Appellant further complained that the trial court filled in gaps in the prosecution case. He submitted that the trial magistrate in his judgment concluded that the complainant's vaginal opening was inflamed which according to her was an indication of sexual assault. It was the Appellant's submission that the trial court erred in reaching that finding of fact which in his view to him was not based on evidence adduced by the prosecution witnesses. He cited the case of **Okethi Okale & Another –versus- Republic [1965] EA 565** in support of his submission. In concluding his submission, the Appellant submitted that the prosecution failed to prove its case to the required standard of proof and therefore urged the court to grant him the benefit of doubt.

In response to the Appellant's submission, the learned State Counsel opposed the appeal. She submitted that the prosecution had established, to the required standard of proof that indeed the Appellant had committed an indecent act on the complainant. She stated that the complainant's age was satisfactorily established by the medical evidence (P3 form) tendered as evidence during trial. In addressing the issue of penetration, Ms. Akunja submitted that the complainant's testimony was corroborated by the medical evidence of PW5 Dr. David Thuo. She submitted that the injuries sustained by the complainant were conclusive evidence of sexual assault. She explained that PW3 Dr. Zephania Kamau found nothing remarkable when he examined the complainant because the complainant's injuries had healed at that time. Regarding the identification of the Appellant, the learned State Counsel submitted that the Appellant was well known to the complainant prior to the incident. She submitted that the Appellant's defence was dismissed for being a mere denial. It is on the basis of the above facts that the State urged the court to find the appeal without merit and dismiss it.

The facts of the case as presented by the prosecution are straight forward. The complainant in this case is PW1, G M N. She was said to have been aged five years at the time of the alleged incident although no documentary evidence was adduced during trial to support this assertion. The Appellant is the complainant's paternal uncle. The prosecution's case is that on the material day of 14th September 2010, the complainant's mother, PW2 M M left her children, the complainant and her younger brother one J N in her house under the care of the Appellant to attend a meeting which was being held within the neighbourhood. PW2 did not take long at the meeting. When she returned, she found the Appellant and the children sitting outside her shop. The Appellant then left after she arrived. PW2 testified that the following evening as she was relaxing with the complainant in the house, the complainant informed her that the Appellant had removed his penis and inserted it into her vagina and that he even urinated on her. She testified that the complainant repeated what she had told her in her father's presence when he later arrived. The evidence of the complainant was that on the day in question while in the house, after PW2 had left, the Appellant unzipped his pants and removed his penis in her presence. She testified that he then put his finger inside her vagina. She testified that she felt pain. She testified further that the Appellant asked her not to tell her mother what he had done and promised to buy her a biscuit. The complainant's testimony was that her brother J N was present when the incident occurred. She knew the Appellant very well and stated that he was PW2'S friend. They went to church together.

The incident was reported to Karen Police Station. The complainant was taken to Nairobi Women's Hospital. At the hospital, the complainant was medically examined by Dr. Nzila Liku on 14th September 2010. The doctor's report was produced into evidence by PW5 Dr. David Thuo as ***Prosecution's Exhibit No. 1***. A vaginal examination carried on the complainant showed that her hymen was intact. However, she had a bruised fourchette. The doctor concluded that the complainant had been sexually assaulted. She was also examined on 21st September 2010 by PW3 Dr. Zephania Kamau based at the police surgery. He found nothing remarkable on examining the complainant. He filled a P3 form of his findings which he produced into evidence as ***Prosecution's Exhibit No. 2***. PW4 CPL Josephat Ndungu was assigned to investigate the case. After concluding his investigations, PW4 concluded that a case had been established

against the Appellant and charged the Appellant with the offences he was charged with. When the Appellant was put on his defence, he simply denied committing the offences.

This court has carefully evaluated the evidence adduced by the prosecution witnesses before the trial court. It has also considered the defence that was put forward by the Appellant. The court has also considered the grounds of appeal that the Appellant relies on in support of his appeal and the submissions made by both the Appellant and on behalf of the State. This being a first appeal, it is the duty of this court to subject the evidence adduced before the trial court to a fresh evaluation with the objective of ascertaining whether the conviction of the Appellant ought to stand. In doing so, this court must take cognizance of the fact that it neither heard nor saw the witnesses as they testified and must therefore give due regard in that respect (see **Okeno –vs- Republic (1972) EA 32**). The issue for determination by this court is whether the prosecution adduced sufficient evidence to secure the conviction of the Appellants on the charge of **committing an indecent act with a child** contrary to **Section 11(1) of the Penal Code** to the required standard of proof beyond any reasonable doubt.

It was the prosecution's case that the complainant and her brother were left in the custody of the Appellant as their mother attended a nearby meeting. The complainant's testimony was that while she was in the house with her brother J N and the Appellant, the Appellant unzipped his trouser and removed his penis. She also stated that he also inserted his finger inside her vagina. She stated that she felt pain. The complainant further testified that the Appellant asked her not to report the incident to her mother and promised to buy her biscuits. It was the complainant's evidence that her brother J N saw what the Appellant had done. The version presented by the complainant's mother, PW2 was that the complainant told her that the Appellant had removed his penis and inserted it into her vagina. She had told her that he even urinated on her. The complainant was taken to Nairobi Women's Hospital for medical examination and was found to have a bruised fourchette. She was examined by Dr. Nzila Liku on 14th September 2010 who concluded that she had been sexually assaulted. The medical report was produced as **Prosecution's Exhibit No. 1**. In its analysis of the evidence adduced by the prosecution, the trial court found that the prosecution had established a case against the Appellant. The trial magistrate accepted the complainant's evidence which according to her, was corroborated by the medical evidence. She was satisfied that the Appellant had been positively identified by the complainant and therefore proceeded to convict the Appellant on the alternative count of **indecent assault**.

In her judgment, the learned Principal Magistrate found as follows:

“Although PW3 Dr. Kamau did not see any physical injuries on the complainant, he saw her on 21/9/2010 about 9 days later while the doctor who saw her at Nairobi Women's hospital saw her on 14/9/2010 just 2 days later and he was able to find that the vaginal opening was inflamed an indication of sexual assault. This report was produced as exhibit 2. By the time Dr. Kamau saw PW1 this inflammation may have healed. Although the accused person has denied committing the offence in this particular day. I am satisfied that PW1 cannot have mistaken as to his identity as he was a regular and constant visitor and related to her and her family. She knew him very well and to the extent that PW2 her mother could leave him with her and another child as she left to go for a meeting. PW2 testified that on the day of the incident the accused person did visit and she left him with the children. The conduct of the accused person after the information of what he had done leaked out is also a pointer to his guilt as he stopped visiting PW1 and her family and even stopped going to church. He probably felt safe enough later when he saw no action had been taken to come out and go to church and that is when PW2 had him arrested after tricking him. PW2 explained that the accused person had not been arrested earlier after the police informed her that they were busy and she could also be on the lookout for him and that is why she had him arrested when she saw him later. In the premises; this court finds that the alternative charge of indecent act with a child contrary to Section 11(1) of the sexual offences Act NO. 3 of 2006 has been proved beyond any reasonable doubt. I dismiss the defence raised by the accused person, find him guilty as charged and convict him under Section 215 of the Criminal Procedure Code.”

According to the Appellant, the fact that the trial magistrate failed to make a finding on the main count of

defilement prior to convicting him on the alternative count renders the judgment incompetent. This court agrees with the Appellant in that regard. It was the complainant's testimony that she was sexually assaulted by the Appellant. It should be noted that the complainant was alleged to be a child aged 5 years at the time of the incident. She gave unsworn testimony. At that vulnerable age, she was bound to be influenced by suggestions made by adults. She testified that she was defiled while she was with other children. None of the other children were called to give evidence in the case. The doctor who examined the complainant found that there was no penetration although there were injuries in the vaginal area that suggested that attempt at sexual assault may have been made. The issue that this court has had to grapple with is to reconcile the evidence that was adduced by the complainant and her mother and that which was adduced by the doctor who examined the complainant soon after the complaint was made. Another doctor saw the complainant seven (7) days after the incident. He noted nothing remarkable. In fact, it was his finding that the complainant had not been sexually assaulted.

Section 124 of the **Evidence Act** allows the court to admit the evidence of a child in a sexual assault case without the necessity of corroboration provided that the court is persuaded that the complainant is telling the truth. In the present appeal, it was clear to this court that the evidence adduced by the complainant was completely at variance with the medical evidence. The only conclusion that this court can reach is that what the complainant was telling the court was not the truth or at the very least not the whole truth. The conclusion reached by the trial court in finding the Appellant guilty discloses elements of conjecture and suppositions which were not based on the evidence adduced. For instance, when the trial court stated that the Appellant stopped visiting the complainant's mother after the alleged incident as proof of his guilt, the trial court was engaging in speculation. That also applies to the finding by the trial court that the Appellant had failed to attend church after the alleged incident. No evidence was adduced by the prosecution witnesses to the effect that the police went to the Appellant's home and failed to find him for the trial court to reach the conclusion that the Appellant disappeared from the locality after allegedly committing the said offence.

In the premises therefore, this court finds that reasonable doubt was raised in the evidence adduced by the prosecution witnesses that the Appellant committed the offence that he was convicted of by the trial court. Those doubts are resolved in favour of the Appellant. In the circumstances therefore, this court holds that the prosecution failed to establish the alternative charge of **committing an indecent act** contrary to **Section 11(1)** of the **Sexual Offences Act** to the required standard of proof beyond any reasonable doubt. The Appellant's appeal has merit and is hereby allowed. The Appellant's conviction is quashed. The custodial sentence imposed is set aside. The Appellant is ordered set at liberty and released from prison forthwith unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 29TH DAY OF SEPTEMBER 2016

L. KIMARU

JUDGE