REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL 113 OF 2013

KENNEDY MUINDI NZUKI……..……..……APPELLANT

VERSUS

REPUBLIC……..……RESPONDENT

(An appeal arising out of the judgment and sentence of Hon. I.M. Kahuya Ag SRM in Criminal (SO) Case No. 21 of 2012 delivered on 18th December 2011 at the Principal Magistrate's Court at Kangundo)

JUDGMENT

The Appellant was convicted of, and sentenced to serve ten years imprisonment on 18th December 2012 for the offence of committing an indecent act contrary to section 11(1) of the Sexual Offences Act No 3 of 2016. The particulars of the offence were that on 23rd September 2012 at about 11.00am at [particulars withheld] village within Kathiani District in Machakos County of the Eastern Province he committed an indecent act with B M M a child of 8 years by rubbing his penis against B M M's buttocks.

The Appellant is aggrieved by the judgment of the trial magistrate, and has preferred this appeal against the conviction and sentence. The grounds of appeal are in Grounds of Appeal he filed with his Petition of Appeal on 18th February 2013, and in Amended and Supplementary Grounds of Appeal and two sets of submissions he availed to the Court. The grounds raised by the Appellant are that the trial magistrate erred in law and facts by convicting him on evidence that was contradictory and hearsay, on the identification by and evidence of a single identifying witness, and without considering his defence of a grudge he had with the complainant's mother.

The Appellant submitted that in his testimony, the complainant (PW2) did not state that the Appellant rubbed anything against his anus, and neither did PW4 indicate what caused the lacerations around the complainant's anus. In addition, and that the evidence by P3 that she was told by the complainant that the Appellant sodomised him was hearsay evidence, as she did not witness the said incident. Further, that the trial magistrate should have warned herself before relying on the evidence of the complainant alone under section 124 of the Evidence Act. Lastly, that the prosecution had the burden of disproving the defence raised by the Appellant.

Mrs Tabitha Saoli, the learned prosecution counsel, also availed written submissions filed on 15th March 2016. It was urged therein that that the evidence adduced by the prosecution through the testimony of five witnesses was firm and consistent, and sufficient to secure a conviction.

As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

Upon consideration of the grounds of appeal, submissions made and evidence in the trial Court, I find that the substantive issues raised in this appeal are firstly, whether the Appellant's conviction for the offence of committing an indecent act with a child was based on sufficient evidence, and secondly, whether the defence by the Appellant was given due regard.

The offence of committing an indecent act with a child is provided in section 11 (I) of the Sexual Offences Act as follows:

> "**(1) 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."**

An indecent act is further defined in section 2 of the Sexual Offences Act as

> **"indecent act" means 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;**

On the first issue, the evidence that is material is that of B M (PW2) who was the complainant and Rebecca Mukonza (PW4) a clinical officer at Kangundo District Hospital. The other witnesses namely J M M (PW1) who was the complainant's mother; P W M also known as E (PW3) who was the complainant's brother; and P.C Joshua Omondi (PW5) who was the investigating officer, all testified as to the reports the received of the alleged offence .

I will reproduce the unsworn testimony of PW2 that was given on 1st November 2012 after a *voire dire* examination verbatim for full effect, which was as follows:

> **PW2 Voir Dire examination- Kamba**
>
> **Name: B M**
>
> **School: Kama Primary**
>
> **Class:**
> **2**
>
> **Age: I don't know**
>
> **Siblings: None**
>
> **Mums name: M**
>
> **Father's name: M**
>
> **Church: Koma**
>
> **Court: from the brief examination I do realize the child doesn't understand the nature of an oath.**
>
> **Unsworn statement**

On that day, the accused called me then started doing bad manners. Then he asked me to go back and heard cattle. I left and informed E. Then he told my mother about it. Then we went to Kantafu. Thereafter KBC Malaa finally at Kangundo where I was given medicine. I was herding cattle before the accused called me. I went to his house and he gave me ugali. So I ate then he asked me to remove my underwear. Then he asked me to lie on the sofa set on my stomach. He lied on top of me with his clothes still on. He told me not to look at him. Then I felt pain in the anus . He told me not to cry. Then he asked me to go back and herd. There's also another time he did the same. He again had called me for ugali. I didn't tell anybody . I feared my mum would beat me up. This time round, I told E so that he tells my mum. That is all."

PW4 on her part testified that she examined PW2 on 23rd March 2012 and that there were lacerations around the anal region but no active bleeding. Further, that the approximate age of the injury was 1 day, and that they took a rectal swab which showed no spermatozoa. She produced the P3 form with the results of the complainant's medical examination as an exhibit.

The Appellant has contested the evidence by PW2 on the ground that it was that of a single witness and not corroborated under section 124 of the Evidence Act. Although I find that the said evidence was corroborated by the evidence of PW4, I noted after perusing the Court record that on 1st November 2012 , after PW2 gave his unsworn evidence-in-chief, the trial magistrate immediately proceeded to conduct a *voire dire* examination of PW3, who then gave his sworn testimony. There is no indication on the record if the Appellant declined to ask PW2 any questions in cross-examination or if he was called upon by the trial Court to cross-examine PW2. Therefore, the Court cannot rely on the testimony of PW2 as its veracity was not established through cross-examination.

It was incumbent upon the trial court to have informed the Appellant of the right of cross-examination, especially as he was not represented by a legal counsel, and if the Appellant did not have any question to put to the witness, it should have recorded that fact. Thus, the failure by the trial court to do so was an error. It is also my finding that this error that prejudiced the Appellant as the evidence of PW2 who was also the complainant was central in the Appellant's conviction.

In addition, the issue of cross-examination of children of tender years who give unsworn testimony was settled *by the Court of Appeal in* **Nicholas Mutula Wambua v Republic, MSA CRA No. 373 of 2006** *where it quoted with approval the decision of the Supreme Court of Uganda in* **Sula v Uganda [2001] 2 EA 556** *that:*

*"**The second point we wish to discuss is whether or not a child witness, who gives evidence not on oath is liable to cross-examination. There appears to be a widespread misconception that a child witness who is allowed to give evidence without taking oath because of immature age, should not or cannot be cross-examined.... It would appear that misconception arises from a view that because accused persons are not cross-examined whenever they make unsworn statements in the defence, child witnesses who did not take the oath should be treated in the same way. Such a view is oblivious of the peculiar protection given to an accused person in the form of a right to make an unsworn statement with no liability to be cross-examined".***

I am of the view that the ground of failure to afford the Appellant an opportunity to cross-examine PW2 is on its own sufficient to dispose of the appeal. In addition, it will not be prudent for this Court to proceed with a determination of the outstanding issues, as the same will entail and evaluation of the evidence adduced in the trial Court, which would be prejudicial in the event that a retrial is ordered.

The only outstanding issue therefore is whether I should acquit the Appellant or order a retrial. The principles governing whether or not a retrial should be ordered were summarized the case of **Muiruri vs. Republic (2003) KLR 552**, the court considered a similar situation and held as follows, inter alia:

"Generally whether a retrial should be ordered or not must depend on the circumstances of the case. It will only be made where the interest of justice require it and if it is unlikely to cause

injustice to the appellant. Other factors include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely the prosecution making or not."

In this appeal the victim was a minor then aged 8 years, and the offence took place in 2012, and it would therefore not be difficult to secure the witnesses. Balancing all the interests, I am of the view that justice demands that the case be re-heard in the trial court.

I accordingly allow the appeal, and quash the conviction and sentence of the Appellant by the trial Court. I direct that the Appellant shall be retried on the same charge before a Magistrate of competent jurisdiction other than Hon. I. Kahuya, and for that purpose he shall remain in custody and shall be taken before a Senior Resident Magistrate at the Kangundo Principal Magistrate's Courts, on **11th November 2016** to plead to fresh charges.

It is so ordered.

DATED AND SIGNED AT MACHAKOS THIS 31st DAY OF OCTOBER 2016.

P. NYAMWEYA

JUDGE