REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 130 OF 2013

NGUI MALUKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*Appeal from the judgment and sentence in Mwingi SRM Criminal Case No. 800 of 2011 – V. A. Otieno Ag. SRM*)

JUDGMENT

The appellant was charged in the subordinate court with attempted defilement contrary to section 9 (1) (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 15th December 2011 at [particulars withheld] Sub Location Mutyangome Location Mwingi East District within Kitui county attempted to cause his male genital organ namely penis to penetrate the female genital organ namely vagina of MA a child aged 13 years. He denied the charge. After a full trial he was convicted of indecent assault and sentenced to serve ten years imprisonment.

Dissatisfied with the decision of the trial court, the appellant filed an appeal initially on 30th July 2013. On 6th May 2014, however he filed an amended petition of appeal and written submissions. I have perused the written submissions of the appellant. He elected to rely on the same.

The Learned Prosecuting Counsel Mr. Okemwa also filed written submissions on 2nd March 2015. Counsel highlighted the written submissions. Counsel emphasized that corroboration in sexual offences was not required as provided for under section 124 of the Evidence Act. Provided the evidence of a single minor victim of a sexual offence is believed by the trial court on reasons given, a conviction can be sustained. Counsel also submitted that the failure of a court to conduct an inquiry as to whether a child witness should or should not testify on oath is not fatal to a conviction. Counsel submitted that the charge for which the appellant was convicted was proved as the appellant touched the thighs of the complainant with his penis. The appellant had also not demonstrated any prejudice he suffered and that his mode of arrest was proper. According to counsel, no law was violated.

The prosecution called 6 witnesses at the trial. PW1 was the complainant aged 13 years. She testified on oath that she was born in 1996. It was her evidence that as she was herding goats in the bush when the appellant approached and persuaded her to walk away from the goats. When she resisted the appellant held her by the hand, pulled her to a nearby thicket and tried to defile her. However in the process, the mother of the complainant PW2 arrived and called the complainant's name. The appellant panicked, moved away and zipped his trouser.

PW2 was the mother of the complainant. It was her evidence that she followed the complainant after she got information that the appellant had trailed her. She saw the goats unattended and called the name of the

complainant and suddenly she saw the appellant, whom she knew for six years, emerge from the bush and ran away. PW3 was a sister of the complainant aged 9 years. It was her evidence that she saw the appellant trailing the complainant and reported the same to her mother PW2. PW4 was a police offence who received the report in the police station and issued the complainant with a P3 form. He also received the appellant from PW5 who was the arresting officer. PW6 was Doctor Ogeto who conducted the medical examination and found no injuries on the complainant. He also found that the complainant had previous sexual intercourse and as such the hymen was missing.

In his defence the appellant initially was recorded as having claimed the existence of a vendetta or grudge. He testified a second time and called one witness. He denied committing the offence. His witness DW2 Munyoki Masila claimed to be present with the appellant that day, but did not know his activities.

This being a first appeal I am duty bound to reevaluate the evidence on record and come to my own conclusions and inferences. See the case of ***Okeno VS. Republic [1972] EA 32***. I have re-evaluated the evidence on record.

The appellant was clearly known by PW1, PW2 and PW4. He was a neighbour for six years. He himself admitted that fact.

Though the appellant claims that PW1 and PW3 were not tested to know whether they should give evidence or not, I dismiss that ground. It is true they were not tested by the magistrate to find out whether they understand the nature of an oath and the importance of saying the truth. However I find no prejudice occasioned on the appellant.

The age of the complainant has not been challenged. I find that indeed she was 13 years as stated.

The incident occurred in broad daylight. The evidence of PW1, PW2 and PW3 was consistent. It was that the appellant followed the complainant from behind as she took out the goats from the homestead. Shortly thereafter, PW2 saw the goats in the field unattended. When she called the name of the complainant, the appellant emerged from a bush and started zipping his trousers. PW1 the complainant stated that the appellant had already removed her clothes and was touching her thighs with her penis. This is my view confirmed that the appellant was the culprit. The appellant was convicted of the minor offence of committing an indecent assault. This was the description under the old law. The Sexual Offences Act has an offence of indecent act with a child. In my view the evidence on record proved beyond reasonable doubt that the appellant committed the offence of an indecent act with a child contrary to section 11 (1) of the Act. The use of the wrong term did not prejudice him.

On sentence, the offence has a minimum sentence of 10 years imprisonment. The learned magistrate could not impose a lesser sentence. The sentence was therefore lawful and proper.

To conclude, I find that the magistrate was correct in convicting and sentencing the appellant. I thus dismiss the appeal and uphold both the conviction and sentence of the trial court.

Dated and delivered at Garissa this 20th day May, 2015

GEORGE DULU

JUDGE