REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL 60 OF 2015

MESHACK MAINGI KITHEKA…….....……..……...……
APPELLANT

VERSUS

REPUBLIC……..……
RESPONDENT

(An appeal arising out of the conviction and sentence of D.G. Karani PM delivered on 16th April 2015 in Sexual Offences Act Case No. 13 of 2014 in the Principal Magistrate's Court at Kithimani)

JUDGMENT

The Appellant has appealed against his conviction and sentence of 10 years imprisonment for the offence of committing an indecent act with an adult, contrary to section 11(1) of the Sexual Offences Act. The Appellant was arraigned in the trial court on 7th April 2014, and charged with the offence of rape contrary to section 3(10)(A)(B)(3) of the Sexual Offences Act, Act No. 3 of 2006. After conducting the trial, the trial court found that the charge of rape could not stand and acquitted him of this offence.

However, the Appellant had on arraignment also been charged with an alternative offence of committing an indecent act with an adult contrary to section 11(1) of the Sexual Offences Act, , which offence he was convicted of after trial. The particulars of the alternative offence were that on diverse dates between 8th and 10th March in Masinga sub-county within Machakos County he intentionally touched the vagina of *(sic)* with his penis against her will.

The Appellant being aggrieved has appealed the conviction and sentence meted by the trial magistrate. The learned counsel for the Appellant in this appeal was Mr. Uvyu Advocate, while the learned counsel for the State was Mr. Mamba.

The Appellant's grounds of appeal are stated in his Memorandum of Appeal dated and filed in Court on 29th April 2015. These grounds are that the trial Magistrate erred in law and in fact in convicting the Appellant on insufficient evidence, and in relying on evidence which did not prove the offence beyond reasonable doubt. Further, that the trial magistrate failed to consider and/or rejected the defence case without giving any reason thereof, and that the sentence is manifestly excessive having regard to all the circumstances of the case.

The Appellant's counsel submitted that the trial magistrate found that the rape could not be proved because the sex was consensual. However, that the trial magistrate erred in law in convicting the Appellant of the alternative count of indecent Act because the charge was defective, as section 11(1) of the Sexual Offences Act under which the Appellant was charged is with respect to the offence of an

indecent act with a child and not an adult. Further, that the complainant was an adult of about 18 years and was not a child as defined under the Children Act as a person under 18 years. The Appellant's counsel submitted that it is on the basis of section 11(1) of the Sexual Offences Act that the Appellant was convicted for 10 years, when he ought to have been charged under section 11(A) of the Sexual Offences Act under which the maximum sentence is 5 years or a fine of 50,000/= or both.

The Appellant's counsel further submitted that the definition of an indecent act under the Sexual Offences Act does not include an act that causes penetration, and that if the trial Magistrate found that there was penetration, then the offence of committing an indecent act cannot apply to or be attributed to the Appellant. The Appellant's counsel asked the Court to apply section 382 of Criminal Procedure Code, and find that the trial magistrate caused failure of justice by convicting the Appellant under the wrong section of law and imposing the wrong sentence. Further, that the Appellant was not possible to raise this issue earlier as he was unrepresented in the trial court.

The learned counsel for the State on his part conceded that that the sentence meted by the trial court was erroneous and that the Appellant was wrongly charged under section 11(1) instead of section 11(A) of the Sexual Offences Act. He also conceded that under section 11(1) of the Sexual Offences Act the minimum sentence is 10 years imprisonment, and under section 11(A) the sentence should have been five years imprisonment.

According to the counsel for the State, the trial Magistrate noted that PW 1 and the Appellant had known each other earlier, when the Appellant went to PW1's school to register her for an identity card, and that this clearly indicates that PWI had not obtained the identity card as at the time of the alleged act of sexual contact. Further, that the issue of consent never came out clearly when the Appellant was put in his defense, and therefore that the charge under the Section (11)A of the Sexual Offences Act should stand. The counsel for the State asked the Court to consider section 382 of the Criminal Procedure Act in this regard.

As this is a first appeal, I am required to re-evaluate the evidence tendered in the trial Court, 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**).

Four witnesses testified at the trial in the lower court. PW1 who was the complainant stated that she was 18 years old, and that on 8th March 2014 she was on her way to school at around 4.am when two people on a motorbike approached her, one of whom was the Appellant. She testified that the Appellant was known to her and that she stopped to greet them, and that she then found herself at a house at [particulars withheld] market where the Appellant had sex with her, and on the following Monday he took her to her parent's house. The complainant testified that she explained to her parents what had happened, and that she was taken to [particulars withheld] Health Centre where she was examined and issued with a P3 form, tested for pregnancy and HIV, and found to be pregnant.

PW2 who was the complainant's mother testified that she went to Masinga police station on 10th March 2014 to report that PW1 had been missing from home since the previous Saturday, and after making inquiries she was given the Appellant's number and she called him. Further, that the Appellant was summoned to the police station, but that instead of coming to the police station, he took PW1 to her parent's home. PW2 confirmed the evidence about PW1's medical examination, and stated that PW1 had told her she previously knew the Appellant when he had gone to their school to register them for identity cards.

PW3 was a clinical officer at Masinga sub-county hospital, and he testified that on 12th March 2014 he examined PW1, and filled a P3 form which he produced as an exhibit. He further testified that PW1, who was assessed to be 19 years, claimed to have been kidnapped and raped, and that there was medical proof that she had been raped.

The last witness for the prosecution was PW4, a police officer at Masinga Police Station, and he testified

that on 10th March 2014 he received a report of a missing person, which was made by her parents, and that on 12th March 2014 the said parents came to the station and informed him that they had found their daughter and she was pregnant. Further, that the Appellant was the suspect and should be charged. PW4 stated that upon investigation, he arrested and charged the Appellant, who was previously known to him.

After the close of the prosecution case, the Appellant was put on his defence and made an unsworn statement. He stated that on 10th March 2014 he received a telephone call from the complainant's father asking him to produce PW1, and was also summoned to the police station, where he stated that he did not know PW1. The Appellant testified that he thereupon contacted the complainant who informed him that she was at [particulars withheld] and he should meet her there.

He further testified that he informed the complainant that her parents were looking for her, and made calls to various persons to inform them that the complainant was on her way home. The Appellant stated that he accompanied the complainant upto Masinga, and she said she would go home on her own from there. The Appellant stated that he was then subsequently arrested.

From the foregoing submissions and evidence, I find that the issues raised in this appeal are firstly, whether the Appellant was convicted under a defective charge, secondly, whether the Appellant's conviction for the offence of committing an indecent act with an adult was based on sufficient and satisfactory evidence, and lastly whether the sentence meted out to the Appellant is illegal or unlawful.

On the first issue as to whether the charge was defective, the learned counsel for the State did concede that the Appellant was wrongly charged under section 11(1) instead of section 11(A) of the Sexual Offences Act. In **Amedi Omurunga v Republic, Malindi Criminal Appeal No. 178 0f 2012, [2014] eKLR**, the Court of Appeal held that an accused person must fully understand the nature of the offence he is facing so that he pleads to it with full knowledge, and that it is preferable that the statement of offence contains a reference to the section creating the offence as well as that prescribing the punishment.

Further, the Court held that the answer to the question whether a defect in the charge sheet would vitiate the proceedings and the conviction entered depended on whether the defect occasioned a failure of justice and thereby prejudiced the appellant, by applying the test provided for under **section 382** of the Criminal Procedure Code. The Court of Appeal did however state in this regard that if an accused was to be charged under the wrong age bracket of the victim, the charge-sheet would be deemed to be defective in that regard, since the age of the complainant of a sexual assault is a critical component in sexual offences.

In the present appeal, although the charge sheet did state that the alternative offence the Appellant was being charged with was committing an indecent act with an adult, the section that was cited and which prescribed the punishment was that of section 11(1) of the Sexual Offences Act, which was with reference to committing an indecent act with a child and which carried a minimum sentence of 10 years. Section 11(A) which prescribes the punishment for the offence of committing an indecent act with an adult on the other hand provides as follows:

> **"Any person who commits an indecent act with an adult is guilty of an offence and liable to imprisonment for a term not exceeding five years or a fine not exceeding fifty thousand shillings or to both."**

The learned trial Magistrate relied on the cited provisions of section 11(1) of the Sexual Offences Act in sentencing the Appellant to the 10 years minimum sentence provided for in the section. To this extent I am satisfied that this irregularity in the charge-sheet did imperil the Appellant and occasioned him a failure of justice as he was subjected to an inapplicable, harsher and excessive sentence. This defect is not curable under section 382 of the Criminal Procedure Code as urged by the learned counsel for the state. The said section provides as follows:

> **"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge,**

proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

The Appellant was unrepresented in the trial Court, and I am persuaded that he was not in a position to raise an objection as to the defective charge in the proceedings in the trial Court. Lastly, the Court also notes that the alternative charge did not contained all the necessary particulars in accordance with section 134 of the Criminal Procedure Code, as the name and/or description of the complainant or victim of the offence was not indicated.

On the second issue as whether the conviction of the Appellant was based on satisfactory evidence, this Court is mindful of the elements of the offence of committing an indecent act as provided under section 2 of the Sexual Offences Act, which defines an "indecent act" to mean 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 displays of any phonographic material to any person against his or her will."

"Penetration" under section 2 of the Act means, "the partial or complete insertion of the genital organs of a person into the genital organs of another person." The complainant in this regard clearly testified that the Appellant had sex with her, which sex appears to have been consensual as she did not testify to any force used by the Appellant or lack of consent on her part. It is my view that her testimony leaves no doubt that there was penetration, and therefore the facts cannot support a charge of indecent act. The learned trial magistrate therefore erred in finding that the evidence showed that the Appellant had committed an indecent act.

On the last issue as regards the legality of the sentence meted on the Appellant, the principles upon which an appellate Court will act in exercising its discretion to review or alter a sentence imposed by the trial court were settled in the case of **Ogolla s/o Owuor, (1954) EACA 270,** wherein the Court of Appeal stated as follows:

"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors". To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (R - v- Shershowsky (1912) CCA 28TLR 263)."

In the instant appeal, this Court has already found that there was a defective charge which cited an inapplicable section of the law being section 11(1) of the Sexual Offences Act, and which resulted in the Appellant being sentenced to an inapplicable sentence. The learned counsel for the State also conceded that under section 11(1) of the Sexual Offences Act the minimum sentence is 10 years while under section 11(A) the sentence should have been five years imprisonment. This Court has also found that the Appellant was wrongly convicted of the offence of committing an indecent act with an adult, and therefore the sentence under section 11(A) of the Sexual Offences Act cannot lie.

I accordingly allow the Appellant's appeal and quash his conviction for the offence of committing an indecent act with an adult contrary to section 11(1) of the Sexual Offences Act, Act No. 3 of 2006. I also set aside the sentence imposed upon him for the said conviction and order that the Appellant be and is hereby set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

DATED AT MACHAKOS THIS 22ND DAY OF JULY 2015.

P. NYAMWEYA

JUDGE