REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MARSABIT

CRIMINAL APPEAL NO.15 OF 2015

OTE MAMO KASA.....APPELLANT

VERSUS

REPUBLIC …….……. RESPONDENT

(From the original conviction and sentence in Criminal Case No.478 of 2014 of the Principal Magistrate's Court at Marsabit by Boaz M.Ombewa – Ag.Principal Magistrate)

JUDGMENT

The Appellant, **OTE MAMO KASA**, was Charged with an Offence of sexual assault contrary to section 5(1) (a) (2) (sic)of the Sexual Offences Act of 2006. He was alternatively charged with an offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act, 2006.

The particulars of the offence were that on 30th May2014 in Marsabit County, the appellant unlawfully used his fingers to penetrate the vagina of **S.G.M.** alternatively, he intentionally and unlawfully touched the vagina of**S.G.M**, a girl aged 3 years.

The appellant was found guilty of the offence in the alternative charge and sentenced to serve 20 years imprisonment. He now appeals against both conviction and sentence.

The appellant relied on five grounds in the petition of appeal filed on 18th August 2014. The grounds are as follows:

1. That the learned magistrate erred in law and in fact in failing to establish that the charges levelled against the appellant were never proved beyond reasonable doubts.

2.That the learned trial magistrate erred in law and in fact in failing to establish an existing grudge between the Appellant and the girl's father.

3.That the learned magistrate erred in law and in fact in failing to establish that the witnesses gave conflicting evidences (sic) that were unreliable by law (sic).

4.That the proceedings were prejudicial, irregular and unfair as the accused was not afforded an opportunity to be heard personally as provided for under section 364 (2) of the Criminal Procedure Code.

5. That the doctor's report and his evidence did not point towards his guilt and warrant a conviction.

The state opposed the appeal through Mr. Mwangangi, the learned counsel.

Briefly the facts of this case were that the Appellant called **S.G.M** placed her on his laps. He removed her pants and inserted a finger into her genitalia. When she cried he released her.

The Appellant opted to keep mum after he was placed on his defence.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated Case of **OKENO VRS. REPUBLIC 1972 EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."

Before I embark on the analysis of the evidence, I wish to point out that the charge in count one was wrongly drafted; it cited a nonexistence section. It ought to have read:

"… **contrary to section 5(1) (a) (i) as read with section 5 (2)…"**

Since no prejudice was occasioned, I will not comment further on the same.

When the trial magistrate made a finding that the offence in the substantive charge was not proved, he ought to have acquitted the Appellant in respect of that offence. He stopped after saying the offence was not proved.

All the other grounds touch on the sufficiency and quality of the evidence except the fourth ground. I will therefore start with it. The contention by the Appellant that he was not accorded a chance to be heard personally is not supported by the record. My perusal of the record indicates that he fully participated in the trial. He was given a chance to cross examine witnesses and when the court found that he had a case to answer,he elected to exercise his right keep quiet. This is full participation in the trial. Section 364 (2) of the CPC he had cited, applies in the High Court in cases of revision.

D G (PW3) testified that on 30.5.2014, she was washing clothes at the back of her house while **S.G.M**, her neighbour's daughter was playing with her children in the sitting room. When she heard the children screaming, she went to check on them. When she enquired from the appellant as to why **S.G.M** was crying, he informed her that her son aged about one and a half years had assaulted her.

K S B (PW1) is the mother of **S.G.M** She testified that when her daughter went home crying, she reported that the Appellant who was taking alcohol in **Daiche's** house had inserted his finger into her vagina. This was after he had placed her on his laps and removed her pants. This was the gist of the evidence of **G M G (PW2),** the father of **S.G.M** He however added that his daughter informed him that the Appellant had also given her chang'aa, which she spat.

Another witness who was present when **S.G.M** reported to her parents was **S G S (PW4).**He testified like the rest on the allegation against the Appellant. He however unlike the others said that **S.G.M** had said that the Appellant was at the shop of **Ababa.**

It is not in all sexual offences where the victims must testify in order for there to be a conviction. I have in mind the offence of bestiality or where the victim is of unsound mind or mentally impaired or like in the instant case, too young to testify. The court of appeal in **MM vs. Republic in Nairobi Cr.Ap.No.41 of 2013** observed as follows:

"Any requirement that insists on a child victim of defilement, irrespective of his or her age to testify in order to found a conviction would occasion serious miscarriage of justice. What fair hearing would a child victim aged six (6) months, like that in the case of Robinson Tole Mwakuyanda V. R. H.C. Cr. Appeal No 227 of 2007, get if the courts were to insist on the evidence of such a child, who on account of his/her tender age cannot speak."

Although in the instant case this was not an issue, it was necessary I mention it at this juncture for it will have a bearing on what I am going to say in a short while. We are aware that the victim herein did not testify due to her age. However the evidence that was attributed to her raised some contradictions.

S G S (PW4) said that **S.G.M** told her parents that the Appellant was at the shop of **Ababa.** Her parents however said she said that the Appellant was at the home of **Daiche (PW3).** Can this be ignored as a mere discrepancy? The temptation is there but I am persuaded otherwise due to some other facts am about to address.

In his testimony **G M G (PW2)** said that his daughter also reported that the Appellant gave her some chang'aa which she spat. This was absent from the evidence of the other witnesses present when the report was made. This cannot be said to be an oversight considering that this is a child of three years and such allegation about alcohol cannot be taken lightly. Why was this absent from the evidence of the other witnesses? We may not know the answer.

The mother of **S.G.M (PW1)** said that her daughter told her that the Appellant removed her pair of pants before inserting his finger into her genitalia. Nobody told the court whether she had her pants on when she went to report to her parents or when **Daiche** went to check on her when she was crying. Had **Daiche** testified that she found it elsewhere other than her **(S.G.M)** wearing it, it would have bolstered the allegation against the Appellant. This is an omission the investigating officer ought to have pursued to give credence to the case.

From the foregoing analysis I make a finding that the prosecution case was not proved to the required standards. The evidence on record is unsafe to found a conviction on. Consequently, the appeal by the Appellant is allowed. The conviction is quashed and the sentence set aside.

The Appellant is therefore set at liberty unless if otherwise lawfully held.

DATED at Marsabit this 24th day of November 2015

KIARIE WAWERU KIARIE

JUDGE