



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A
CRIMINAL APPEAL NO. 116 OF 2013

PETER MAINA MWANGI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

**(Being an appeal against conviction and sentence in Kangema Senior Resident Magistrate's Court
Criminal Case No. 59 of 2010 (Hon. D.A. Orimba) on 7th October, 2010)**

JUDGMENT

The appellant was charged with the offence of attempted defilement of a girl aged 16 years contrary to **section 9(1) (2) of the Sexual Offences Act, No. 3 of 2006**. It was stated in the particulars of the offence that on the 15th day of February, 2010 at [Particulars Withheld] in Murang'a North District within central province, the appellant committed an act which causes penetration with a child namely R W, a girl aged 16 years.

In the alternative, the appellant was charged with the offence of indecent act with a child contrary to **section 11(1) of the Sexual Offences Act No. 3 of 2006**. On this alternative count, it was alleged that on the 15th day of February, 2010 at [Particulars Withheld] in Murang'a North District with central province, the appellant unlawfully committed an indecent act with a child namely R W, a girl aged 16 years old by touching her private parts namely vagina and breasts.

Upon hearing both the prosecution and the defence case, the learned magistrate came to the conclusion that the prosecution had proved its case beyond reasonable doubt and convicted the appellant though it is not clear from the learned magistrate's judgment whether the appellant was convicted of the principal charge or the alternative count. The appellant was sentenced to serve 10 years in prison for whatever offence he was convicted of.

The appellant appealed to this court against the said conviction and sentence. Amongst the grounds upon which the appellant's appeal is based as stated in the appellant's amended supplementary grounds of appeal dated 15th October, 2013 are that the charge was defective in nature as the particulars of the charge sheet omitted to indicate the means of penetration on the complainant which omission violated **section 3(1) (a) of the Sexual Offences Act No.3 of 2006**; that the learned magistrate erred in law and fact by shifting the burden of proof to the appellant and that the case for the prosecution was not proved beyond reasonable doubt.

The prosecution had five witnesses the first of whom was the complainant's father. **B M G (PW1)** told the court that her daughter had a mental problem and could not communicate. This witness said that on 15th February, 2010, he was informed by her daughter's classmate that someone had led her daughter into

the bush and defiled her. He then proceeded to Kairo police station to make a report but on arrival he found the suspect, the appellant herein in police custody already.

The witness testified that her daughter had visible injuries on her head and the appellant had injuries on his body as well.

Susan Wahuru Kimani (PW2) is the witness who is said to have caught the appellant in the act of defiling the complainant. According to her, on 15th February, 2010 at around 2 pm she was on her way to the tea-buying centre when she saw the appellant in a tea bush lying on a naked child; she recognised the child as the complainant. The appellant is said to have been half naked with only his shirt on; his trouser is said to have been beside the road. The appellant is a person she knew before and that he used to work for her neighbour.

Susan Wahuru Kimani proceeded to the police station at Kahuro to report this incident. On her way to the police, she informed one Gachinga and another person she described as a boy of this incident and sought their assistance to arrest the appellant. Although she did not find the police, she was assisted by a lady who telephoned one of the police officers informing him of what had happened. The witness, the police and members of the public went back to the scene of crime. The appellant was arrested about thirty metres from the scene but the complainant was still there, naked.

Moses Mwangi Muturi (PW3) testified that on the 15th day of February, 2010, at around 2 pm he was working at the Anglican Church of Kenya at Kahero with his friend whom he identified as **Stanley Gachinga(PW4)** when a lady came seeking for help to arrest the appellant who was allegedly defiling a girl. This witness together with his friend and the lady who sought help proceeded to the scene where they found the appellant. The appellant is alleged to have asked to be pardoned even before anybody talked to him. The witness said that the appellant was drunk and the girl who had been defiled was still naked. The appellant is said to have been erect. This witness together with his friend arrested the appellant and took him to the police.

Stanley Gachinga (PW4) on his part told the court that indeed he was on duty with his friend **Moses Mwangi Muturi (PW3)** at the Anglican Church at Kahuro when **Susan Wahuru Kimani (PW2)** whom he referred to as mama Wangari came asking him to go and witness the appellant defiling the complainant. When he went he saw the appellant emerging from tea bushes and found the complainant naked. He went back and asked his friend to join him and arrest the appellant. They found the appellant who pleaded with them for help. PW3 and PW4 arrested the appellant and escorted him to the police station.

The police officer who received the report concerning the complaint against the appellant was **Daniel Kibor (PW5)**, a police constable attached to Nyakianga police station. He said that on 15th February, 2010, he was on duty when at 2 pm, members of the public came with the appellant to the station. The members of the public alleged that the appellant had been found attempting to defile a child; he confirmed to have known the child previously. The officer booked the appellant and subsequently charged the appellant.

Since the appellant is said to have been assaulted by members of the public, this witness testified that he took him to Kahero Dispensary for treatment. He produced a treatment note which was admitted in evidence as a prosecution exhibit to prove this fact of injury.

The doctor who examined the complainant was **Dr Mark Nganga (PW5)** who was then a medical officer in charge of Kangema hospital. According to the doctor's findings, the complainant had a scratch on the face. The hymen was intact, the libia minora was intact. There were no spermatozoa. There was an infection. The doctor's findings were contained in a P3 form which was admitted in evidence as a prosecution exhibit. Apart from examining the complainant, this witness also produced a report by Dr Owino from Nyeri hospital to the effect that the complainant had some sort of mental retardation and therefore could not testify in court though she was 16 years old. This report was also admitted in evidence.

The last prosecution witness was the complainant's mother **LW (PW6) who** testified that the complainant, who was present in court with her, was mentally retarded and that she could not talk. She said that at the time of the offence, the complainant was 16 years old and that she was attending a special school.

When the appellant was put on his defence he opted to give unsworn testimony. His evidence was that on 15th February, 2010, he was on his way to hospital when he saw a girl coming from a nearby home. According to him, this girl greeted him and passed. A few metres ahead, he found some people seated, they arrested him demanding to know where he was coming from. They forced him to sit down and started beating him. There was a lady among these people who demanded that the appellant "tells the truth." This lady, according to the appellant had begrudged him at the place of his work. Generally, the appellant denied having defiled the complainant.

Having laid out the evidence as presented in the subordinate court, it is my obligation, as the first appellate court to re-evaluate the evidence and come to my own conclusions always bearing in mind that, unlike the subordinate court, I do not have the advantage of seeing and hearing the witnesses. This is the legal position in such matters since the court of appeal decision in the case **Okeno versus Republic (1972) EA 32** where it was stated that:-

"An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. 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 findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can 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 page 36).

I will proceed to evaluate the evidence in the light of provisions of the Sexual Offences Act under which the appellant was charged.

The principal count of the offence of attempted defilement with which the appellant was charged is defined **in section 9(1) of the Act**. This section provides as follows;

9. (1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.

Section 9(2) simply prescribes the penalty for the offence of offence of attempted defilement; it says:-

9. (2) A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term not less than ten years.

The statement of offence or the charge on the main count against the appellant appear to be inconsistent with the particulars of the offence; while the charge is of an attempt to defile, the particulars thereof point towards the offence of defilement itself as defined in **section 8(1) of the Sexual Offences Act** because the appellant is alleged to have ***"committed an act which causes penetration with a child namely R.W a girl aged 16 years"***. This resonates with the provisions of **section 8(1)** of the Act which state:

8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

There was no evidence, as far as I can gather from the record, that there was penetration. The complainant herself could not testify because she was certified to be mentally handicapped and therefore not able to testify. The subordinate court did not therefore have the benefit of hearing from her on what exactly took place as far as the case against the appellant is concerned.

The only other useful evidence in this regard is the evidence of the medical doctor who examined the

complainant. According to the P3 form in which he compiled his findings upon examination of the complainant, the doctor was clear that the complainant's hymen, labia minora and labia majora were all intact. There were no spermatozoa detected. Apart from identifying scratches on the complainant's face and what was described as a "whitish p.v. discharge" the doctor did not detect anything abnormal on the complainant's genitalia or any other part of her body. Upon cross-examination the doctor said that he did not find anything on the complainant linking the appellant with the offence and therefore, from an expert's point of view, the whitish discharge had nothing to do with the appellant.

Without the evidence of penetration, there is no factual basis to support the particulars that the appellant committed an act which causes penetration. In any event those particulars, even if they were proved to exist, do not support the charge as framed in the charge sheet. The net result of the inconsistency between the charge and the particulars of the offence is that there are no particulars for the offence of attempted defilement.

The alternative count which the appellant was confronted with is the offence of an indecent act with a child contrary to **section 11(1) of the Sexual Offences Act, No. 3 of 2006**. An indecent act is defined in section 2 of the Act as unlawful intentional act which causes:-

- a. *Any contact between the 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.*

For purposes of this appeal, part (a) of section 2 is more relevant as the appellant is alleged to have committed an indecent act with the complainant by touching her private parts namely, vagina and breasts. The only eye witness in this regard was **Susan Wahuru Kimani (PW2)** who allegedly saw the appellant defiling the complainant in a tea bush. On the material date and time this witness saw the appellant, half-naked, lying on the complainant; she knew the appellant before as a person who used to work for her neighbour.

This eye witness told the court that she went to report the incident to the police but before that, she informed **Gachinga (PW4)** and his friend. The witness did not find the police at Kahuro where she went to report but with the assistance of a certain lady she managed to get hold of one officer through his phone; the witness testified that she led people to the scene. According to this witness the appellant tried to escape but was arrested about thirty metres from the scene; his victim, the complainant was found at the scene, still naked.

The evidence of this eye witness was corroborated by two other prosecution witnesses; these were **Moses Mwangi Muturi (PW3)** and **Stanley Gachinga (PW4)**, who confirmed that on the material date and time, **Susan Wahuru Kimani (PW2)** found them working at the Anglican Church of Kenya, Kahuro and told them that the appellant was in the course of defiling the complainant. When they arrived at the scene, they did not find the appellant defiling the complainant as alleged; however, they found the appellant and the complainant at the scene. The complainant was naked. The evidence of these two witnesses was more of circumstantial evidence tending towards the guilt rather than the innocence of the appellant. There is nothing from the record that would cast any doubt on their truthfulness or the credibility of their evidence.

The conclusion that I can make from the re-evaluation of the evidence is that the prosecution proved the alternative count of the offence of indecent act with a child contrary to **section 11(1) of the Sexual Offences Act** beyond reasonable doubt. I had noted earlier in this judgment that the learned magistrate did not specify which of the counts he had convicted the appellant. For avoidance of doubt, if the learned magistrate convicted the appellant on the main count, I would quash the conviction and set aside the sentence on that count and substitute it with a conviction of the alternative count of the offence of indecent act with a child. Under **section 11(1)** of the Act the minimum sentence for the offence of indecent act with a child is 10 years imprisonment. The appellant will, accordingly serve a sentence of ten years in prison which sentence shall run from 15th October, 2010 when the appellant was detained in custody immediately after arrest. Subject to my findings on the learned magistrate's decision on the

offence of which the appellant was convicted and sentenced, the appellant's appeal is dismissed.

Dated, signed and delivered in open court this 14th day of January, 2014

Ngaah Jairus

JUDGE