REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 24 OF 2012

EVANS MAGOMA ONTOBO……………………………….…………………….APPELLANT

VERSUS

REPUBLIC………………………………………..……………………………..RESPONDENT

(From the original conviction and sentence of SRM's

Kilgoris in Criminal case No. 431 of 2011)

JUDGMENT

Introduction

1. The appellant herein Evans Magoma ontoro was the accused in criminal case Number 431 of 2011 of the Principal Magistrate's court at Kilgoris. He was charged with an indecent act with a child contrary to **Section 11(1)** of the **Sexual offences Act No. 3 of 2006**. The particulars of the charge were that on 29th May, 2011 at 2.00p.m. at [particulars withheld]Secondary School field in Transmara West District within Narok County, he intentionally and unlawfully caused his penis to come into contact with the buttocks of T N a girl aged 15 years contrary to **section 11(1)** of the **Sexual offences Act No.3 of 2006**. He pleaded not guilty to the above charge and his trial ensued.

The Prosecution Case

2. The complainant herein testified as PW1 after the court had conducted a voir dire examination on her. She testified that at the time of the incident, she was 14 years old. She told the court that on the material day, she was in the company of other girls watching a music festival. They were all standing along a fence facing the school with their backs to the open field.
3. As PW1 and the other girls stood there, she felt that someone was touching her buttocks. When she turned, she saw the appellant who had a jacket wrapped around his waist and covering his naked penis which the appellant had used to touch PW1's buttocks PW1 identified the appellant's jacket in court.

4. PW1 also stated that the appellant was in the habit of touching girls' buttocks with his penis. PW1 sent for one of her teachers who came around. It was discovered that the appellant was walking around with an unzipped trouser that exposed his penis which he then camouflaged by tying a jacket around his waist.
5. PW1 also stated that after the appellant was taken to the school office, he was caned and that is when he admitted that whenever he went to where girls were, he was sexually turned on and went

about doing what he did to PW1.

6. PW2, N N, a colleague of PW1 also testified that as she stood along the fence with other girls watching the music festival, she felt someone touching her waist. She was surprised by the act and on turning around, she saw the appellant who was carrying a jacket on his hands covering the front part of him. PW2 also testified that she had seen the appellant leaning towards PW1. PW2 also corroborated PW1's evidence to the effect that the appellant told the teachers that he was turned on sexually whenever he went to where girls were gathered.
7. Caroline Achieng Ojwang testified as PW3. She is a teacher at [particulars withheld] School in Kilgoris. Her evidence was that on the 25th May 2010, she was in the staff room when she received a report that there was a man who was sexually harassing the girl students; among them PW1. PW3 went towards the fields but before she got there the appellant started running away. He was however apprehended and taken to the staff room for questioning. PW3 stated that the appellant's trouser zip was open and when asked why that was so, he said that it was as a result of jostling with pupils. After more interrogation, PW3 said the appellant told them that he was in the habit of removing his penis and touching the girls' buttocks with it. PW3 told the court that a number of girls from her school had raised similar complaints that had arisen during previous music festivals.
8. PW4 was No.88807 Police Constable David Murai. He received a report of the complaint made by PW1 and also received the appellant at the police station and placed him in cells. After taking statements from witnesses, PW4 charged the appellant with the offence of committing an indecent act with a child. PW4 also produced the appellant's jacket as **P. Exhibit 1**.
9. The last witness, PW5 was Intitolesha Naenkop a security guard at [particulars withheld] Secondary School. He testified that on 25th May 2011, while he was on duty at the school, he was called to the office where he found the appellant tied up. With the help of 2 teachers, PW5 escorted the appellant to the police station and handed him over to the police. PW5 identified the appellant in court.

The Defence Case

10. The appellant gave an unsworn testimony in which he told the court that on 25th May 2011, he left his home at Nyacheki and went to Sosio, arriving there at 4.00 p.m. That he had gone to pay fees for his brother. After paying the fees, he decided to stop briefly and watch some games which were going on. At the same venue, there was a young girl who was standing infront of him. He asked her to move away as she was blocking him from watching the game. She moved away

without uttering a word.

11. When the games ended, he moved towards the gate but he was prevented from leaving on the pretext that he had to explain something to the police. He was then arrested and taken to Kilgoris police station and put in cells on allegations that he had touched a girl. The appellant stated that if indeed he had committed the offence as alleged, he would have been mobbed by members of the public since the incident is alleged to have taken place during the day.

Findings of the Trial Court

12. After carefully evaluating the evidence that was placed before him, the learned trial magistrate was satisfied that the case against the appellant had been proved beyond any reasonable doubt. The appellant was found guilty as charged, convicted and sentenced to serve ten (10) years' imprisonment.

The Appeal

13. Being aggrieved by both conviction and sentence, the appellant preferred appeal vide the Petition of Appeal filed in court on 6th February 2012. There are 5 grounds of appeal:-

1. *That the learned trial magistrate erred in both law and fact by misdirecting himself and failing to*

notice that there was no sufficient evidence on whose strength he could convict the appellant.

2. *That the learned trial magistrate erred in law and fact in failing to appreciate that crucial witnesses were not called by the prosecution.*
3. *That the learned trial magistrate erred in law and fact by upholding and accepting the speculative evidence tendered by PW1, PW2 and PW3.*
4. *That the learned trial magistrate erred in law and fact by failing to appreciate that the conditions and circumstances prevailing at the scene of crime were not conducive for positive identification.*
5. *That the learned trial magistrate erred in law and fact by failing to consider the appellant's defence.*

14. The appellant therefore prays that the appeal be allowed, conviction quashed and sentence set aside.

The Submissions

15. At the hearing of this appeal, the appellant relied on his written submissions filed in court on 5th December 2013. He reiterated the grounds of appeal and urged the court to find that the prosecution evidence fell far below the required standard.
16. The appeal was opposed by Mr. Majale, the prosecution counsel who appeared for the respondent. Counsel's argument was that the prosecution case was very tight and that all the prosecution witnesses, namely PW1, PW2 and PW3 positively identified the appellant. Counsel urged the court to find that the appellant's defence was a mere denial and that the same did not dislodge the evidence given by the prosecution in support of the claims against the appellant. He urged the court to dismiss the appeal on both conviction and sentence.

First Appeal

17. This appeal before me is a first appeal. In this regard my duty as the first appellate court is to reconsider and evaluate the evidence afresh with a view to reaching my own conclusion in the matter remembering only that I do not have the privilege of seeing and hearing the witnesses who testified during the trial. See generally **Pandya-vs- R [1957] EA 336**; **Okeno –vs- Republic [1972] E.A 32** and **Selle & another –vs-**

Associated Motor Boat Co. Ltd & Others [1970] EA 123.

Issues for Determination

18. I have now carefully reconsidered and evaluated the evidence

afresh. I have also considered and weighed the judgment of the trial court with a view to establishing whether the same can be supported.

19. While the prosecution evidence shows that the appellant walked around with an unzipped trouser and a jacket on his hand which he used to cover his naked penis with which he touched PW1's buttocks, the appellant contends that all he did was to ask an unnamed girl who was standing infront of him as he watched games to move away so that his eyes could freely see what was happening. After the above analysis, the issue that arises for determination is whether the prosecution proved beyond doubt that the appellant indeed touched PW1's buttocks with his penis as he stood behind her.

Findings and Decision

20. After a careful analysis of the evidence on record, I am satisfied that the judgment by the learned trial magistrate was well founded. The evidence of PW1 and PW2 shows clearly that the appellant was standing right behind PW1 with his penis protruding out of his trouser and that he indeed touched PW1's buttocks as alleged. In his defence, the appellant confirms that he was standing

behind PW1 (the unnamed girl) though he says that all he did was to ask her to move away from his view. PW2 confirmed that she saw the appellant leaning against PW1.

21. PW3 also confirms that when the appellant was apprehended and taken to the office, his trouser zipper was still open and he could not clearly explain why that was so until he was caned. PW3 also confirms that the appellant admitted to having touched PW1's buttocks with his penis because of an irresistible urge to do so whenever he found himself among girls.
22. It is also instructive to note that the appellant had actually got into the habit of doing what he did to PW1 and PW2. Further, the appellant tried to flee when he was confronted after a report was made to PW3. That conduct on the part of the appellant of taking flight for no apparent reason was, in my humble view, not consistent with innocence.
23. The only other issue for determination is whether, during the trial, the age of PW1 was firmly established. The complainant told the court during her evidence in chief that she was 14 years old, but this was not supported by any documentary evidence such as a birth certificate, a baptism card or such other document as would prove PW1's age.
24. In **<u>Faustine Mghanga –vs- Republic [2012] e KLR</u>** the High court sitting at Mombasa (Nzioka, J.) had this to say on the question of documentary proof of age:-

> **"I do appreciate the importance of age assessment in such cases. But honestly who can know the age of a child better than the mother of a child and or the child if of age? I personally take judicial notice of the fact that most people in rural areas and even urban areas would not purpose to have a birth certificate unless required for a specific purpose. If the court are going to insist on birth certificates as the scientific methods of proof of age there may be no successful matters especially under Sexual Offences Act. What kind of justice then shall we be giving, if we released all suspects, not based on the totality of the evidence but on technicalities of failure to prove one single issue of age? I note that Article 159 of the constitution of Kenya has impressed upon the court to do justice by avoiding 'technicalities'. What kind justice will be done if victims are left without redress simply because they are helpless in the hands of "careless, unconcerned or intentional default on the part of investigating officers who fail to demand, during investigation or prosecution to establish and or prove age of a victim beyond reasonable doubt? For how long shall the courts lament in their judgment that age was not proved and set free all suspects? Isn't it injustice? Indeed no justice will be done, nor seen to be done and the society will continue to lose confidence in the judiciary. Is there anything like 'social justice'? Does the society understand the courts language of 'proof of age?' Is the judiciary alive to the fact that justice is done when seen to be done? I entirely agree with the above sentiments."**

25. I entirely agree with the sentiments by Nzioka J as above stated. Similar sentiments were expressed in the case of **<u>Mangungu –vs- Republic</u>** where Hon. Justice W. Ouko quoting a reference from I.E Collingmood's Criminal Law of East and Central African (London Sweet and Maxwell) 1967 Ed at page 123, observed

> **"Age may be proved by a birth certificate or particularly in the case of Africans by the evidence of a person present at the birth".**

26. In the more recent decisions of **<u>Francis Kiptanui Sitienei –vs- Republic [2013] e KLR</u>** and **<u>Hillary Nyongesa –vs- Republic [ELD] Criminal Appeal no. 123 of 2009</u>**, Mwilu J, (as she then was) held as follows:-

> **"Age is such a critical aspect in Sexual Offences that it has to be proved conclusively. Anything else is not good at all. It will not suffice. And it becomes more important because punishment (sentence under the Sexual Offences Act) is determined by the age of the victim."**

27. **Section 11 (1)** of the **Sexual Offences Act No. 3 of 2006** provides:-

"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 10 years." while

Section 11 A. provides:

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

28. In light of all the above authorities, and from the evidence by

PW1, who told the court after a *voir dire* examination that she was born on 12th November 1997, there is no doubt in my mind that she proved her age to the court. The court noted after the *voir dire* examination and before PW1 testified that **"this subject is very intelligent. Converses in English and Kiswahili fluently. --- She knows where we are and knows what to say. --."** PW1 thus knew exactly what to say to the court, including her age.

29. In the premises, I hold and find that this appeal on both conviction and sentence lacks merit. It is accordingly dismissed in its entirety. R/A to the Court of Appeal within the next 14 days.
30. Orders accordingly.

Dated and delivered at Kisii this 27th day of February, 2014

R.N. SITATI

JUDGE.

In the presence of:

Present in person for Appellant

Mr. P.O. Ochieng (present) for Respondent

Mr. Bibu - Court Clerk