



REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL NO: 80 OF 2012

(Appeal arising from the Judgment of C. KENDAGOR SRM

dated 427/3/2012 in Kakamega CM's court vide Cr. Case No. 134 of 2012)

DENNIS WANJALA MASINDE.....APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGEMENT

The appellants were charged with two counts of committing an indecent act with a child under the sexual offences Act No. 3 of 2006. The particulars of the offence for each count were as follows;

On the diverse dates between 7th and 10th January 2012 at [particulars withheld] Kakamega District within Western Province jointly intentionally exposed/displayed pornographic materials to G I a child aged 12 years.

And on count two is that, **On the diverse dates between 7th and 10th January 2012 at [particulars withheld] Kakamega District within Western province jointly intentionally exposed/Displayed pornographic materials to B A a child aged 10 years.**

The appellants were convicted of both counts and sentenced to serve 10 years imprisonment. Ms Andia , Counsel for the appellant filed the appeal and the grounds of appeal are that the prosecution evidence was contradictory, non-corroborative and un reliable, that the trial magistrate considered irrelevant facts, the sentence is excessive and illegal, the trial court disregarded the law and that the evidence does not link the appellants to the offence.

Counsel for the appellants filed written submissions and further submitted that the charge sheet was defective. Counsel contented that the charge sheet related to display of pornographic materials and there is no evidence relating to indecent assault. **Section 16 of the Act** provides for pornographic offences and therefore the conviction is based on the wrong section of the law. Counsel relied on the case of **OLE NAENI VR REPUBLIC**.

According to the written submissions it is indicated that there was no evidence that the complainant were exposed to video of pictures. A crucial witness by the name J was mentioned but she was not called to testify and that the court ought to have found out how the photographs got into the phone.

Ms Ngovi, learned state counsel opposed the appeal and submitted that the charge sheet was proper. The

complainants testified that there were exposed to phonographic materials on a mobile phone. Indecent act is defined in the sexual offences act and the action of the appellants fall within the definition.

The sentence was proper.

Five witnesses testified before the trial court. **G Iwas PW1**. He was aged 12 years old. His evidence was that on the 7th January 2012 he was with PW2 B cycling at about 7.00pm. The 1st appellant called them indicating that he would show them a “**Papa Shirandula video**”. The appellant showed them a video whereby a dog and a girl were having sex. The next day at about 6.30 pm the 1st appellant called them again and showed them from his phone a girl and a man having sex. The 2nd appellant was also present on both occasions. On the same date the 1st appellant held a girl and told PW2 to go and have sex with her. The incident was reported to PW2’s parents and later to the police. It is PW1’s evidence that the two appellants were working as security guards in the neighborhood and they forced them to see the pictures.

PW2, B H A was 10 years old. His evidence is similar to that of PW1. His further evidence is that he was told to practice what he saw with a girl and when he refused the 2nd appellant slapped him. He knew the phone belonged to the 1st appellant. PW3 A K is the mother of PW2. She works in Nairobi and was informed of the incident on 13/1/2012 by her niece, J, who was staying with the children. She interrogated the boys and later reported the matter to the police on 18/1/2012. PW4 CORPORAL JOEL was stationed at Kakamega police station. He was instructed by PW 5 to go and arrest the appellants at Otiende estate. He did so and recovered a mobile phone from the 2nd appellant.

PW5, SARGENT LUCY WAITHERA investigated the case. She was based at the Kakamega police station and instructed PW4 to arrest the appellants. She checked the mobile phone and saw images of a dog that was having sex with a naked woman. She also saw another image of a man and woman having sex. This was in line with what the complainant had told her. She decided to have the appellants charged with the offence.

The appellants were put on their defence. The 2nd appellant was the 1st accused who testified that he works as a watchman. He was on leave from 24/12/2012 and resumed on 12/1/2012. On the 19/1/2012 he was on duty when the police went to arrest him. The police took his phone. He denied that he was on duty when the alleged offence occurred. In his sworn evidence the appellant further testified that the phone belonged to the 2nd appellant and he only saw the pictures in court. The 2nd appellant who was the 1st accused also gave sworn evidence. He testified that he used to work as a security officer. At one time PW3 went to his place of work with two police officers looking for a Mr. Maina who was also a guard. He was arrested on the 19/1/2012 at his place of work by police officers who were with PW3. He was later charged with the offence.

The main issue raised by the appeal is whether the charge sheet was proper, whether the prosecution proved its case as required by the law and whether the sentence is proper. Counsel for the appellant submitted that the evidence on record relates pornographic materials which is catered for under section 16 of the Sexual Offences Act. The appellants were charge with two counts of indecent act with a child under **Section 11** of the act. The definition of indecent act under section 2 of the act includes:-

(b) exposure or display of any pornographic materials to any person against his or her will.

Section 16 of the act provides for the offence of child phonography and penalizes incidents of exposure by means of print, audio visual or any other media to a child. The evidence on record shows that PW1 and 2 were exposed to some pornographic materials by the appellants. That was an indecent act on the part of the appellants. The appellants would have been charge with an offence under section 11 or 16 of the sexual offences act as their actions also fell under the provisions of section 16 of the act. Under section 16 the minimum sentence is 6 years imprisonment or a fine of not less than Ksh 500,000/= while under section 11 the minimum sentence is 10 years.

I do find that the charge sheet was proper as the main element of the offence was the exposure of indecent

materials to the complainants against their will. The trial court therefore did not error in not finding that the charge sheet was defective.

According to PW 1 and 2 it is the appellants who showed them the materials on the phone. The complainants knew the appellants and it is not a case of mistaken identity. The appellants denied committing the offence and mainly narrated how they were arrested. The defence evidence did not raise doubt on the prosecution evidence. Both the appellants did confirm that they were working as security guards. A mobile phone was recovered from them and PW5 managed to see the photographs from the phone. It doesn't matter how the images got into the phone as it is clear that the appellants were the ones operating the phone. They could have easily deleted the images without showing them to other people.

I do find that the conviction was proper and the sentence is not excessive. The appeal lacks merit and the same is disallowed.

Dated, Signed and Delivered at Kakamega this 19th day of March 2014

SAID J. CHITEMBWE

JUDGE