REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 47 OF 2013

MUSYIMI KASOA ……. APPELLANT

VERSUS

REPUBLIC ……...RESPONDENT

(Being an Appeal from the original conviction and sentence in Mutomo Senior Resident Magistrate's Court Criminal Case. 33 of 2013) by Hon. Sandra Ogot- RM (Ms.) on 12/4/2013)

JUDGMENT

1. The appellant was charged with the offence of attempted defilement contrary to **Section 9(1)** as read with **Section 9(2)** of the **Sexual Offences Act**, No**. 3** of **2006.**

Particulars of the offence being that; on the 19th day of **February 2013** at about 5.00p.m at ***[particulars witheld]*** **village, Mathima Location** in **Mutomo District** within **Kitui County** intentionally attempted to cause his penis penetrate the vagina of **S S** a child aged **13 years.**

2. In the alternative he was charged with committing an indecent Act with a child contrary to **Section 11(1)** of the **Sexual Offences Act** No. **3** of **2006.**

Particulars of the offence being that; on the **15th February** 2013 at about 5.00 p.m. at ***[particulars withheld]*** **village, Mathima Location** in **Mutomo District** within the **Kitui County** committed an act of indecency with **S S** a girl aged **13 years** by touching her private parts namely breasts and thighs.

3. In **Count 2** he was charged with the offence of malicious damage to property Contrary to **Section 339(1)** of the **Penal Code.**

Particulars of the offence being that; on the **15th** day of **February 2013** at about **5.00 p.m** at ***[particulars withheld]*** village, **Mathima location** in **Mutomo** within the **Kitui County** willfully and unlawfully damaged the skirt of **S S** valued at Ksh150/=.

4. He was tried, convicted on the alternative count and the second count and sentenced to serve 10 years imprisonment and to pay a fine of 2000/= or to serve a sentence of **six (6)** months imprisonment in default, respectively.
5. Being aggrieved by the conviction and sentence he appealed on grounds that:

a. The learned Magistrate erred in law and fact when she convicted the accused person based on

uncorroborated evidence.

b. The learned Magistrate erred in law and fact when she held that the accused person had been properly identified by the complainant.
c. The learned Magistrate erred in law and fact when she held that the charge against the accused person had been proven beyond reasonable doubt.
d. The learned Magistrate erred in law and fact when she dismissed the accused person's defence.
e. The learned Magistrate erred in law and fact when she totally relied on the evidence of minor without evaluating and substantiating whether the minor understood the essence and importance of telling the truth in court.
f. The learned Magistrate erred in law and fact when she convicted the accused person against the weight of evidence placed before her.
g. The learned Magistrate erred in law and fact when she held that the sentence that could be imposed upon the accused person was that of custodial sentence of 10 years when no sufficient proof had been tendered in court to warrant a conviction.

6. To prove the case the prosecution called **five (5)** witnesses. PW1, **S S**, the complainant testified that she was sent by her mother to **Nzoani market** to grind maize. On her way back she met the appellant who blocked her path and insisted to be greeted by her. She refused. He attempted to touch her breasts and wanted to lift up her skirt. She bent and he grabbed her skirt from behind which got torn and the flour she carried got poured. On hearing the sound of motor cycle he pretended he was moving away. He moved back and attempted to cover her mouth. She escaped and went home. Her mother asked why she was late and she told her what had befallen her.
7. PW2, **F S**, the mother of the complainant testified that she sent her daughter to the market at 4.00 p.m. She returned at 7.00 p.m. while out of breath and she trembled. She told her what had befallen her. The following day she reported the matter to the Chief. The appellant was arrested.
8. PW3, **Daniel Kingondu Komu** the Senior Assistant Chief, Kinuni Sub/location confirmed having received the report and caused the accused to be arrested. **PW4 No. 2009012826 APC Adam Kibunja** arrested the appellant. **PW5 No. 75433 P.C. Japheth Kidiavai** investigated the case and charged the appellant.
9. In his defence, the appellant stated that on the fateful day in the evening while on his way home he encountered many girls. The complainant was among them. When the motor-cycle passed he recognized the driver. Stating that he was related to the complainant he could not have acted as alleged. He stated further that he had a land dispute with the complainant's mother and the complainant's mother had tried to seduce him. He denied having damaged the complainant's skirt. He called a witness.
10. **DW2, Kitemange Mwetu** said on the material date he saw the accused by passing the complainant.
11. In his submissions, learned Counsel for the appellant, **Mr. Musembi** stated that the trial court failed to appreciate the evidence that was presented before court as against the standard of proof required in criminal procedure; it failed to consider that the prosecution's case was farfetched, malicious and a fabrication. Further, that the trial Magistrate acted on hearsay evidence and failed to analyze the facts and law inorder to reach a proper decision and judgment.
12. In a response thereto the learned state counsel Mrs Abuga opposed the appeal. She stated that the complainant identified the appellant properly, no mistaken identity would arise. She called upon the court to find that the prosecution's case was credible, the defence put up by the appellant was unbelievable hence did not challenge the prosecution's case and the sentence meted out was within the law.
13. This being the first appeal I have to re-evaluate and re-consider all evidence adduced in the trial court and come to my own conclusions bearing in mind that I neither saw nor heard witnesses who testified. ***(See Njorege –vs- Republic [1987] KLR 99; Okeno versus Republic [1972] E.A 32; Kariuki Karanja versus Republic [1986] KLR 90).***
14. A re-evaluation of evidence adduced indicates that the learned trial Magistrate correctly reached a decision of not convicting the appellant on the main court. She has however been faulted for finding him guilty on the alternative charge of committing an indecent Act with a child. The particulars of the charge state that the appellant committed on act of indecency with the complainant a child aged **13 years** old by touching her private parts namely breasts and thighs.

15. An "***indecent Act***" has been defined by **Section 2** of the **Sexual Offences Act** as:

a. ***Any contact between the genital organs of a person, his or her breasts and buttocks with that of another person;***
b. ***Exposure or display of any pornographic material to any person against his or her will, but does not include an act which causes penetration.***

16.In her testimony PW1 stated that:

> ***"When I wanted to pass, he blocked my path and then told me that, I had to greet him, and I refused and he wanted to touch my breasts and wanted to lift my skirt. I bent down and he tore my skirt after grabbing it from behind, he was winking at me."***

17.The evidence regarding what transpired was solely for the complainant. It is clear that it is silent on whether the appellant used his genital organ in an attempt to reach her breasts. The indecency alleged does not arise.
18.In reaching her finding the trial Magistrate stated thus :-

> ***"From the foregoing, I therefore find that the evidence of PW1 is fully supported by PW2, PW3 and pw4. This same confirms that the accused committed an indecent act with the complainant and ripped her skirt in the process."***

19.It is important to note that PW2, PW3 and PW4 were not eye witnesses to what transpired and the indecency alleged was not proved, since the complainant said the appellant wanted to. He did not come into contact with the person of the complainant and for that matter the breasts.
20.In **Count 2** it was stated that the appellant wilfully and unlawfully damaged the complainant's skirt. Evidence led was that the appellant herein was the complainant's uncle. It is not in doubt that they met for the appellant admits having by passed her.
21.According to the complainant following the encounter the appellant insisted of being greeted by the complainant declined. It was in the process of insisting to be greeted and wanting to touch the complainant's breasts that he grabbed her skirt and it got torn.
22.In reaching the decision to convict on that particular count, the learned trial magistrate did not analyze evidence adduced to prove the charge. She did not address the issue whether the appellant tore the skirt intentionally/willfully or if it happened accidently. That notwithstanding, the evidence having been of a single witness it was a requirement for her to caution herself or the danger of having a conviction of such evidence. The principal charge was sexual offence. Pursuant to the proviso to **Section 124** of the **Evidence Act, Cap 80** Law of **Kenya** the learned Magistrate would convict on evidence adduced if sufficient to prove the charge, but the requirement is to caution herself that the witness was truthful. This was not done. In the second count being that of malicious charge to property, there having been no corroboration as to how the skirt got torn, it was a requirement for the trial court to warn itself of the danger of passing a conviction on a single witness' evidence.
23.Evidence adduced by a single witness must be assessed and found to be clear and satisfactory in every material respect. It must be established that the witness had no bias or interest adverse to the accused **[*See RV Makoena 1956 (3) SA 81(a) AT 85h*].** In the instant case the appellant was the complainant's uncle. In his defence he alleged he had a dispute with her family. The trial court was required to consider all evidence adduced cautiously and make a remark to that effect. This was not done.
24.Having weighed the merits and demerits of the appeal, it must succeed in its entirety. The appeal is therefore allowed, the conviction on both Counts quashed and sentences imposed set aside. The appellant shall be released forthwith unless otherwise lawfully held.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **23RD** of **MAY 2014.**

L.N. MUTENDE

JUDGE