



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 41 OF 2012

BENARD MUMITA GAKUNGAAPPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in Kajiado Senior Resident Magistrate's Court Criminal Case No. 58 of 2011 by W, N. Kaberia, SRM on 21/12/2011)

JUDGMENT

1. The appellant was charged as hereunder:-

Count 1 -attempted defilement contrary to **Section 9(1) (2)** of the **Sexual Offences Act No. 3 of 2006**.

Particulars of the offence being that on the **28th December, 2010 at 10.00am** at *[particulars withheld]* in **Loitoktok District** within **Rift Valley Province**, intentionally attempted to cause his penis to penetrate the vagina of **V.W** a child aged **13 years** old.

Count 2 - committing an indecent act with a child contrary to **Section 11(1)** of **Sexual Offences Act No.3 of 2006**.

Particulars of the offence being that on the **28th December, 2010 at 10.00am** at *[particulars withheld]* in **Loitoktok District** within **Rift Valley Province**, intentionally touched with his hands, the breasts and vagina of **V.W**, a child aged **13 years**.

2. He was tried, convicted on the **second count** and sentenced to serve **ten (10) years** imprisonment. Being aggrieved by the conviction and sentence thereof, he appeals on grounds that:-

- i. The learned trial magistrate made an error in both law and fact when he misdirected himself by failing to weigh evidence adduced by the prosecution in light of the defence of the appellant framed up due to a land dispute
- ii. There was no corroborative evidence to establish the charge.

3. According to the evidence adduced on the **28th December, 2010** at about **10.00am**, **PW1, V W** was on her way home when she decided to ask for drinking water from the appellant. The

- appellant went to fetch the water from the tank and took to her. She stood by his door. He caressed her all over the chest. PW2 led many people to where they were. They sought to know what she was doing there. They asked her to leave. The crowd wanted to lynch the appellant but was restrained by neighbours. They took him to the police station.
4. **PW2, P M** stated that she saw the appellant standing with the complainant behind his house and she then saw the appellant enter his house followed by the complainant. She got suspicious as the appellant a neighbor had neither wife nor children. She called **Evans** and sent him to the appellant's house. In the meantime people gathered. They called the representative of **FIDA**, one **Ann** who took up the matter.
 5. **PW3, E M K** was told by **PW2** that she suspected **PW1** was being raped. He mobilized people. They went to the house of the appellant and found the appellant seated while **PW1** was standing next to the door. He asked what they were doing. The appellant said the girl had gone to ask for water. The girl confirmed. The girl then told him that the appellant had touched her breasts and vagina.
 6. **PW4, No 85453 P.C. Everline Anyango** stated that the complainant said that the appellant did not attempt to defile her but he touched her breasts.
 7. In his defence the appellant denied having committed the offence. He alleged that he was framed up because of a land dispute between him and the family of **PW2**. He stated that the husband to **PW2 M M** has caused the police to arrest him for four (4) times. In the year 2000 he demolished his house. He produced photograph to that effect. With regard to the event of the **28th December 2010** he stated that the complainant went to her house to ask for drinking water. Soon thereafter people surrounded her house. He denied an allegation that the complainant entered her house. He alleged that the **Chief** and **Mugo** wanted to take his land.
 8. The appellant relied on written submissions. **Ms Maingi** learned State Counsel submitted that the child (*complainant*) was believed by the court when she testified that the appellant did an indecent act with her. On the sentence passed she submitted that it was in accordance with the law.
 9. This being the first appeal, I am duty bound to reconsider the evidence adduced in the lower court, analyze it and come up with my own conclusions bearing in mind that I neither saw nor heard witnesses who testified. (See ***Okeno versus Republic [1972] E.A. 32***).
 10. This is a case where the appellant was charged with two (2) counts. In his judgment the trial magistrate correctly observed that count 2 should have been an alternative count. Procedurally as a trial court, he ought to have directed the prosecution to present a properly drawn charge sheet.
 11. With regard to the first count, no evidence was adduced to support it. According to **PW4**, the investigating officer the appellant attempted to defile the complainant by touching her breasts. The court did not make any finding on that particular count. Infact the trial magistrate did not address himself on that particular aspect.
 12. With regard to the charge of committing an indecent act with the child, it is stated that the appellant intentionally touched the breasts and vagina of the complainant who was said to have been **aged 13** years.
 13. An indecent act is interpreted to mean;-

“An unlawful act which causes any contact between any part of the body of a person with the genital organ, breasts or buttocks of another...(See Section 2 of the Sexual Offences Act, 2006)”

14. **PW2** saw the appellant standing with the complainant. Later he saw him go to his house followed by the complainant. She got suspicious and called **Evans**. They later called a representative of the **FIDA**. Her suspicion was based on the fact that there was no woman or child in that particular house. **Evans**, **PW3** on being told by **PW2** that she suspected the girl was being raped moved to the house and found the appellant seated while the girl was standing near the door.
15. The complainant explained that she went to ask for drinking water from the appellant. He gave her water as she stood by the door. He then caressed her all over the chest. She left and people arrived.
16. In his defence the appellant stated that the complainant had indeed gone to ask him for water. He argued that after she drank the water she just stood outside. She did not enter his house. He stated that he was framed up because of the land dispute that existed between him and **PW2's** husband.

On cross-examination, PW2 admitted that indeed her husband has a land dispute with the appellant. PW2 said she has offered the complainant's grandmother a portion of land where they live.

17. Considering the fact that PW2 on seeing the complainant and appellant, concluded that he must have had the intent to defile her, without ascertaining why she went to the appellant's house; and further there being a land dispute between her family and that of the Appellant's it would have been important for the prosecution to call some other evidence to confirm the allegation that the appellant touched the complainant's breasts in order to dispel the allegation that, charges were trumped up because of the bad blood that existed between the family that hosted the complainant and the appellant .
18. Without such evidence, the possibility of being framed up cannot be ruled out. The prosecution had a duty of proving the case beyond doubt. An existence of the land dispute between the appellant and PW2's family ought to have introduced some doubt to the prosecution's case that needed to be clarified. This was not done.
19. Having re-evaluated the evidence adduced in the Lower Court, I find the appeal being meritorious. In the premises, it succeeds, it is allowed. I quash the appellant's conviction and set aside the sentence imposed. The appellant shall be set at liberty forthwith unless otherwise lawfully held.
20. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 30TH day of JUNE, 2014.

L.N. MUTENDE

JUDGE