REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO. 304 OF 2013

CHARLES OTIENO ODHIAMBO……..APPELLANT

VERSUS

REPUBLIC……...……..RESPONDENT

(Being an appeal against the sentence and conviction in a judgment delivered in the Thika Chief Magistrates Court Criminal Case No. 4504 of 2009 (Hon. Mrs Wachira) on 2nd December, 2012)

JUDGMENT

The appellant was charged with four counts of defilement contrary to **section 8(1) (2) of the Sexual Offences Act, No. 3 of 2006**. He is alleged to have wilfully and unlawfully committed an act which causes penetration with four different girls aged nine on diverse dates in September 2009 in Murang'a South District within central province.

For each of the principal count of defilement, the appellant was charged with an alternative count of indecent act with a child contrary to **section 11(1)** of the same **Sexual Offences Act**. In this regard, the appellant is alleged to have wilfully and unlawfully committed an indecent act with each of the four girls by touching their private parts, namely vagina; this is said to have happened on diverse dates in the month of September, 2009 in Murang'a South District.

Before the conclusion of the trial, the learned magistrate invoked **section 210** of the **Criminal Procedure Code (Cap 75)** and acquitted the appellant of all the principal counts of defilement for lack of evidence; she, however, put the appellant on his defence on the alternative counts of indecent act with a child contrary to **section 11(1)** of the **Act.**

At the conclusion of the trial, the learned magistrate convicted the appellant on the first three alternative counts of indecent act with a child but acquitted him of the fourth alternative count for lack of evidence.

The appellant was accordingly sentenced to ten years imprisonment on each of these alternative counts with the sentences running consecutively.

The appellant has appealed to this Court against both the conviction and sentences meted out against him. In his appeal, the appellant has impugned the learned magistrate's decision on amongst other grounds, that the learned magistrate erred in law and in fact in convicting him in the absence of any proof that he committed the offences for which he was convicted; that the learned magistrate erred in law and in fact in convicting him when essential prosecution witnesses did not testify; that the learned magistrate erred in law and in fact in convicting the appellant without considering the appellant's defence; and that the learned magistrate erred in law in ordering that the sentences against the appellant should run consecutively rather than concurrently.

The record shows that the appellant's conviction was mainly based on the evidence of the minors who are alleged to have been defiled. These minors shared a class in which the appellant was the class teacher. **MM (PW2),** the first of the four minors to testify, told the court that on 22nd September, 2009, at 1.00 p.m. she was in class when the appellant came and asked everyone else to get out of the class except herself, **WW (PW3), LW (PW4)** and **MM (PW5).**

The witness told the court that the appellant called them and removed their pants; he then asked each of them to sit on him and "shake" while at the same time stroking his genital organ which he had removed from his unzipped trouser. They did this in turns until such a time that they left for lunch.

Later in her evidence in chief this witness said that on the material date, that is, the 22nd September, 2009, she had gone to class to collect water when she found the appellant there; she alleged that the appellant accosted her and kissed her, he then asked her to sit on him.

According to the evidence of **WWG (3),** on 29th September, 2009, at around 7.00 a.m., the appellant came to class and asked everybody else to go out and play except this witness. He told the witness to remove her pants and sit on him. At this time he had unzipped and removed his genital organ. The witness testified that the appellant "did bad manners to her and she felt a lot of pain."

This witness testified that on the same day after lunch, the appellant summoned **MW (5)** from the field to the class where he was seated. When she came out of the class she went to the toilet. She later gave this information to one Consolata who was also a teacher at the school when she enquired from her what it is that the appellant normally does with them.

Although the witness testified that she only went through this experience with the appellant once, she told the court, later in her evidence in chief, that there was another occasion when the appellant summoned the four of them, that is, the witness, **MM (PW2), LW (PW4) and MW (PW5);** on this particular occasion, each of them was sitting on the appellant in turns.

On her part **LW (PW4)** testified that on 31st September, 2009 she went to class and found the appellant with **MW (5)**; M is alleged to have been sitting on the appellant with her clothes pulled up when this witness entered class. He is said to have also called this witness and removed her pants and inserted his genital organ into her private parts. According to her there was nobody else in class at that time. She later reported the incident to Consolata.

M (PW5) herself told the court that the appellant had "raped us" many times before and that the 29th day of September, 2009 was just one of those occasions that he had subjected them to this ordeal. It is not clear from her evidence whom she was referring to besides herself when she spoke of "us". According to her it was on 1st September, 2009 when the appellant defiled both herself and **LW.** This was at 6.00 a.m. before the rest of the students had arrived in school. She reported this incident to Consolata.

The medical examination of the complainants did not reveal any sort of sexual assault on any of them; apparently, it is for this reason that the appellant was acquitted of the offence of defilement.

Although the appellant was convicted of the alternative counts of indecent act with a child, I am not satisfied that these counts were proved beyond reasonable doubt. There is inconsistency in the minors' evidence as to whether they were indecently assaulted by the appellant on the dates they allege they were assaulted and whether they were all huddled together in a place and assaulted together in turns or were assaulted separately at different times.

MM (PW2) testified that on the material day, the four of them were asked to remain in class when the rest of the pupils were sent out. The appellant is said to have defiled or indecently assaulted each of them in turns. The same witness testified that she was sexually assaulted on the material day when she found the appellant alone in class where she had gone to collect water; none of her colleagues is mentioned.

WWG (3), who is supposed to have been referring to the same incident, testified that it was on 29th September, 2009, at around 7.00 a.m., that the appellant excused everyone else from the class and remained with her alone in class where he molested her. She testified that it was only after lunch that he again summoned **MW (5)** to class when everybody else was outside in the playground.

Again, although this same witness testified that she only went through this sort of episode with the appellant once apparently on 29th September, 2009, she later told the court that on some other occasion the appellant summoned the four of them and sexually assaulted them.

LW (PW4) compounded these inconsistencies even further when she testified that it was on 31st September, 2009 that the appellant assaulted her and her friend **MW (5)**; she said that she found M sitting on the appellant when she entered the class. In her evidence she was assaulted on this occasion but she was categorical that there was nobody else in class at that time. M testified that indeed the two of them were sexually assaulted but on 1st of September and not the 31st September, 2009.

It is clear that the prosecution evidence on when the indecent acts are said to have been committed is inconsistent; the witnesses not only contradicted themselves but also contradicted each other. With such contradictions I hold that there is doubt as to whether each of the counts for which the appellant was convicted was proved beyond reasonable doubt.

When this appeal came for hearing, the state conceded that the convictions are not safe and cannot be sustained. The state counsel cited these inconsistencies in the prosecution testimony as clouding the convictions.

On his part, the appellant submitted that besides the contradictory evidence of prosecution witnesses, the state did not call crucial witnesses to testify; one of the witnesses that I suppose the appellant had in mind is one Consolata to whom the minors are said to have reported the alleged sexual assaults. In his defence the appellant testified that the said Consolata had begrudged him; indeed in her testimony, **MMK (PW2)** testified that at one point Consolata's relationship with the appellant had been the cause of separation between him and his wife.

It is clear from the learned magistrate's judgment that she did not consider the appellant's defence in this regard. The state, no doubt, has a discretion as to the number of witnesses it may call to testify on its behalf; **section 143** of the **Evidence Act** is clear that, *"no particular number of witnesses shall, in the absence of any provision of the law to the contrary be required for proof of any fact."* However, failure to call witnesses that may be deemed as essential may be interpreted to mean that if their evidence had been called, it would have been adverse to the prosecution case **(see Bukenya & Others versus Uganda (1972) E.A. 549).** In this regard it is noted that evidence was led to the effect that the relationship between Consolata, whose report led to the arrest and prosecution of the appellant, and the appellant was sour; she is even said to have prompted the complainants to make the reports they made to her. It is safe to conclude that had she been called her testimony would have been adverse to the prosecution case; on the other hand, her absence also raised doubts as to whether charges against the appellant were lodged in good faith or were simply actuated by malice.

One other ground of appeal that merits consideration is the aspect of sentencing the appellant; as noted the appellant was sentenced to ten years imprisonment on each of the three alternative counts he was convicted of. The learned magistrate opted to have the sentences run consecutively rather than concurrently; it is not clear from the judgment why the learned magistrate took this direction because if indeed the appellant was properly convicted, circumstances of the offences were such that the acts that constituted these offences constituted a series of acts that were closely linked in time and criminal intent as to form a transaction. Whenever one is convicted and sentenced on each of such acts that constitute separate offences, the sentences thereof would usually run concurrently and not consecutively.

This question was considered in case of **Odero Versus Republic (1984) KLR 621** where the High Court (Brar, Mbaya JJ, as they then were) sitting in Nairobi held that if a series of acts are so connected together by proximity of time, community of criminal intent, continuity of action and purpose or by the relation of

cause and effect as to constitute one transaction, then the offences constituted by these series of acts are committed in the course of the same transaction.

The court concluded that, in cases where a person has been charged with and convicted of two or more counts involving the same transaction, the practice is to direct that the sentences should run concurrently. The Appellants appeal against sentence in that case was allowed to the extent that the learned magistrate directed the sentences to run consecutively. I think the learned magistrate in the trial against the appellant herein fell into the same error when she sentenced the appellant as she did.

For the foregoing reasons, I find that the appellant's appeal is merited and is hereby allowed; the appellant's conviction is quashed and the sentences set aside. He is accordingly set at liberty unless he is lawfully held under a separate warrant.

Dated, signed and delivered in open court this 17th day of October, 2014

Ngaah Jairus

JUDGE