



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 167 OF 2011

A M G APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original Conviction and Sentence in Criminal Case No. 97 of 2011 of the Senior Resident Magistrate's Court at Kaloleni – **Hon. S. Wewa - SRM**)

JUDGMENT

The Appellant was Sentenced to ten (10) years imprisonment for the offence of indecent act with a child contrary to section 11(1) of the Sexual offences act.

The particulars are that on the 10th day of April, 2011 at about 5:00 am at [Particulars withheld] Village [Particulars withheld] – Kilifi County he committed an indecent act with a child namely S H by touching her private parts namely vagina.

The appellant in the main charge had been charged with attempted defilement of a child contrary to section 9(1) as read with section 9(2) of the Sexual offences Act No. 3 of 2006.

The trial magistrate did find that the substantive charge had not been proved beyond reasonable doubt but found that the act of pulling down complainants pants amounted to an indecent act. She further found that the appellant had been clearly identified by the Complainant. It is not easy to discern what really took place in Court in respect to these proceedings owing to lack of clear and flowing narration of the events that took place, but it falls upon this court to evaluate and analyse the evidence as presented before the lower court.

The Complainant was aged seven (7) years at the time of the alleged offence.

This is what she told the Court at page 6 line 20,

“Am S C. 10th April, 2011 at 5:00 am was on bed slept with M whom I slept with. She is at home. There was someone who tried to remove my pant. I did pull it on I told her that there was someone it was loud voice she woke up she followed him he was leaving to running. He went to their house to put a shirt and said he is not the one. I came out I knew him it was Sunday G, he is staying close to our home. I have known him for long time. When pant was being removed I did not know him Grandmother asked me and I told him what had happened, he is this one. He is my uncle brother to my mother”.

Under cross- examination by the Accused she said,

“He entered in the house he did not have shirt on. Its true that its grandmother told me to say its you”.

It is quite apparent that this incident took place in darkness. The time is given as 5:00 am. There is no evidence of the source of lighting if any. The Complainant herself (apart from feeling somebody attempting to pull down her pants) did not see the intruder. She clearly says that it is her grandmother who told her to mention the Accused person.

PW 1 had told the court that after the child had reported to her that somebody had attempted to pull down her pants. She followed him outside, he went and put on his shirt and started alleging that he had come from a disco. She did not report the matter to anyone till the time when the Complainants mother arrived in the morning and the child narrated of the events of the night. The Appellant was found asleep and was handcuffed.

In his defence the appellant had alleged in his sworn testimony that he had gone to Disco that night and arrived home at around 6:00 am and that he had left the complainants mother behind. They had differed with the complainants mother because he had reported her waywardness to her husband. The complainant mother PW 2 did testify that they were in a wedding fete overnight with the Accused and upon going home in the morning her daughter reported to her that the Accused had attempted to remove her pants early in the morning with a view to defiling her. She went and reported the matter to police and the Accused was arrested. The Complainant was taken for examination and treatment by a doctor but there was no evidence of penetration.

Upon evaluation of the evidence before the lower court it is observed that the complainant did not see who had attempted pull down her pants. This is so because it was dark and there is no evidence as to whether there was any source of light at the time. It is PW 2 the grandmother of the Complainant who is said to have followed the Accused outside yet she did not (according to her evidence) bother to report this to anyone. Which raises the doubt as to whether she indeed saw the appellant coming out of her house on the fateful night.

I am of the considered view that it was not safe to convict the Accused on this alternative count. The conviction is quashed and Sentence set aside.

The appellant is set at liberty unless otherwise lawfully held.

Judgment delivered dated and signed this **23rd** day of **October, 2013**.

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M. MUYA

JUDGE

23RD OCTOBER, 2013

In the presence of:-

Learned state counsel Miss Ogweni

Appellant present

Court clerk Musundi

