REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CRIMINAL APPEAL CASE NO. 493 OF 2010

JOHN MBURU NYAMBURA……………………………….APPELLANT

VERSUS

REPUBLIC ……………….…………………………….……....…RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 591 of 2010 Republic vs. John Mburu Nyambura in the Chief Magistrate's Court at Thika by L. W. Gicheha, Principal Magistrate on 10th September 2010)

JUDGMENT

The Appellant was charged with the offence of defilement which was stated to be "contrary to **section 3(1)(2) of the Sexual Offences Act".** The particulars of that offence were given as "on the 3rd day of February 2010 at (particulars withheld) estate in Thika district of the Central Province committed an act which caused penetration with M W a child aged 8 years". The Appellant was further charged with the alternative charge of committing an indecent act with a child contrary to **section 11(1) of the Sexual Offences Act,** the particulars being that on the 3rd day of February 2010 at (particulars withheld) estate in Thika district of the Central Province, he committed an indecent act with a child namely M W by touching her genital organs.

The trial magistrate convicted the Appellant with the offence of defilement contrary to **"section 3(1)(2) of the Sexual Offences Act**" and sentenced him to 15 years imprisonment.

Being aggrieved by that decision, the Appellant filed this appeal on the following grounds:

1. That the trial magistrate erred by convicting him on a defective charge contrary to the Sexual Offences Act thereby contravening **section 214 of the Criminal Procedure Code** rendering the same incurably defective.
2. That the trial magistrate erred by stage managing the prosecution leading to a miscarriage of justice against the Appellant.
3. That the trial magistrate erred by convicting him in reliance on PW1's evidence being a purported visual identification and allegations which were not supported by PW2, 3, 4 and 6,
4. That the trial magistrate erred in convicting him without considering that essential witnesses were omitted yet no plausible reasons were offered to this effect by PW6.
5. That the trial magistrate erred by rejecting his defence by shifting the burden of proof on his shoulders.

I have studied the evidence adduced in this case very closely. On the first ground of appeal, I note that there was indeed a mistake contained in the charge sheet wherein the first offence the Appellant was charged with was the offence of defilement which was incorrectly stated to be contrary to **section 3(1)(2) of the Sexual Offences Act**. That is incorrect as **section 3(10(2) of the Sexual Offences Act** refers to the offence of rape. The correct citation should have been **section 8(1) of the Sexual Offences Act.** To that extent therefore, I agree with the Appellant's submissions that he was charged on a defective charge. As to the consequences thereof, we shall see shortly.

The Appellant's second ground of appeal is that the trial magistrate stage managed the prosecution. On this ground, it was the Appellant's submission that the trial magistrate filled the gaps in the prosecution case by creating her own theories that though PW1's hymen was found to be intact by the examining doctor, there was penetration and bruises on her vulva. The Appellant contended that this was not proved beyond reasonable doubt. The Appellant submitted that the trial magistrate lost sight of the fact that it is the burden of the prosecution to prove beyond reasonable doubt that the injuries were consistent with the charge. On that count, upon my own independent study of the evidence adduced by the prosecution, I agree with the Appellant that the prosecution was not able to prove beyond reasonable doubt that there was indeed penetration. The offence of defilement as defined in **section 8(1) of the Sexual Offences Act** is an act which causes penetration with a child. Penetration on the part of the Appellant was, in my view, not proved beyond reasonable doubt as to sustain a conviction by the trial magistrate.

On the third ground of appeal which was that the trial magistrate erred in convicting the Appellant on the basis of the visual identification of the Appellant by the complainant, I disagree with the Appellant. I agree entirely with the position taken by the trial magistrate which is that the Appellant was convincingly identified by the complainant. It emerged very clearly that the complainant, PW1, knew the Appellant prior to the offence as he used to visit a person called Njeri at the same plot where the complainant lived. Further, the complainant revealed that though she did not know the name of the Appellant, she could identify him if she saw him and further, she was able to escort her uncle PW4, to the exact place where the Appellant took her and defiled her. She not only escorted PW4 to the exact scene of crime, but was also able to immediately identify the Appellant when he was summoned by his former employer. She was able to take PW4 to the room in the shop where the offence was committed against her by the Appellant. Though she was a minor, I agree with the conclusion arrived at by the trial magistrate that the Appellant was the person who committed a sexual offence against the complainant. While the offence committed is not, to my mind, defilement, it is enough that the Appellant was the assailant. This ground must therefore fail.

On the fourth ground of appeal, which is that the trial magistrate did not consider that essential witnesses were not arraigned, I am of the view that it is not the business of the trial magistrate to determine how the prosecution conducts its case. If the prosecution found it unnecessary to call certain persons as witnesses, then that is neither the court's problem nor the Appellant's problem. The only question which the court need concern itself is whether on the evidence adduced before it, the charges brought forward have been proved beyond reasonable doubt.

Finally, on the ground that the trial magistrate rejected the Appellant's defence, my response to that is that this is not evident at all. I have studied the Appellant's defence which consisted of an unsworn statement alleging that PW4 held a grudge against the Appellant over a competing love interest. Looking at the Judgment of the trial magistrate, I find that indeed the Appellant's defence was taken into account by the trial court. I therefore find no basis of this ground of appeal and the same must fail.

If I may now return to the issue of the defective charge, I find that the first offence the Appellant was charged with was defective to the extent that the wrong provision of the law was cited. This is not so important for this case because the Appellant was also correctly charged with the offence of committing an indecent act with a child contrary to **section 11(1) of the Sexual Offences Act**. As I mentioned before, the charge of defilement was not provide by the prosecution beyond reasonable doubt. They were not able to prove that there was penetration by the Appellant. On that ground, I quash the conviction for defilement remitted by the trial magistrate.

However, I find that the offence of indecent assault was proved by the prosecution beyond reasonable doubt. **Section 2(1) of the Sexual Offences Act** provides that “indecent act” means an unlawful intentional act which causes, inter alia, any contact between any part of the body of a person with the genital organs … of another but does not include an act that causes penetration. To my mind, the evidence adduced by the prosecution points very strongly that while the Appellant did not defile the complainant, he committed an indecent act with her. Though graphic, the evidence that leads me to this conclusion is that PW1, the complainant, testified that the Appellant removed her pant and removed his pant and put his thing for urinating when she was standing and he was seated. This picture does not support the allegation of penetration. Further, the complainant testified that she did not scream. At that age, I consider that penetration would cause sufficient pain to make a child scream in pain. She also testified that she felt pain. PW3 testified that his colleague Dr. Murage examined the complainant whereby the Doctor noted that she had pain and had bruises in the external genitalia but her hymen was intact. I find that this evidence strongly supports the charge of indecent act rather than defilement.

Based on the findings set out above, I proceed to quash the conviction of the Appellant for the offence of defilement against the complainant and the resulting sentence of 15 years imprisonment. However, I enter a conviction against the Appellant for the offence of committing an indecent act against the complainant and proceed to sentence the Appellant to 10 years imprisonment.

SIGNED AND DELIVERED IN NAIROBI THIS 15TH

DAY OF NOVEMBER 2013

MARY M. GITUMBI

JUDGE