REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 192 OF 2012

JUSTUS NYAGA NJINE alias NJOMO……..……APPELLANT

-VERSUS-

REPUBLIC …….RESPONDENT

(From the original conviction and sentence in Criminal Case Number 859 of 2010 in the Senior Resident Magistrate's court at Gichugu –Mr T.M. Mwangi-(SRM)

JUDGMENT

The appellant **JUSTUS NYAGA NJINE** alias **NJOMO** was charged with the offence of attempted defilement **contrary to section 9(1) (2) of the Sexual Offences Act.**

The particulars of the offence alleged that on the 5th day of December 2010 in Kirinyaga East District, Kirinyaga County, the appellant intentionally attempted to cause his penis to penetrate the vagina of **BNA** a child aged 5 years.

The appellant also faced an alternative count in which he was charged with the offence of committing an indecent act with a child contrary to **section 11(1) of the Sexual Offences Act** in that on the same date and place, he touched the vagina of **BNA** a child aged five(5) years with his penis .

After a full trial before the Senior Resident Magistrate at Gichugu (Hon T.M. Mwangi), the appellant was acquitted of the main charge of defilement but was convicted on the alternative count and was sentenced to twelve (12) years imprisonment.

Being dissatisfied with the conviction and sentence, the appellant filed this appeal raising seven grounds of appeal which can be consolidated and summarized into the following main grounds:

1. The learned trial magistrate erred in law and in fact by convicting the appellant on evidence which did not meet the legal threshold of proof beyond reasonable doubt.
2. The learned trial magistrate erred in law and in fact by taking into consideration the evidence of PW1 and PW2 who were minors and who had been coached on what to say by the mother of PW1 who had a long standing grudge against the appellant.
3. That the sentence of twelve years imprisonment was harsh and excessive considering that the appellant was 62 years of age.

When the appeal came up for hearing, the appellant chose to rely on written submissions which he presented to the court. Mr Sitati learned state counsel opposed the appeal on behalf of the state

primarily on grounds that the evidence before the trial court sufficiently proved the charges against the appellant and that he had been properly convicted. He urged the court to dismiss both the appeal against conviction and sentence.

In his written submissions, the appellant urged the court to allow his appeal on conviction allegedly because the evidence on record was not sufficient to sustain a conviction on the alternative charge as the evidence proved that he had touched the complainant's private parts using his hand and not his penis as alleged in the charge sheet. He also complained that the trial magistrate failed to take into account the fact that key witnesses like PW1's mother and PW2's father were not availed as witnesses and that the two families had a grudge against him. His other complaint was that PW2's evidence which the trial magistrate believed and relied upon in convicting him was full of contradictions which showed that she was not a truthful witness.

This being a first appeal, I have re-evaluated the evidence on record as I was required to do - **see**

- **OKENO VS REPUBLIC (1972) EA 36**
- **MWANGI VS REPUBLIC (2004) 2 KLR 28**

I find that the prosecution case was based purely on the evidence of PW1 and PW2 who were both minors aged five years and six years respectively.

The record shows that after a detailed voire dire examination in which both minors were found competent to give evidence on oath, PW1 ***BNA*** testified that on 5th February 2010, she had accompanied ***CW***(PW2) to her grandfather's home . PW2's grandfather was the appellant in this case .He was identified as such by both PW1 and PW2 when they testified before the trial court.

In her testimony, PW1 recalled that on their arrival in the appellant's home, they found the appellant who immediately sent PW2 to the shops. He then took her to his bedroom where he removed her panties and started fondling her private part (vagina) touching it with his hands. She stated that the appellant also removed his male organ from his trousers. She started crying. She at that time became aware of the presence of PW2 who was peeping at them through the door. She (PW2) on seeing the appellant ran away and she followed her out of the house. She then returned to Sunday school and in the evening she reported to her grandmother ***MM*** (PW3) what the appellant had done to her during the day. Accompanied by PW3 and her aunt one C, they went to the appellant's house in search of her under wear which she had left there earlier.

Unfortunately the under wear was not recovered.

On her part, PW3 recalled in her evidence that on the material day at around 8 p.m, she had asked PW1 to remove the clothes she had worn during the day as she prepared to sleep. It was then that PW1 informed her that she did not have her under wear as she had left it in Jomo's house (referring to the appellant's house). PW1 also narrated to her what had happened during the day and how the appellant had inserted his hand in her private parts. It was on the basis of that information that she accompanied PW1 to the appellant's home in search of her under wear after which she reported the matter to the police. She also took PW1 to hospital for examination.

In her evidence, PW 2 confirmed that she had taken PW1 to the appellant's house on the date in question. The appellant then sent her to the shops to buy cigarettes and on her return, she saw PW1 in her grandfather's bedroom. She noted that the appellant was holding her private parts with his hand and that PW1 was not wearing any under pants.

PW4 **P.C** MARTIN **MWALAVU** is the police officer to who PW3 and PW1 reported the matter on the date of the incident at around 9 p.m. The witness who was stationed at Kianyaga police station stated that after recording witness statements, he was unable to arrest the appellant as he had ran away from home. He was later arrested on 23rd December 2010 by PW3's son and handed over to him at the police station. He subsequently charged him with the offences for which he was tried and convicted in the

principal count.

In his defence, the appellant gave a sworn statement and did not call witnesses.

He denied having committed any of the offences preferred against him and stated that PW1 had been influenced by her mother to give false evidence against him allegedly because her mother had a grudge against him after he allegedly refused her to till his land or harvest his tea bushes. He also claimed that he had a sour relationship with PW3 but he did not state for what reason.

Having considered the evidence on record, I find that the appellant's claim that the charges were a fabrication by PW1 engineered by her mother cannot be true because there is no evidence that PW1's mother had any role to play in the appellant's prosecution. There is no indication that she was ever made aware of PW1's ordeal with the appellant since it is apparent that she did not come into contact with PW1 on the date of the alleged incident nor did she accompany PW1 and PW3 to the police station when they reported the incident. It would appear from the evidence that PW1 was living with her grandmother (PW3) at the time in question.

Besides, PW1's mother was not called as a witness in this case and it is difficult to understand why the appellant had insisted in his defence that she had actually falsely testified against him. His claim that he shared a sour relationship with PW3 was disputed by PW3 in her evidence in cross-examination.

In any event, PW1's evidence was materially corroborated by the evidence of PW2 who actually witnessed the appellant, her grandfather touching PW1's private parts with his hand. The appellant did not allege that PW2 had any reason to give false evidence against him. And being a child aged only 6 years old, I doubt that she was capable of giving false evidence against her own grandfather.

The appellant had complained that the trial magistrate erred in relying on the evidence of PW2 which was contradictory and hence unreliable. He alleged that PW2 was not a truthful witness.

In my reading of the evidence on record, i did not come across any contradictions in PW2's evidence or any contradiction between her evidence and that of the other prosecution witnesses. Her evidence was clear, straight forward and consistent with the evidence of PW1 and PW3.

The learned trial magistrate totally believed the evidence of PW 1 and PW2 and said the following regarding their evidence;

"… they were truthful, credible, steadfast in their evidence and testified with such freshness of mind and innocence as if the offence had taken place the day before they testified…."

Having seen and heard the witnesses as they testified and having reached the conclusion that they were credible and truthful witnesses, the trial magistrate was entitled to base his finding of guilt of the appellant on their evidence in view of the provisions of ***section 124*** of the **Evidence Act.** This court cannot fault his findings since it is clear from the record that he believed the complainant was a truthful witness. The fact that the two people mentioned by PW1 and PW3 in their evidence were not called as prosecution witnesses though relevant was not significant as it did not adversely affect the prosecution case. The trial magistrate was alive to this fact as demonstrated by his remarks in his judgment that failure of the prosecution to call PW2's father to testify in this matter did not weaken the prosecution's case.

Finally, the appellant took issue with his conviction on the alternative count because according to him, the offence had not been proved as the evidence adduced proved that he had touched the complainants private parts with his hand and not with his penis as alleged in the charge sheet.

I find that this issue can be easily resolved by a consideration of the meaning of the term "indecent act" from which the offence is created.

The term indecent act is defined in ***Section 2*** of the ***Sexual Offences Act*** as

"An unlawful intentional act which causes;

a. ***Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another but does not include an act that causes penetration"***

From the above definition, it is clear that any contact with any part of an accused person's body with the genital organs of a complainant if made unlawfully and intentionally is sufficient to constitute the offence of committing an indecent act. Contact therefore need not be made with the accused persons genital organs in order for the offence to be committed.

But when will the contact be said to be intentional and unlawful?

In my considered view, such contact will be intentional if there is evidence to show that it was deliberate as opposed to accidental. And it will be unlawful if not consented to by the affected party or the victim.

In this case, there is no doubt that the appellant used his hand, obviously a part of his body to make contact with the complainant's private part (Vagina) by touching it.

From the evidence on record, it is clear that the act was intentional as it was obviously not accidental the appellant having taken the trouble to take PW 1 into his bedroom and to remove her under wear. The act was also unlawful since it is clear that PW1 was a child of tender years and had no capacity to give consent for such an act.

Though I agree with the appellant that PW1's exact age was not specifically proved, it is not disputed that she was a child of tender years (below 10 years of age) at the time the offence was committed and in any case given her stated age , it is obvious that she had not reached the age of majority.

For the foregoing reasons, I am satisfied that the learned trial magistrate in this case properly interrogated the evidence before him and arrived at the correct conclusion that the prosecution had proved the charges in the alternative count against the appellant beyond any reasonable doubt.

It is thus my conclusion that the appellant was properly convicted. His appeal against conviction is thus unmerited and it is hereby dismissed.

On sentence, the appellant complained that the sentence of 12 years imprisonment was harsh and excessive considering his age which he put at 62 years.

The offence for which the appellant stands convicted attracts a penalty of a minimum of ten years imprisonment. The sentence of 12 years was therefore lawful and noting from the record that the learned trial magistrate considered the appellants stated age while passing sentence together with other relevant factors for instance the gravity, prevalence of the offence as well as the circumstances under which the offence was committed, I find no reason to interfere with the sentence.

In the end therefore, the appeal against both conviction and sentence is hereby dismissed for lack of merit.

C.W. GITHUA

JUDGE

DATED, SIGNED AND DELIVERED AT KERUGOYA THIS 11TH DAY OF DECEMBER, 2013

in the presence of;-

The appellant

MR Sitati for state counsel

Kariuki Court Clerk