



A M M.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence in Kithimani Senior Resident Magistrate's Court

Criminal Case No. 22/2010 by Hon. A.W Mwangi ,SRM. on 21/10/2010

JUDGMENT

On 21st October, 2010, **Alex Mutunga Masila** hereinafter "*the appellant*" was arraigned before the Senior Resident Magistrate's Court at Kithimani on one count of indecent Act to a child contrary to section 11(1) of the Sexual Offences Act. The particulars thereof were that on diverse between 24th September and 11th October, 2010 at N, K Sub-location, M Location in Mwala District within Eastern Province, the appellant unlawfully did an indecent Act to **E N M**, a girl aged 7 years by touching her private parts namely, vagina.

The appellant pleaded guilty to the charge. As required, the prosecutor thereafter led the facts. These were the facts -

"On 11th October 2010, the complainant's mother left the complainant aged 7 years at home and went to work. Accused who is the complainant's father arrived home for lunch, got hold of the complainant's hand, took her to his bedroom, undressed her and tried to have carnal knowledge of the girl. The complainant freed herself and ran away and reported the matter to her grandmother and mother. The matter was reported at Yatta Police Station. The complainant recorded her statement and was taken to hospital. She stated that her father had been taking her to bed severally since 24th September, 2010. She was taken to hospital and on being examined, her hymen was intact but from her vagina non viable spermatozoa were detected. The doctor concluded there was sexual contact with no penetration but with ejaculation. Accused was arrested and charged with this offence. I produce the complainant's P3 form as an exhibit. Accused used to do indecent acts with the complainant".

Upon the appellant admitting the facts, the trial court duly convicted him on his own plea of guilty. Following mitigation, he was duly sentenced to 10 years imprisonment. That conviction and sentence triggered this appeal. The grounds of appeal are –

- "1. That I pleaded guilty at trial***
- 2. That I am remorseful of the offence and promise that if given another chance I will adhere to all the laws of the land.***
- 3. That I am married to a wife with four children with whom (sic) I was their breadwinner***
- 4. That I have a problem of stomach ulcers and humbly request this honourable court to consider the sentence (sic) for the interest of my health since it is excessive.***

5. That the sentence imposed on me is harsh and excessive thus it is necessary to be reduced and if possible a non-custodial sentence for the benefit of natural justice.

1. That I am a poor man and have no money for my appeal fee.

2. That I urge the court to exercise its leniency on me and/or substitute the imprisonment term with a non custodial one”.

As can readily be seen, the appeal is really limited to sentence. The alleged grounds of appeal are basically pleas in mitigation.

When the appeal came before me for hearing on 13th June, 2012, **Mr. Mukofu**, learned State Counsel appeared for the State whereas the appellant appeared in person. The appellant urged his appeal by way of written submissions which he had earlier filed with the court.

Mr. Mukofu opposed the appeal by submitting that the appellant pleaded guilty to the charge. He accepted the facts. Since the appeal was limited to sentence, there was no cause for the interference with the sentence.

Much as the appeal appears to be limited to sentence, it is still my duty as a first appellate court to satisfy myself that the conviction leading to the sentence sought to be impugned was proper and can stand up to scrutiny. Having perused carefully and considered the proceedings before the trial court, I am satisfied that the appellant’s conviction cannot stand.

The particulars of the offence charged were that on diverse dates between 24th September and 11th October, 2010 the appellant is alleged to have conducted himself indecently by touching the vagina of his daughter, **EN**. In the facts as narrated and captured above, there is no reference at all, to the appellant having touched the complainant’s private parts namely, the vagina. All that the prosecutor stated in the facts is that the appellant held complainant’s hand, took her to his bedroom, undressed her and tried to have carnal knowledge of the complainant. The complainant however managed to extricate herself from his grip and ran to her grandmother. Where is the evidence that the appellant touched the complainant’s vagina? It cannot be assumed that merely because the appellant took the complainant to his bedroom and attempted to have carnal knowledge of her, he must have touched her vagina. This was a criminal trial. There is no place for assumptions, speculation and or theories. The prosecution ought but did not show that he appellant touched the vagina of the complainant. All that the prosecution proved was that the appellant held the complainant’s hand. A hand is not a private part nor is it a vagina.

In any event from the facts, it would appear that the appellant should have been charged with defilement, attempted defilement or even attempted incest for-

“The doctor concluded that there was sexual contact with no penetration but with ejaculation”.

It is pretty obvious therefore that the facts led by the prosecution did not support the charge preferred. They were divergent. In the premises the plea of guilty entered by the appellant cannot be said to have been unequivocal. Accordingly, I allow the appeal, quash the conviction and set aside the sentence imposed. The appellant should be set at liberty forthwith unless otherwise lawfully held.

JUDGMENT DATED, SIGNED and DELIVERED at MACHAKOS this 30TH day of JULY 2012.

ASIKE-MAKHANDIA
JUDGE