REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Criminal Appeal 10 of 2010

DAVID NG'ONDU MALOMBE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*Being an appeal from original conviction and sentence in Mutomo Senior Resident Magistrate's Court*

***Criminal Case No. 94 of 2009 by Hon. R.A. Oganyo -S.R.M on 21.01.2010*)**

JUDGMENT

1. The Appellant, David Ng'ondu Malombe ("Appellant") was charged before the Resident Magistrate's Court in Mutomo with the offence of defilement contrary to section 8(1)(4) of the Sexual Offences Act, 2006. The particulars of the offence as disclosed in the charge sheet were that "during the month of November, 2008, at [particulars withheld] Mutomo district within Eastern province, defiled KM a child aged 17 years." The alternative charge relies on roughly the same facts save to substitute the defilement with touching the Complainant's private parts as the defining offensive act and charging under section 11(1) of the Sexual Offences Act, 2006, with the offence of indecent act with a child – that indecent act being touching the private parts of the child namely vagina and breasts.

2. The Prosecution called twelve witnesses. At the end of the Prosecution case, the Learned Magistrate concluded that the Prosecution had established a prima facie case and put the Appellant on his defence. In his defence, the Appellant gave an unsworn statement and closed his case. The Learned Magistrate dismissed the main charge of defilement but convicted the Appellant of the alternative charge of indecent acts with a child. He proceeded to sentence him to ten years imprisonment.

3. The Appellant is, naturally, aggrieved. He filed his grounds of appeal, Amended Grounds of Appeal and Written Submissions. When he appeared before the Court to argue his appeal, he also made oral submissions. The Learned Mr. Mwenda, State Counsel, defended the conviction and urged the Court to uphold it.

4. The gist of the Prosecution case is in the testimony of the Complainant who testified as PW1. At the time she gave her testimony, she was 17-years old. She testified that as an orphan she was living in the home of the Appellant who was acting as her guardian. The Appellant is her paternal uncle. Her testimony was that sometime in November, 2008, the Appellant's wife went to visit her parents leaving the Complainant to take care of the children of the Appellant and his wife. It was at this time, the Complainant testified, that the Appellant approached her and urged her to have sex with him. She says

that she refused. However, on the following day, the Appellant came home late at night and when the Complainant went to his room to take him food, he suddenly attacked her, threw her into a bed, slapped her and defiled her while naked. The Complainant further testified that the Appellant threatened her not to tell anyone. Later on, fearing that the Complainant was pregnant, the Appellant, according to the Complainant tried to induce her to procure an abortion but she refused.

5. The Complainant's story is that while she did not tell the Appellant's wife what had happened at first, she later reported the matter to village elder by the name Mati and then to the area Chief. However, the Complainant says that before the matter could be fully discussed at the Chief's camp, the Appellant arranged for her to be taken to live with the Appellant's brother in Jipe. Ostensibly, this was to escape the fallout from the pregnancy. It is important to note that this was around March, 2009.

6. The story that emerges after this is a little sketchy but the gist can be reconstructed. Apparently, the Area Chief, Sly Kiambati King'ondu, received the report from the Complainant on 26/03/2009. The Complainant reported that the Appellant had defiled her on 20/11/2008; that she had discovered she was pregnant; and that the Appellant was denying her food. The Area Chief, who testified as PW7 testified that he responded to the report by summoning the Appellant to give an explanation and also ordered a village elder to give the Complainant relief food. There was, apparently, a lull in the matter until 09/05/2009 when a Musya Kinyili, a distant relative of the Complainant went to inquire about the "case" from the Chief. The Chief responded by summoning all family members to report to his office on 14/05/2009 to discuss the matter. On that appointed day, the Complainant and her grandmother did not show up.

7. It seems that Musya Kinyili was apprehensive that something untoward had happened to the Complainant so he went to the press with the story. The story was broadcasted on the local FM Station. As narrated by three witnesses, PW3, PW4 and PW7, the story that was broadcasted was that the Appellant had defiled the Complainant and then "hidden" her. The media report led to a flurry of administrative interventions which led to the final return of the Complainant to the Mutomo area through coordination of administration officers and the Police in Jipe (where she had relocated to living with the Appellant's brother) and Mutomo.

8. That is the gravamen of the Prosecution case. The only bit of important information missing is the sad fact that the Complainant's pregnancy ended in tragedy: still birth. Unfortunately, no medical evidence of either the pregnancy or the still birth was ever presented to the Trial Court. It was this fact that led the Learned Trial Magistrate to acquit on the main charge of defilement.

9. What about the alternative charge of indecent acts with a child? This was the Learned Magistrate's thinking and conclusions on the matter:

From the evidence adduced by the prosecution's witnesses, it is quite clear that the accused committed an indecent act with the Complainant. I have no doubt in my mind that the accused committed such an atrocious and beastly act with the Complainant, which resulted in her pregnancy.

The accused denied committing the offence and stated that there was no medical report produced to support the charges brought against him. He further stated that there was only a singly evidence of PW1. The failure of the Prosecution to produce a medical report was a fatal mistake. As a result, the charge of defilement brought against the [Appellant] cannot be sustained. However, the evidence adduced by PW1 is fully supported by PW3, PW6, PW7, PW9, PW11 and PW12 evidence since she told them what had happened and who had committed the act of indecency with her. The evidence adduced by these witnesses supports the charge of indecent act with a child.

10.To recap, the Learned Magistrate was persuaded that the Complainant was telling the truth and that her testimony supported the charge of indecent act with a child. The Learned Magistrate further found corroboration in the testimonies of PW3, PW6, PW7, PW9, PW11 and PW12.

11.It is important to begin the analysis by recalling that corroboration is not required in order to convict

on a charge of indecent act with a child. However, corroborative evidence is often extremely useful in shoring up the Prosecution theory of the case and placing the established factual elements beyond reasonable doubts – the standard demanded by our law. It is in this light that we must re-evaluate the evidence adduced by the witnesses – acutely aware of this Court's duty as a first appellate Court: to re-evaluate all the evidence given at trial and come to its own independent conclusions. This Court is not to merely confirm or disconfirm particular hypothesis made by the Trial Court. Even then, this Court must be acutely aware that it never saw nor heard the witnesses as they testified and, therefore, it must make an allowance for that. See ***Okeno v R*** **[1972] EA 32** and ***Kariuki Karanja v R*** **[1986] KLR 190**.

12.Looking at the totality of the evidence presented, the Learned Magistrate was surely right to find that there was insufficient evidence to convict on the main charge of defilement. First, it is disturbing that no medical evidence whatsoever was ever presented to substantiate either the fact of penetration or pregnancy. All we have here is the word of the Complainant. Yet, we know from the evidence that the Complainant got pregnant, visited hospital, went through ante-natal clinic and, finally, through labour even though, unfortunately, it ended in still-birth. No hospital treatment notes or outpatient cards were presented in evidence. No P3 was ever filled or tendered in evidence. No DNA evidence was ever done on either the Complainant or the Appellant. And, finally, not attempts were made to match the blood groups of the foetus and the Appellant. This state of affairs leaves too many gaps in the Prosecution case.

13.The gaps left with the utter lack of medical evidence to support the charge create doubts in the minds of reasonable people as to the guilt of the Appellant. Those doubts are accentuated to become truly reasonable when one considers some discrepancies in crucial evidence tendered by the Prosecution. For example, it was the Complainant's story that on the material day when the defilement happened, she went to take food to the Appellant after she had given him the key to his house. When she got to the house, the Appellant attacked her and assaulted her. However, the evidence we have from PW10 that it was she (PW10) that, in fact, gave the key to the Appellant after he came home late. PW10 further emphasised that the Complainant had taken food into the Appellant's house long before the Appellant came home. This puts in question the Complainant's narrative about how the defilement occurred.

14.If all these raise reasonable doubts making it untenable to convict on the main charge of defilement, then it is surely equally difficult to convict on the alternative charge of indecent assault. Aside from the jurisprudential controversy whether it is possible to convict on a charge of indecent assault where there was penetration – and here there was since it resulted in a pregnancy – there is the question of whether there was sufficient evidence to convict on that alternative charge. The Learned Trial Magistrate clearly thought there was. His analysis on the question was thus:

From the evidence adduced by the Prosecution's witnesses, it is quite clear that the accused committed an indecent act with the complainant. I have no doubt in my mind that the accused committed such an atrocious and beastly act with the Complainant, which resulted in her pregnancy.

15.The Learned Magistrate's reasoning here is quite puzzling. The Learned Magistrate had just concluded that there was no sufficient evidence to convict the Appellant on the main charge because the pregnancy was not proved beyond reasonable doubt. Yet, on the alternative charge, the Learned Magistrate uses the fact that the Complainant was "pregnant" to convict the Appellant. This is an error. If the pregnancy evidence was not good enough to use to convict on the main charge, it surely cannot be good enough to convict on the alternative charge.

16.At this juncture, it is also apropos to recall the discrepancy in the Prosecution case raised above. It applies to the alternative charge as well and establishes some doubts about the certainty of the Prosecution's case.

17.Finally, this Court must point out that there was no evidence at all tendered on the age of the Complainant. The age of a victim is an essential ingredient of the offence of indecent assault under section 11 of the Sexual Offences Act. For a conviction to ensue, the victim must be a child; a minor under eighteen years. Here, there was simply no proof that the Complainant was a minor. That, in itself, would be enough to allow this appeal.

18.Consequently, I find that the alternative charge is not proved beyond reasonable doubt. Accordingly, the conviction is hereby quashed and the sentence set aside. The Appellant shall be set at liberty unless otherwise lawfully held.

DATED and **DELIVERED** at **MACHAKOS** this **28TH** day of **SEPTEMBER, 2012.**

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J.M. NGUGI
JUDGE