



EDWARD MURIGI MUKUHA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Appeal from sentence and conviction of the Chief Magistrate Court at Thika Criminal Case No. 4642 of 2006 on 1st August 2008 by Hon. F. Nyakundu, Ag. PM.)

JUDGMENT

1. The Appellant, **Edward Murigi Mukuha** was charged with the offence of defilement of a girl contrary to **Section 8(2)** of the **Sexual Offences Act**. At the close of the trial, the appellant was convicted on the alternative charge of indecent act with a child contrary to section **11(a)** of the **Sexual Offences Act** and sentenced to serve 10 years' imprisonment.

2. The particulars of the charge were that on the 4th day of October 2006, at Thika, the appellant committed an act that caused penetration with T.N.M, a girl of 4 years.

3. Aggrieved by both the conviction and sentence, the Appellant filed an appeal and advanced the following summarized grounds of appeal:

1. **The prosecution did not discharge the burden of proof in the charges against the appellant,**
2. **The trial court did not take into consideration the inconsistencies in the prosecution evidence,**
3. **The alternative count of indecent act with a child was not proved,**
4. **The trial magistrate erred by shifting the burden of proof to the appellant,**
5. **The trial court arrived at a decision without wholly weighing the evidence in accordance with Section 107 of and thus prejudiced the appellant.**
6. **The defence testimony was not considered and no reasons were given for the judgment as required by section 169 (1) Criminal Procedure Code.**

4. Miss Maina, for the Respondent conceded the appeal, in agreement with the appellant's submission that the offence of indecent act was not proved to the required standard, since there was no supporting medical evidence adduced.

5. This court as the first appellate court is required to reconsider and re-evaluate the evidence, and make its own findings and draw its own conclusions, and in doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. **(see Ngunu v Republic [1984]KLR 729).**

6. In his written submissions, the appellant urged that the prosecution did not prove that he was the one who committed the offence in question. The evidence however shows that **PW2**, the child, recognized the appellant as the one who committed the indecent act against her. The appellant is well known to **PW2**, being her paternal uncle, and living within her vicinity. Despite her tender age she, was steadfast and consistent as to the fact that the appellant had committed the act and in her words **“not any other person.”** This fact was also supported by **PW1**, her mother, **PW3** and **PW4** who recounted what **PW2** had informed them.

7. On the second ground, the appellant submitted that the trial court did not take into account inconsistencies in the prosecution case. I have carefully considered the testimonies of all prosecution witnesses and the appellant and find that the ground of inconsistency is unfounded. **PW1**, **PW3** and **PW4** all consistently corroborated the testimony of **PW2** that the alleged offence was committed on the 4th October 2006 by the appellant.

8. On the third ground, the appellant urged that by failing to prove the main charge, the prosecution had failed to prove the alternative offence of indecent act with a child. Such a nexus has no basis in law. It is a well established principle that where the evidence does not support the main charge, the court can safely convict on the alternative charge if there is sufficient evidence to support the alternative charge. I found guidance in the Court of Appeal’s decision in **MBO vs. Republic, Criminal Case No 342 of 2008**, which stated that:

“...If the main charge is not proved, either because it is defective or because the evidence on record does not support any element of the offence, the evidence does not evaporate into thin air! It may be examined to see if it supports a minor and cognate offence and if it does prove such offence beyond doubt, a conviction will follow...”

9. The appellant also submitted that the alternative offence of indecent act was not proved to the required standard there being no medical evidence tendered in support thereof. For that reason the learned state counsel conceded the appeal. I find that the basis upon which the appeal was conceded was not sound in law. There is no legal requirement for there to be medical evidence as proof of an indecent act. In **Thumi vs. Republic, (1984) KLR p.660**, the learned Judges of Appeal Kneller, Chesoni and Nyarangi, sitting in Nakuru held that:

“Medical evidence is not necessary to convict on a charge of indecent assault...”

The evidence of the prosecution witnesses herein was strong on its own.

10. On the fourth and fifth grounds, the appellant further contested that the trial court shifted the burden of proof and failed to take into account the defence statement. I have independently scrutinized and evaluated the evidence on record and find that the appellant was positively identified by the minor to whom he was well known.

11. It does not follow, as submitted by the appellant, that if there was who witness to the actual incident a conviction cannot stand. Courts can and do convict on the evidence of a single witness where there is reason to believe that the witness is telling the truth (See **proviso to section 124 of the Evidence Act, Cap. 80 laws of Kenya**).

12. The evidence of identification of the appellant by the minor was credible and was corroborated by **PW1**, **PW3**, and **PW4**, who despite having not witnessed the incident, testified as to having checked the child’s genitalia upon receiving the report and noted that there was discharge and blood. The condition of the minor’s genitalia was indicative of sexual assault having taken place upon the minor. It is pertinent that the minor was aged only 4 years at the time and would not have been possessed of enough guile to make up a story of this magnitude. Even if she were coached by her guardian she would not have withstood cross-examination as she did.

13. On the sixth ground, in which the appellant urged that his defence was not considered, and that the

trial court contravened **Section 169 Criminal Procedure Code**. It is evident from the record that the trial court complied with the said Section. In her judgment, the learned trial magistrate noted thus,

“I have considered the evidence of the complainant PW2....PW1 her mother and PW4 both of whom examined the child confirmed that she had blood and discharge...the complainant has identified her assailant as the accused person who was known to her prior to this day. The accused has denied any involvement in the commission of the offence; but this defence cannot be true in light of the evidence of PW1, PW2, PW3 and PW4 respectively.”

14. The appellant put forth an alibi defence, for the first time in his unsworn statement in defence, almost two years since the occurrence of the alleged offence. While the appellant was under no obligation to prove his innocence and it was the duty of the prosecution to prove the case beyond reasonable doubt, such proof included the testing of the alibi defence. In the case at hand the prosecution was not availed the opportunity, to test the alibi defence against the evidence of the prosecution witnesses.

15. Where an alibi defence is raised the trial court will consider it, as it did in this case, together with or alongside the prosecution evidence. The learned trial magistrate concluded that the alibi defence could not hold in light of all other evidence on record. In **Wangombe vs. Republic, Cr. Appeal No. 56 of [1980] KLR 1976-80 p1683**, Madan, Miller and Potter, JJA held:

“Even if the alibi is raised for the first time in an unsworn statement at his trial, the prosecution (or police) ought to test the alibi wherever possible; but different considerations may then arise as regards checking and testing it and it is sufficient for the trial court to weigh the alibi against the evidence of the prosecution.”

16. The appellant referred to the cases of **Abel Monari Nyanamba and Others vs Republic Cr. Appeal No. 86 of 1994** and **Wangombe vs. Republic (1980) KLR p149** urging that evidence which itself requires corroboration cannot provide corroboration for other evidence also requiring corroboration. In the case before this court, **PW2** was the main witness and her testimony was direct. There is no requirement under the Law of Evidence that there be corroboration in cases of this nature. The court may convict on the basis of sole a witness where for reasons to be recorded, the court believes such testimony to be true. (See **Proviso to Section 124 of the Evidence Act**).

17. The evidence of **PW2** was corroborated, by **PW1, PW3** and **PW4**, who had the occasion to examine her and testified to having seen blood and discharge from her genitalia. This materially corroborated the complainant’s testimony that she had been sexually assaulted. There is also no doubt as to the fact that the complainant correctly identified the appellant as the assailant.

18. I have anxiously scrutinized the entire record in light of the submissions of both counsels and for the aforesaid reasons, I find that the learned trial magistrate was correct in entering a finding of guilt against the appellant. I therefore find that the appeal against both conviction and sentence is without merit, and is hereby dismissed.

SIGNED DATED and DELIVERED in open court this 17th day of October 2012.

L. A. ACHODE

JUDGE