



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 628 of 2010

HUMPHREY ATITI EMASISI ..... APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

*(From original conviction and sentence in criminal case Number 2249 of 2009 in the CM'S court at Makadara - Mrs. T. Ngugi (PM) on 27th November 2010)*

JUDGEMENT

The appellant was convicted of the offence of indecent act with a child contrary to Section 11 (1) of the Sexual offences Act. The particulars of the offence are that on the 27<sup>th</sup> May 2009 at [particulars withheld] Nairobi area province, intentionally and unlawfully committed an indecent act with S N a child aged 8 years by inserting fingers to her private parts namely vagina. There was a second count of assault contrary to Section 251 of the Penal Code. After the full trial he was convicted and sentenced in count I to 10 years imprisonment.

In his petition of appeal he raised several grounds the summary of which is that, the learned trial magistrate based his conviction on inconclusive evidence and did not appreciate that the appellant was framed in the alleged offence. It is also his case that his defense was not duly considered.

As the first appellate court it is my duty to evaluate the entire evidence adduced against the appellant in the lower court and come to an independent conclusion. In convicting the appellant the learned trial magistrate said as follows:-

***“PW1 answered the questions put to her intelligently and from voire dire examination, she struck me as a very intelligent and bright child. She understood the duty to speak the truth and gave evidence under oath. I have no reason to doubt her testimony. She was clear in her testimony and appeared to appreciate and clearly recall what had happened to her. From the date given by PW2 who rescued PW1's younger sister, it is apparent the assault and the indecent act happened on 27<sup>th</sup> May 2009. It was not an isolated incident from the testimony of PW1 and that of the investigator. After considering the evidence before me and for the reasons stated I find that the prosecution has proved its case beyond reasonable doubt....”***

From the evidence on the record the PW1 testified as to what transpired on the material date of the offence. From the evidence on the court record, she appears visibly shaken and deeply traumatized by her recollection of the events of the material day. She cries intermittently and appears distressed. PW1 whose age was given as six years at the time was assaulted by her father whom she identified in court. She testified that on the material day, she was with her younger sister and the appellant in their house when

the he ordered them to remove all their clothes and whipped her younger sister with a whip until she started bleeding. The father beat her sister up until she almost fainted. PW 1 also told the court that the appellant touched her with a finger between her legs and she felt bad. She feared and she cried. She pointed at her vagina as the place where the appellant had touched her and even identified the appellant in court.

I would find it as a matter of fact that indeed the PW1 was telling the truth. Though this evidence on record is circumstantial, I am satisfied that the appellant must have committed an indecent act with PW1 for the following reasons.

The law is supportive of PW1's evidence; Section 124 of the Evidence Act and its proviso states as follows: -

**“Section 124. Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of a child of tender years is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him,**

**Provided that where in a criminal case involving a sexual offence the only evidence is that of a child of tender years who is the alleged victim of the offence, the court shall receive the evidence of the child and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the child is telling the truth.”**

The learned trial magistrate at page 5 of the judgment made the following observation of the Complainant's demeanour.

**“PW1 answered the questions put to her intelligently and from voire dire examination, she struck me as a very intelligent and bright child. She understood the duty to speak the truth and gave evidence under oath. I have no reason to doubt her testimony.”**

I find that the learned trial magistrate viewed the PW1's evidence against the proviso to Section 124 of the Evidence Act and found her to be a truthful witness. The learned trial magistrate was justified to believe her evidence having made that observation after testing the PW1's demeanour during the trial of this case. I see no reason to disagree or disapprove the learned trial magistrate's finding of fact on the credibility of the PW1 and the truthfulness of her evidence. PW1's evidence alone was enough to found a conviction if it passed the test set by the proviso to Section 124 of the Evidence Act. I find that indeed the PW1's evidence passed the test.

PW2 and PW4 corroborated the evidence of PW1. PW2 testified that PW1's sister whom she took in had wounds on her back; PW1's sister told her that it was her father who inflicted those on her. She also had wounds between her legs that appeared like whip marks. PW2 testified that she could tell the child had been assaulted by reason of bleeding in her vagina and wounds on her back. PW4 also examined PW1 and her sister when they were brought at Kariobangi Police Station by members of the public on 29<sup>th</sup> May 2009 at about 1 pm. She observed that they had scars on the thighs and buttocks. PW1 and her sister further confirmed to PW4 that it was their father the appellant who had sexually assaulted PW1 and beaten them.

The appellant gave an unsworn defense and did not call any witness. His defense consisted of mere denials that did not in any way impeach the prosecution case but seemingly appeared to be an afterthought.

And so, in my independent evaluation of the evidence on record, I find that the charge against the appellant was proved beyond any reasonable doubt and that the conviction was safe. The sentence is lawful and I have no reason to interfere with the same. This appeal is accordingly dismissed.

Orders accordingly.

**Dated, signed and delivered at Nairobi this 22<sup>nd</sup> day of November, 2012.**

**A. MBOGHOLI MSAGHA**

**JUDGE**