REPUBLIC OF KENYA

High Court at Machakos

Criminal Appeal 279 of 2010

JOSHUA MUMO KIOKO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of the Resident Magistrate A.W. Mwangi delivered on 3/6/2010

in Kithimani Senior Resident Magistrate S.O.A Case No. 14 of 2009)

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(Before George Dulu JJ)

J U D G M E N T

The Appellant **Joshua Mumo Kioko** was charged in the subordinate court with attempted defilement contrary to **section 9 (1) (2)** of the **Sexual Offences Act 2006**. The particulars of the offence were that on 11th May 2009 at **[particulars withheld]** in **Kangundo** District within the **Eastern** Province intentionally and unlawfully attempted to do an act which could have caused penetration of his genital organs (penis) to the genital organs of **E.N.** a girl aged 5½ years. This charge was introduced after the initial charge of indecent act with a child contrary to **section 11 (1)** of the **Sexual Offences Act no. 3 of 2006** was substituted.

He denied the charge. After a full trial, he was convicted of the initial charge of indecent acts with a child contrary to **section 11 (1)** of the **Sexual Offences Act** on the basis that it was a minor cognate offence, and sentenced to serve **ten (10)** years imprisonment. He has now appealed to this court. His grounds of appeal are three. Firstly, that he was kept in custody longer than the Constitution permits before being charged. The second ground is that the trial court should have applied the provisions of **section 389** of the **Penal Code** with regard to offences of attempt. Thirdly, that the learned magistrate erred in reducing the charge to that of committing an indecent act. With the permission of the court, the appellant filed written submissions, which I have perused. At the hearing of the appeal, the appellant relied on the written submissions filed.

The learned State Counsel **Mr Mwenda** opposed the appeal. Counsel contended that the evidence from the Government Chemist (PW1) was that the blood stains and spermatozoa found on the complainant were of blood **Group AB**, which was the blood group of the appellant. The complainant, on the other hand, was of blood **Group O**. The incident occurred in broad daylight and the evidence of PW4 established recognition of the appellant rather than identification. Recognition is more reliable. In addition, PW3 the complainant, gave unsworn evidence which was corroborated by that of PW4. Counsel was however of the view that the magistrate should have convicted of attempted defilement as charged, and not for an indecent act.

The brief facts of the prosecution case are as follows. The complainant PW3 E.M.N. was a minor child of 5 years attending school in standard 1. As she was going home from school in the evening of 11/5/2009, someone she had not seen before, met her. He was on a bicycle. He took her and gave her a ride on the bicycle into a coffee farm where he removed her biker and lay on her and she felt pain. A herdsman who was near, PW4 **Nthenge Wamuithya,** saw them. The person who lay on the complainant moved and rode away on the bicycle as PW4 approached. The herdsmen, PW4, approached and told the complainant to take her books and leave. The complainant went home and informed her grandfather and her mother PW2 about the incident.

The herdsman, PW4 **Nthenge Wamuithya,** knew the appellant before. He was the person he saw lying on the complainant. He informed one **Wambui** about the incident.

When the complainant reported the incident to her mother PW2 **M.W.** at around 2 p.m. on the same material day, PW2 observed and noted a blood stain at the back of the complainant's uniform. PW2 took the complainant to **Kilimambogo** Hospital and was referred to **Thika** Hospital for treatment. She later reported the incident to **Donyo Sabuk** Police Station. On reporting at the police station, they found that an elder called **Paul** had already reported the incident and the suspect (appellant) had already been arrested. Later, **Nthenge** (PW4) who witnessed the incident, informed PW2 about it, and also informed her that the suspect was called **Mumo**.

The appellant was arrested by members of the public on 11/5/2009 and a report was made to the police by the headman of **Muthini** village through the phone. The police then re-arrested the appellant. The complainant's school uniform and biker were taken by the police. Blood samples, of both the complainant and the appellant, were taken to the Government Chemist together with the complainant's vaginal swab. The complainant was also treated and examined medically and a P3 form filled. No evidence of attempted penetration was found by the doctor. The hymen was intact. The report from the Government Chemist established that there were spermatozoa on the complainant's vaginal area from a **Group AB** person. The blood group of the appellant was **Group AB**. The blood group of the complainant was **Group O**. The appellant was then charged.

When put on his defence, the appellant gave an unsworn testimony. It was his defence that he was employed as a worker by one **Kieti Musyoka**. On 11/5/2009 at about 7 p.m., he had passed by a bar where he took Keg beer. On his way to his employer's home and while carrying maize flour and paraffin, some people stopped him, insulted him and arrested him. They took him to the police station where he was locked in for something he did not know. On 19/5/2009, he was asked to buy his release with Kshs.10,000/=, which he did not have. He was later charged in court with an offence which he did not know about.

Faced with this evidence, the learned trial magistrate found that the prosecution had proved its case for the lesser offence of committing an indecent act with a child contrary to **section 11 (1)** of the **Sexual Offences Act**.

This is a first appeal. As a first appellate court, I have to remind myself that I am duty bound to re-evaluate the evidence on record afresh and come to my own conclusions and inferences – *See* **Okeno –vs- Republic (1972) EA 32**.

I have re-evaluated the evidence on record. I wish first of all to deal with technical issues raised on appeal.

The appellant complains that his Constitutional rights were contravened. That he was held in custody for 8 days before being brought to court. **Article 49 (1) (f)** of the **Constitution (2010)** provides that an arrested person should be brought to court within 24 hours. Though there has been earlier jurisprudence developed by courts that violation of this right leads automatically to an acquittal, that jurisprudence has now changed. The remedy for such violations if proved, is a claim for damages. The **Constitution (2010)** adequately provides for such remedies. On my part, I will not hold that the conviction herein cannot stand because of that violation, even assuming that there was such violation of the provisions of **Article**

49 (1) (f) of the Constitution.

Was the magistrate correct in substituting a lesser offence and convicting thereby? The appellant claims that the magistrate should have been guided by **section 186** of the **Criminal Procedure Code (Cap 75).** In my view, that section is not applicable in our present case, as the appellant was not charged under the **Penal Code**. The provisions that govern the conviction for a lesser offence are under **section 179 (1)** of the **Criminal Procedure Code** which provides:-

"179. (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted for the minor offence although he was not charged with it.

(2) When a person is charged with an offence and the facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."

The above underlining is mine.

In my view, the offence on which the appellant was convicted of was not minor to the offence charged, as the sentence is the same. Therefore in my view, the magistrate was wrong to convict on the same. The argument by learned State Counsel that the court should have convicted of the offence charged, in my view, is sustainable as the offence on which the magistrate convicted the appellant is not minor to the offence charged.

My humble view is that, if the prosecution or the court found that the evidence could prove the offence of committing an indecent act on a minor, then the charge should have been amended and the appellant called upon to plead afresh as required by law. **Section 214** of the **Criminal Procedure Code**, requires the prosecution or the court to have amended the charge, and called upon the appellant to plead to the fresh charge. That was not done. Without doing so, the rights of the appellant to a fair trial were compromised, because under **section 214 (1) (i)** it is mandatory that the accused be called upon to plead to the altered charge.

The evidence on record certainly does not prove the offence charged, as there is no tangible evidence of an attempt to defile. Key witnesses that is the headman of **[particulars withheld]** village who called the police, and those who arrested the appellant were not called to testify. The attempt by the learned magistrate to convict for the offence of committing indecent acts on a child was misguided, as this offence is not minor to the offence charged. For these reasons, the conviction cannot stand.

Do I order a retrial?

Considering the circumstances of this case, and the fact that the appellant has been in custody since he was arrested in May 2009, which is more than 3 years now, I am of the view that ordering a retrial will not serve the best interests of justice. Besides, I am not certain if witnesses are readily available. Therefore, this court is reluctant to order a retrial.

For the above reasons, I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

Dated and delivered at Machakos this **21st** day of **November** 2012.

George Dulu
Judge

In presence of:-
N/A for State

Appellant present in person
Nyalo – Court clerk