REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 211 of 2011

JAMES NJOROGE MUCHOKI..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No. 484 of 2011 of the Chief Magistrate's court at Thika by L. Wachira – Senior Resident Magistrate)

JUDGMENT

JAMES NJOROGE MUCHOKI, the appellant herein, was convicted for the offence of Committing an Indecent Act with a child **contrary to section 11 (1) of the Sexual Offffences Act.** He was then sentenced to imprisonment for TEN (10) YEARS.

In his appeal to the High Court, the appellant has challenged his conviction.

The first point he canvassed was to the effect that the prosecution failed to prove the case against him to the standard required in law.

Secondly, the learned trial magistrate is said to have erred by holding that the appellant did not challenge the evidence put forward by the prosecution. It was the appellant's contention that the evidence was not capable of being challenged because the particulars of the charge sheet did not conform with the ingredients of the offence with which the appellant had been charged.

It was the appellant's submission that the offence of "Indecent Act" can only be said to have been committed if the ingredients set out in **Section 11(1)** of the **Sexual Offences Act** were proved.

In that regard, the Appellant emphasised that an Indecent Act can only be committed by an intentional act which causes:

"(a) Any contact between the genital organs of a person, his/her breasts and buttocks, with that of another person.

(b) Exposure or display of any pornographic material to any person against his or her will, but does not include an act which causes penetration."

Therefore, when the particulars of the charge sheet, as well as the evidence tendered by the prosecution did not specify that there had been contact between his genital organs and the genital organ of the complainant, the appellant submits that the charge sheet was defective.

And because the charge sheet did not disclose any offence under **Section 11 (1)** of the **Sexual Offences Act,** the appellant argued that he ought not to have been required to defend himself.

The facts alluded to by the prosecution were that the appellant had rubbed his hands against the complainant's private parts. If that be factually correct, the appellant argued that it did not disclose any criminal offence.

Even the partial removal of the complainant's bikers is said not to disclose an offence under **section 11(1)** of the **Sexual Offences Act.**

His contention was that if a suspect had not caused his sexual organ to get into contact with the sexual organ of the complainant, he could only have been guilty of an "Indecent Act" if had exposed or displayed some pornographic material to another person, against the will of that other person.

The appellant also faulted the trial court for convicting him in the absence of evidence from at least one of the members of the public who are said to have arrested him.

Finally, the appellant argued that the learned trial magistrate erred by finding that the appellant had caused the redness of the complainant's labia minora by using his fingers on the said organ. As far as the appellant was concerned, that finding was not supported by any evidence.

In answer to the appeal, Ms. Aluda, learned state counsel, submitted that the prosecution had proved the case beyond any reasonable doubt.

Indeed, the respondent pointed out that the appellant was caught in the act, by the mother of the complainant.

Thereafter, the clinical officer who examined the complainant is also said to have verified that there had been an attempted defilement.

PW 1 is the complainant's mother. She testified that she found the the appellant holding up the complainant.

PW1 testified that the appellant had partially removed the complainant's bikers, and was rubbing her private parts with his hand. At that stage **PW 1** screamed.

Members of the public responded to the screams, and arrested the appellant, after some pursuit.

PW 2 is the complainant. She said that the appellant removed her pant and then rubbed her private parts, using his fingers. This is what PW 2 said;

"He rubbed me here (showing her private parts). He was using his hand. He had removed my pant. He put his finger on my private parts. He was just rubbing me when my pant was half way down."

PW 3 testified that the appellant was beaten up by members of the public. According to **PW 3**, the appellant appeared drunk. He did not talk. He did not deny or confirm the allegations that he had rubbed the private parts of the complainant.

PW 4 re-arrested the appellant from the members of the public. He issued a P3 form to the complainant, who was then attended to at the Ruiru Sub-District Hospital.

PW5 is the clinical officer at the Ruiru Sub-District Hospital. She examined PW 2 and found that her hymen was intact. However, **PW 2's** labia and introitus were red.

It was the assessment of **PW5** that there had been no penetration.

The redness was shown to have been caused by a blunt “weapon”

When the appellant was put to his defence, he said that he met the complainant and her mother at about 10p.m, when he was going home.

He said that the mother of the complainant started screaming at him.

He also said that before heading home, he had gone for a drink, after doing the day's work. His work involved the use of a donkey to carry loads. And on that day, he delivered chicken for a lady.

Having re-evaluated all the evidence on record, I note that the appellant was caught in the act. The mother of the complainant found him holding up the little girl.

The girl's bikers were pulled down halfway.

Both the complainant and her mother testified that the appellant used his hand to rub against the girl's private parts.

It is therefore true that none of the witnesses said that the appellant had caused his sexual organ to have any contact with the sexual organ of the girl.

The charge sheet also specifically asserted that the appellant had unlawfully touched the vagina of the complainant, with his fingers.

There is no doubt that the prosecution set out to prove that the appellant had touched the complainant's sexual organ, using his fingers. The evidence of the complainant, and her mother proved that fact.

The clinical officer also verified that the complainant's sexual organ had had contact with a blunt “weapon”, causing it to redden.

The only question that now remains unanswered is whether or not the act of touching the vagina of the little girl, using fingers, constituted an indecent act.

If, as the appellant submitted, an indecent act is only committed when the sexual organ of the offender is brought into contact with the sexual organ of the victim, then the evidence adduced in this case did not disclose the offence. Indeed, if the argument advanced by the appellant was accurate, it would imply that the charge sheet did not disclose the offence of indecent act.

A perusal of the **Sexual Offences Act** reveals that the phrase “Indecent act” is defined in **Section 2 (1)** as follows:

“ an unlawful intentional act which causes -

(a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act which causes penetration.

(b) exposure or display of any pornographic material to any person against his or her will.”

Clearly, therefore, the offender need not cause his sexual organ to make contact with the sexual organ of a complainant, for him to be culpable for the offence of indecent act. Provided that the offender causes any part of his body to make contact with the genital organ, breasts or buttocks of the complainant, the said offender would have committed the offence of indecent act.

As the evidence in this case proved that the fingers of the appellant made contact with the vagina of

the complainant, intentionally; and as that act was unlawful, the conviction was founded on solid evidence.

Secondly, the statute stipulates that the sentence for the offence of indecent act with a child is imprisonment for a term of not less than 10 years. Therefore, the sentence that was handed down by the learned trial magistrate was the minimum provided for by the law.

Accordingly, the appeal has no merit. It is dismissed. I uphold both conviction and sentence.

Dated, Signed and Delivered at Nairobi this 19th day of December, 2012

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FRED A. OCHIENG

JUDGE