



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEAL NO. 120 OF 2009

MARIKUS ODOYO

ATIENO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case number 1621 of 2008 of the

Senior Resident Magistrate's Court at Winam)

J U D G M E N T

The appellant herein faced in the lower court a main charge of attempted defilement contrary to section 9 (1) of the Sexual Offences Act No. 3 of 2006 Laws of Kenya in that **“on the 30th day of October 2008 in Kisumu district within Nyanza province attempted to have carnal knowledge with a child namely S.K aged 3 years”**. In the alternative the appellant faced the charge of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006 Laws of Kenya in that **“on the 30th day of October 2008, in Kisumu district within Nyanza province had indecent act with a child namely S.K aged 3 years by touching her genital organs”**.

It is evident that the appellant was tried, found guilty and convicted of the alternative charge and sentenced to serve ten (10) years imprisonment.

He became aggrieved and appealed to this court citing six grounds of appeal and in a summary form, these read that learned trial magistrate erred both in law and in fact by:-

- **Admitting and relying on hearsay and circumstantial evidence which was not watertight enough to warrant a conviction.**

- **By convicting the appellant without sufficient evidence on record.**

- **By relying on evidence which did not attain the required standard of proof as it lacked probative value and was unsafe for conviction.**

- **The prosecutions evidence on record fell short of the standard required for indecent act as the complainant (minor) did not testify nor was the appellant caught in *flagrante de licto* (caught in the act) to warrant a conviction.**

- **By shifting the burden of proof to the appellant.**

- **By failing to appreciate that in the case of an indecent act the complainant must demonstrate the actual act and that the said act must be indecent in nature.**

The applicant's counsel argued all the grounds as one and in a summary form stated that the court should allow the appeal because:-

(i) The appellant was found not guilty of the main charge.

(ii) That the main charge having been ousted by the evidence, the learned trial magistrate could only fall back on to the alternative charge if the facts supported the same. Herein they content the facts do not support the alternative charge because in the learned trial magistrate's opinion, the appellant had indecently exposed the minor, an offence the appellant was not charged with as opposed to committing an indecent act with the minor.

The state does not support the conviction and it concurs with the submission of the appellants counsel, that the facts and the learned trial magistrate found existence of the offence of indecent exposure proved and not the offence of committing an indecent act with the minor.

(b) Agrees with the submissions of the appellant's counsel that since the appellant was not caught in the act and the mother of the minor did not witness anything, the failure of the court to call for the minor's testimony to tell the court what happened in order to weigh that testimony with that of the appellants defence is fatal to the prosecutions case.

This court has given due consideration to the complaints raised by the appellant in his ground of appeal and considered the same in the light of the convenience of both counsels, that the appeal should be allowed, and in its opinion makes a finding that as an appellate court it should revisit that evidence before the lower court, re-evaluate the same and then arrive at its own conclusions on the matter either agreeing or disagreeing with the concurrence and then give reasons.

The court has noted both facts on the record and the arguments on both sides. The only issue in contest is whether the offence charged is the offence that the appellant was convicted of. The particulars of the alternative charge have already been set out above. They talk of committing an indecent act. Indecent act is defined in section 2 (1) of the Sexual Offences Act as follows:-

“Indecent act” means any intentional act which causes (a) any contact between the genital organs of a person, his or her breasts and buttocks with that of another person.

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

This court has considered this definition and considered it in line with the complaint raised by the appellant and the state and also the totality of the evidence on the record and the court proceeds to make the following findings on the same:

(1) Indeed it is on record that the minor was aged three years, she was not called to testify to tell the court what happened to her. PW1 saw appellant leave the house with his trousers down and walked away hurriedly. PW1 did not see anything done to the child.

(2) The medical evidence given by PW4 found nothing abnormal on the child and for this reason there is nothing to show that the body parts of the appellant had touched the body parts of the minor.

(3) The learned trial magistrate made the following observations of the evidence before him:-

(i) That PW1 & 2 were hated because they were husband and wife but did not elaborate who hated them.

(ii) Noted that the minor did not testify but had been seen in court severally with the mother and appeared fearful a matter confirmed by the doctor. But there is no mention that any attempt was made to put the minor in the stand to talk even through an intermediary.

(iii) Believed PW1 found appellant leave his house with his trouser down but did not believe that PW2 when called later came and found appellant still with his trousers down.

(iv) Believed PW1 was honest in her testimony.

(v) Dismissed the issued of grudge as a reason to bring charges against the appellant.

(vi) Found that there was no evidence that appellant attempted to defile the minor and for this reason acquitted the appellant of the main charge.

(vii) Found that the prosecution had given overwhelming evidence on an indecent act on the child. The learned trial magistrate went on:-

“The accused’s act of having the minor on his bed with her trousers removed and lying at the floor of the bed was clearly an indecent exposure of the minor”. And proceeded to convict the appellant on the alternative charge.

Due consideration has been made by this court of those findings of the learned trial magistrate and the court agrees with the concurrence of counsels of both sides that what the learned trial magistrate found to have been proved was indecent exposure of the minor, an offence not preferred against the appellant.

The moment the main charge and the alternative charge become ousted by the evidence on the record, the learned trial magistrate had no alternative but to acquit the appellant.

For the reasons given, the appeal is allowed in its entirety. Conviction quashed and appellant ordered to be set at liberty forthwith in connection with the conviction which led to this appeal.

Dated, signed and delivered at Kisumu this 8th day of March 2011.

ROSELYN N. NAMBUYE

JUDGE

RNN/va