



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal 3 of 2009

GIDEON OMONDI OLUCHA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from original conviction and sentence in Nyahururu P.M.CR.C.NO.2058/2008 by Hon T.M. Matheka, Ag. Principal Magistrate, dated 10th December, 2008)

JUDGMENT

The appellant was tried, convicted and sentenced to ten (10) years imprisonment in the alternative charge of **indecent act with a child** contrary to **section 11(1)** of the **Sexual Offence Act.**, (the **Act**) after being acquitted for lack of evidence in the main charge of **sexual assault** contrary to **section 5(1)(a)(i)** of the **Act**.

In support of the charges, the prosecution called six witnesses. It was the prosecution case that **P.W.1, D.N.K** (the complainant) (a boy) whose age was given as 16 years but who testified that he was in class six, was sleeping with two other children in the sister's house (**P.W.3 M.W.C (M)**) when a stranger entered the house and forced himself in the bed where he was sleeping. The stranger, after asking if there was a big (adult) girl in the house, began to undress the complainant who resisted. The stranger pulled down the complainant's trousers as the latter.

screamed. The stranger strangled the complainant as he inserted his private parts in the complainant's anus. The stranger got hold of the complainant's private parts and fell asleep. The complainant alerted one of his sisters, **P.W.2, J.W (J)** living in the neighbourhood who in turn contacted their cousin, (**P.W. 4, F.M.C, (M)**). The stranger was locked in the house. The police led by **P.W.5, Sgt. Charles Ocharo** went to the house where he found the appellant lying in bed with a head injury. He was arrested and the complainant taken to hospital.

On examination, Dr. Kiona, whose report was produced on his behalf by **P.W.6, Dr. Muriithi Aruja** as he was away on study leave, found no spermatozoa in the anal region. The only unusual things noted were bruises and tenderness on the neck. It is probably because of this finding that the learned trial magistrate found no evidence to support the main court.

The appellant, however, was dissatisfied with the finding and sentence on the alternative count and has challenged the same on six grounds from what I can glean from the (unheaded) petition and written submissions. These grounds may be stated in summary as follows:

- i) that the investigating officer was not called to testify
- ii) that the appellant's defence was not considered
- iii) that there was no evidence of penetration
- iv) that the appellant was not examined by the doctor to link him with the offence

Learned counsel for the respondent supported the conviction and sentence on the ground that the appellant was caught "*red handed.*"

I have considered these grounds in the light of the evidence on record and the judgment of the trial court. This being the first appeal

I am bound to re-evaluate the evidence afresh in order to arrive at my own conclusion bearing in mind that I have not seen the witnesses. There cannot be any doubt that the appellant spent the night in M's house. There cannot also be any controversy that M and the appellant were friends as correctly observed by the trial magistrate. It is common ground that the complainant was a child as defined in **section 2** of the **Children Act**. The only question that fell for determination by the trial court, which must also be decided by this court is whether there is evidence that the appellant indecently assaulted the complainant contrary to the law. The law is **section 11(1)** of the **Act**. It is an offence, punishable upon conviction with not less than ten (10) years imprisonment, to commit an indecent act with a child. An indecent act is defined in **section 2** of the **Act** to mean.

- “...any unlawful intentional act which causes:-**
- a) any contact between the genital organ of a person, his or 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.”**
- (Emphasis added)

The circumstances of this matter can only come under (a) above, that there was contact between the appellant's genital organ with the complainant's buttocks.

The only evidence of this came from the complainant. That evidence was cogent and was a very clear account of the events in question. I will accept it as the trial magistrate did. It is supported by the subsequent events. The complainant alerted his sister J and cousin, M, immediately and narrated his ordeal. The appellant was found still sleeping on the bed. The complainant was examined that morning, although the P3 form was completed later on. That examination, although did not reveal penetration, disclosed some whitish dry discharge on the buttocks, which again were not conclusively determined to be sperms. Indeed the complainant did not testify that there was ejaculation by the appellant. As I have noted, the offence of indecent act with a child is committed simply by contact between the genital organs with the body parts of another as enumerated in **section 2** of the **Act**

I am persuaded from the evidence of the complainant and the supporting evidence that there was such contact between the appellant's genital organs and the complainant's buttocks.

The appellant's defence is that he had been on drinking spree with M, moving from Nameless Bar to Jogoo Bar. He was unable to recall how he ended up in M's house.

It is trite learning that in considering whether a person has committed a criminal offence, the court must determine and resolve two critical questions. It is not enough under **English Common** law for the prosecution to show that the suspect has done an act which is contrary to the criminal law (*actus reus*). It must also be demonstrated that the suspect did the act with a certain state of mind, *mens rea*.

Both *actus reus* and *mens rea* must be present for a criminal offence to exist. I have found that the appellant committed *actus reus*. Did he have *mens rea*? I have set out the definition of indecent act and highlighted the phrase unlawful intentional act. Was the act of causing contact between the appellant's genital organs and the complainant's buttocks unlawful and intentional?

Section 43(1)-(4) of the **Act** provides the answer. **Subsection 4** stipulates that:

- “(4) The circumstances in which a person is incapable in law of appreciating the nature of an act referred to in sub-section (1) include circumstances where such a person is, at the time of the commission of such act-**
- (a) asleep;**
 - (b) unconscious;**
 - (c) in an altered state of consciousness;**
 - (d) under the influence of medicine, drug, alcohol or other substance to the extent that the person's consciousness or judgment is adversely affected;**
 - (e) mentally impaired or**
 - (f) a child.”**

The defence of the appellant taken with the evidence of the complainant as well as the appellant's conduct point to an altered state of consciousness or impaired judgment making him incapable of appreciating the nature of the act he is accused of.

He kept calling the complainant “sweetie” and asking him to “*weka keino vizuri*” translated by the trial magistrate to mean “*put your vagina properly.*” He told M the next morning that he was in his house – and shortly later that he was in his girlfriend's house. The appellant “*blacked out*” and did not know where he was or what he had done.

In the result, I find that he had no *mens rea*. The appeal is allowed, conviction quashed and sentence of ten (10) years set aside with the result that the appellant shall be set at liberty forthwith unless detained for any other lawful cause.

Dated, Signed and Delivered at Nakuru this 12th day of March, 2010.

W. OUKO
JUDGE