REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Criminal Case 197 of 2007

KYALO MUSYIMI. ……. ……...……. APPELLANT

VERSUS

REPUBLIC …….……...……..……...……..RESPONDENT

JUDGMENT

1. The Appellant, Kyalo Musyimi was convicted of the offence of indecent assault contrary to s.144(1) of the Penal Code. It was alleged that on 11.2.2004 at ***[particulars withheld]*** Village in Meru Central District of the Eastern Province, he unlawfully and indecently assaulted C K by touching her private parts. He was sentenced to serve 5 years in prison on 13.10.2005 and he thereafter preferred this Appeal. The issues that arise for determination from the petition and submissions by Mr Murango Mwenda, Advocate for the Appellant are;

(i) Whether the evidence tendered was contradictory thus rendering the connection unsafe.

(ii) Whether the burden of proof was shifted to the Appellant by the trial court.

(iii) Whether the judgment is a proper judgment.

(iv) Whether the sentence was harsh and excessive.

2. To understand the basis for these undetermined issues, and since it is the duty of this court to evaluate and analyse the evidence afresh and reach its own conclusions, I should set out the evidence as tendered before the trial court. It was as follows:-

3. P.W.1, C K, a student at ***[particulars withheld]*** Primary School stated that the Appellant, whom she identified in court, removed her pant and inserted his finger in her genitalia while outside the verandah of his house and then warned her not to tell anyone about his act. He had given her ugali and cabbage after calling her and before he lifted her and made her sit on his lap as he committed the offensive act. While inserting his finger in her vagina, P.W.1 said that the Appellant covered her mouth when she tried to cry and then released her. That because her mother was not present, she only told her of the act at night when she came and later she was taken to hospital.

4. P.W.2, Salome Kinaa, mother of P.W.1 stated that on 11.2.2004, she had left the child under the care of one Wangari and when she returned at 6 p.m., P.W.1 did not want to eat and instead just slept and the next day went to school and that evening at 8.p.m. said that she was feeling pain in her private parts and when P.W.2 inspected the child's vagina, it was inflamed. When asked who had injured her, the child said that it was "**Kyalo**", their neighbour who was identified in court as the Appellant and that he had done so the day before after giving her food. The child also demonstrated how she had sat astride the Appellant while he inserted his finger in her vagina. The child was taken to hospital the next day after making a report at Meru Police Station.

5. When P.W.2 was cross-examined by the Appellant, she stated that the Appellant was arrested after about 5 days because he and P.W.2 were trying to settle the matter out of court and that the Appellant had admitted giving the child food on the material date but denied doing anything untoward to her. That the appellant had offered to pay Ksh.20,000/- to the victim's family and P.W.2 denied demanding Ksh.25,000/- from the Appellant.

6. P.W.3, F W who had been left to take care of P.W.1 by P.W.2 said that she had left P.W.1 playing with other children in the afternoon and in the evening she went to her mother's house. The next day in the evening, P.W.2 told her that the child had complained of pain in her genitals but that when P.W.3 checked, she saw nothing untoward with the child's genitals. That when the child was questioned, she said "**Dan**" and then kept quiet. They then agreed to take her to hospital the next day. The Appellant elected not to cross-examine P.W.3, a

matter otherwise insignificant in other cases because it is a matter of right.

7. P.W.4, Wilson Namu, a clinical officer examined P.W.1 on 13.2.2004 and he found bruises on her genitalia and that her hymen had been broken. His conclusion was that the child had had some form of sexual activity.

8. P.W.5, P.C. Judy Magiri recalled that on 13.2.2004, she received the report of assault and the child when interviewed said that she had been defiled on 11.2.2004 and then she was treated and discharged. P.W.5 arrested the Appellant after he was pointed out by P.W.1 and P.W.2 when the Appellant went to the Meru Police Station to try and settle the incident amicably. She denied in cross-examination that she received any information about one "**Dan**" and denied trying to extort money from the Appellant.

9. The Appellant in a sworn statement stated that he did not commit the offences laid against him and that he was arrested and charged only after he refused to pay Ksh.25,000/- to P.W.2 and P.W.5 and that they also offered to give her the child as a wife after she turned 18 years of age.

10. In support of his evidence that the P. 3 form was made up, he said that he had investigated the matter and that there was no record of the child being treated.

11. D.W2, Stanley Nkanata said that on 15.2.2004 he attended a meeting between the Appellant and P.W.1's parents and when he interviewed the child she said that the Appellant had given her food but did nothing else. That the Appellant had denied committing the offence.

12. D.W. 3, Mutinda Katuu said that the Appellant had called him to escort him to the police Station on 19.2.2004 as he had a problem and when they went there he saw a child and her parents and then the Appellant was arrested. It was his evidence further that the mother of the child insisted on a payment of Ksh.25,000/- for the Appellant to be released from custody.

13. D.W4, Joseph Chege Kariri produced the Heath Records for Meru District Hospital and P.O. No. 4399/04 related to a patient named Chris Munene but at first testimony that he had not produced the Register for females and Children. When he was recalled, he produced P.O. 4355/04 where the patient being treated was P.W.1. and that entry No. P.O. No. 4399/04 related one Pascualine Kanini.

14. With this evidence in mind, I should start by setting out my appreciation of the offence of indecent assault. **In R vs McCanananek [1969]** 2 Q.B 442 it was held that where a man inserts his finger into the vagina of a girl under the age of 16, the act constituted indecent assault, however willing or co-operative the girl may be. In **Archbold** on Criminal Pleading, Evidence and Practice, 2003 at page 1759 para 20-148, the elements of the offence are given and of importance in this regard is that the "**victim need not be aware of the circumstances of indecency or apprehended indecency**" and that

"cases which ordinarily present no problem are those in which the facts, devoid of explanation, will give rise to the irresistible inference that the defendant intended to assault his victim in a manner which right-minded persons would clearly think was indecent. Where the circumstances are such as only to be capable of constituting an indecent assault, in order to determine whether or not right-minded persons might think that the assault was indecent the following factors are relevant:

(i) the relationship of the defendant to the victim (relative, friend, stranger)'

(ii) how the defendant had come to embark on this conduct and why he was so behaving.

Such information helps a jury to answer the vital question; are we sure that the defendant not only intended to commit an assault but an assault which was indecent? Any evidence which tends to explain the reason for the defendant's conduct is relevant to establish whether or not he intended to commit not only an assault but an indecent one.

The prosecution must prove; (i) that the accused intentionally assaulted the victim; (ii) that the assault or the assault and the circumstances accompanying it are capable of being considered by right minded persons as indecent; and (iii) that the accused intended to commit such an assault as is referred to in (ii) above".

15. The law above was set out in the speech of Lord Ackner in **R vs Court [1989] A.C. 28** at page 36 in which the majority concurred with Lord Goff dissenting.

16. Applying the above principles to this case and in answering the first question I earlier posed, I have no doubt in my mind that P.W.1 knew the Appellant as a neighbour and it is not denied that on the material afternoon they were together and that the Appellant gave P.W.1 food. This is clear from the evidence of P.W.1, P.W.2 and D.W. 2. What is not agreed is whether the eating session was accompanied by some indecent act on the part of the Appellant. Mr. Mwenda has argued that the persons who may have committed the act is one "**Dan**". I note from the evidence that the name "**Dan"** was introduced by P.W.3 and no other witness. A look at her evidence however would show that she was an incredible witness whose evidence cannot be entirely relied upon. She was the child's minder who left her unattended and when confronted with evidence of her ordeal had no answered because she was not present when it happened. Compared her evidence with that of the child, (P.W.1) and her mother P.W.2 as well as that of the medical officer, P.W.4 and that of the investigating officer, P.W.5. That evidence in totality pointed to the fact that the Appellant lured the child with food, placed her on his lap, removed her pant and insertered his finger into her vagina and evidence of that fact was seen by the fact that a day later she had pain while passing urine (a matter even P.W.3 did not deny) and the inflammation of her labia majora further confirmed the fact. The child's evidence on the precise circumstances of her ordeal was clear, consistent and unchallenged and I do not see how the same can be faulted. The child named the Appellant a person she knew quite well and all the hype about "**Dan**" cannot change that fact. Precisely because P.W. 3 cannot be termed a reliable witness.

17. An issue was also raised about the P3 form whereas in a case of defilement contrary to s.145(1) of the Penal Code medical evidence is paramount, in a case of indecent assault, even where there is no actual penetration but merely some form of sexual activity, the offence is proved (see **George Ngugi Njenga vs R [2007]** eKLR per Koome J. approving the definition in **Collins Concise Dictionary**). In the instant case in any event, D.W. 4 confirmed that P.W.1 was indeed a patient at Meru Hospital on 13.2.2004, evidence consistent with that of P.W.1, P.W.2 and P.W4. Again that issue is moot. Again that issue is moot.

18. Secondly, it has been argued that the trial magistrate shifted the burden of proof to the Appellant and the reason for this argument is that in the judgment, the trial magistrate noted as follows:-

"When I look at the defence case, he has not presented any evidence to exonerate him. His witness did not give any testimony with any bearing on the question before [the] court….."

19. Whereas I would agree that the choice of words appeared to indicate that the Appellant needed some "**proof"** to "**exonerate"** himself and therefore a burden placed on him, I would look at it as a bad choice of words and the judgment must be looked at in totality and if so, the words have no such effect. In any event, this court has the duty to re-evaluate the evidence including the defence and clearly the offence was proved beyond reasonable doubt and even without considering the defence at all, the conviction based on the evidence by the prosecution was sound and credible.

20. Thirdly, the above analysis also takes care of the argument that the judgment of the learned trial magistrate was a non-judgment. I do not agree that it was because the evidence was analysed, evaluated in the light of its circumstances and a proper decision reached. There is little more to say on the matter.

21. As to sentence imposed, the maximum sentence for an offence under S. 144 is 5 years imprisonment. The Appellant was given that maximum sentence. I have not been told that there was any misdirection in that sentence or that some wrongful principle was applied. To interfere with discretion properly exercised is not the place of this court and I see no reason to disturb the sentence imposed.

22. Because I have found no merit in any of the grounds of appeal, it follows that the Appeal must and is hereby dismissed in its entirety.

23. Orders accordingly.

Dated signed and delivered this 2nd day of August 2007

ISAAC LENAOLA,

JUDGE

In the presence of:

Mr. Mwenda Advocate for the Accused

Mr. Muteti State Counsel for the Republic

ISAAC LENAOLA,

JUDGE