



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 100 OF 2019

AMBROSE MATATA NZUKI..... APPELLANT

-VERSUS-

REPUBLIC..... RESPONDENT

(From the original conviction and sentence of Hon. C. A. Muchoki (SRM) in Tawa Senior Resident Magistrate's Court Sexual Case No. 15 of 2018 delivered on 2nd May, 2019).

JUDGMENT

1. The appellant was charged in the Magistrate's court with indecent act with a child contrary to section 11(1) of the Sexual Offences Act of 2006, the particulars of which were that on 6th August 2018 in Mbooni East Sub-county within Makueni County, intentionally and unlawfully did indecent act by touching a vagina of **EKM**, a girl aged 4 years.

2. After a full trial, he was convicted of the offence and sentenced to 10 years imprisonment.

3. Dissatisfied with the decision of the trial court, the Appellant has come to this court on appeal. He relied on his amended three grounds of appeal which are as follows -

1. The learned magistrate erred in both law and fact and misdirected himself by holding that the case for the prosecution was proved to the required standard whereas on the basis of record the burden of proof was not

discharged and indeed left reasonable doubts that ought to have been resolved in the Appellant's favour.

2. The learned trial magistrate erred in law and fact by wholly relying on prosecution witnesses' testimony yet in the circumstances the case ought to have been backed by evidence linking him to the indecent act.

3. The honorable magistrate misdirected himself after failing to seriously explore statements of Pw1, Pw2, Pw3 and Pw4 who could not prove clearly that there was an indecent act.

4. The appeal was canvassed through written submissions, and I have perused and considered the submissions of both the Appellant and the Director of Public Prosecutions.

5. I will start by stating that this being a first appellate court, I am required to re-examine the evidence afresh and come to my own independent conclusions and inferences. See **Okeno -Vs- Republic [1972] EA 32**.

6. I have re-considered the evidence on record. The prosecution called four (4) witnesses, including the Complainant a minor of 4 years who testified as Pw2. The Appellant on his part tendered a short sworn defence statement and was not cross-examined.

7. In every criminal case, the burden is on the prosecution to prove all the elements of the offence alleged against the appellant beyond any reasonable doubt.

8. The primary evidence against the Appellant herein is that of the minor Pw2 which was unsworn, who stated that she was 5 years old and that the Appellant Ambrose did "bad manners" to her. She did not describe the nature of the "bad manners".

9. The evidence of the mother of the complainant **Pw1 WM** was that she left the appellant and the minor in the house and went to the farm with her husband and came back home at 8.00 p.m. On arrival the minor started crying and then told her that the appellant had done bad manners to her.

10. **Pw4 Jackson Masika Kathenge** a Clinical Officer at Kalawa Hospital examined the Complainant and filled the P3 form (medical report). He found the genitals intact and no trauma. In oral evidence however he was recorded to have said that “approximate age of injuries 10 hours” without indicting the injuries suffered.

11. I note that in the judgment the learned trial magistrate referred to reddish lacerations in the private parts of the minor while no evidence to support such a finding was tendered either orally or in the medical examination report.

12. I note also that in supporting the conviction, the Director of Public Prosecutions in their submissions, refer to an offence of defilement contrary to section 11 (1) of the Act, at Uvete Trading Centre and an alternative count of indecent act relating to two different complainants “MM” aged 17 years and “FN” aged 16 years.

13. Under section 107 of the Evidence Act (cap.80) the burden was on the prosecution to prove their case against the appellant. This being a criminal case the standard of proof is beyond any reasonable doubt.

14. In my view the prosecution did not prove their case against the Appellant beyond any reasonable doubt. Though the evidence of a single victim of a sexual offence (the complainant herein) does not require corroboration under the proviso to section 124 of the Evidence Act, in my view the evidence of the victim herein who was a minor of 4 years at the time of the offence, is not believable as it is not consistent with the medical evidence in the medical report which noted nothing unusual on her. In any case the complainant did not explain in her evidence what exactly the Appellant did to constitute “bad manners”. What the clinical officer Pw4 Jackson Masila stated orally in court also contradicts the contents of medical report and watered the prosecution case further.

15. Secondly, the Appellant tendered sworn testimony in his defence which was not challenged by the prosecution through cross examination and thus the defence of the Appellant stood unchallenged and the trial court thus erred in not deciding in his favour as he had no burden to prove his innocence.

16. Thirdly, the magistrate erred in making a finding of reddening of the genital organs of the complainant while the medical evidence tendered did not support such finding. The appeal will thus succeed.

17. Consequently, I allow the appeal, squash the conviction and set aside the sentence. I order that the appellant will be released from custody unless otherwise lawfully held.

Orders accordingly.

Delivered, signed and dated this 10th day of February, 2021, in open court at Makueni.

.....

GEORGE. DULU

JUDGE