



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO. 31 OF 2019

ATHMAN JOHNY YAHYA APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from Original Conviction and Sentence in Criminal Case No. 65 of 2019 of the Principal Magistrate's Court at Lamu Law Court- Hon. V.K Asiyo, RM dated 13TH AUGUST 2019)

Coram: Hon. Justice R. Nyakundi

The appellant in person

Mwangi for the State

J U D G M E N T

The appellant was charged with indecent act with a child contrary to section 11 (a) of the Sexual Offences Act. The particulars of the offence were that on 6th April 2019 at around 1600 hours at Mkomani area in Lamu west division in Lamu County, intentionally touched the breast of SA with his hand against her will.

Aggrieved by the sentence and the conviction of the trial court, the appellant lodged an appeal on the following grounds:

1) That he pleaded not guilty to the charge.

2) That he was sentenced to 10 years imprisonment for the offence of indecent act with a child contrary to section 11 (a) in Cr. Case no. 6 of 2019 on 13/8/2019 before PM's court Lamu.

3) That the judgement delivered by the Hon V.K Asiyo was not fairly done and it's unconstitutional just because the learned trial magistrate erred in law and facts by ignoring his defence and he did not analyse properly the prosecution witnesses which were full of contradictions and loopholes.

4) The judgment and sentence imposed to the accused was not safe and unlawful because the trial magistrate erred in law and facts by siding with the prosecution side despite all witnesses and evidence averred in court were from the same family members and the incident according to their statements took place in the town street but they did not avail any passerby to jec their allegations (sic).

PW1 SF testified that on 7th April 2019 she was fetching water at a well with SA at around 4.00 pm when the accused came from behind and grabbed SA's breast. He then told her that he wanted to make love to her. During the commotion, SA fell on the ground and the accused threatened her if she did not make love to him he would do something bad to her.

SA scream for help while **(PW1)** rushed home to call their aunt NA who upon reaching the well the accused fled from the scene.

PW 2 SA testified that on the material day together with **(PW1)** they had gone to the well to fetch water at around 4.00 pm when the accused came and held her from behind causing her to fall. While lying down on the ground, the accused touched her breasts and told her that he wanted to make love to her threatening to do something bad to her if she did not comply. She tried to cover her breasts with her hands but in the scuffle, the accused tore her clothes. She scream for help while **(PW1)** went to fetch their aunt whom upon reaching the scene, the

accused fled.

PW3 NA, told the court that on the material day she had sent both **(PW1)** and **(PW2)** (her nieces) to go to the well and fetch water. **(PW1)** came back running and crying and told her that the accused had accosted **SA** causing her to fall on the ground and told her that he wanted to make love to her. They both rushed to the well and found **SA** lying on the ground and the accused holding her but on seeing them he fled from the scene. She then took the girls home, changed and they reported the matter to the village headmen who directed them to the police.

PW4 CPL Benson Abuya informed the court that he took over from **Cpl. Stephen Maiya** who was the initial investigating officer. That upon receiving the complainant they took her for age assessment which ascertained that the complainant was 13 years old and produced the age assessment report and the accused was arrested on 22/4/2019.

Upon the close of the prosecution case, the trial court found that a prima facie case had been established and the appellant was placed on his defence. He elected to give sworn testimony. In his defence he stated that on 22/4/2019 he was arrested on his way to the hospital. That upon enquiry of reason for his arrest he was told he would be informed at the police station and even upon arrival at the station he was not informed.

Relating to the charges, he told the court that on the material day of the alleged offence he was playing football and he was not at the scene of the incident. That there was an existent grudge between his family and that of the complainant.

The learned magistrate in the trial court after analyzing the evidence before him, he convicted the accused for the offence of committing an indecent act with a child. He then sentenced the accused to minimum mandatory custodial sentence of ten years imprisonment.

Submission on the appeal

The appellant submits that the prosecution did not prove its case beyond a reasonable doubt. He offers that the prosecution's case was full of contradictions and discrepancies. Further, the allegations against him were founded on family grudges between the family of the accused and the family of the complainant.

The respondent submits that the evidence of PW1 and PW2 was accurate as to what transpired on the material day thus no inconsistencies. They submitted that when the accused was placed on his defence he did not call any witness to corroborate his narrative that he was playing football on the said day thus his defence was a mere denial.

The prosecution submitted that the appellant was rightly convicted of attempted

Analysis and determination

This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, reevaluate and analyze it and come to its own conclusion. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanor of the witnesses and the appellant during the trial and can therefore only rely on the evidence that is on record. See **Okeno v R (1972) EA 32, Eric Onyango Odeng' v R (2014) eKLR**.

I have considered the grounds of appeal, the respective submissions, and the record and the issues for determination are;

a) Whether the offence of indecent act was proved beyond reasonable doubt

b) Whether the sentence was excessive

The offence of indecent act with a child is defined and created under Section 11 of the sexual Offences Act as follows: -

11(1) any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term not less than ten years.

Section 2(1) of the said Act defines an '**indecent act**' as follows:

'Indecent act' means an unlawful intentional act which causes: -

a. Any contact between any part of the body of a person with the genital organ, breast or buttocks of another, but does not include an act that causes penetration;

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

Therefore, the main ingredients of the offence of committing an indecent act with a child are: -

a. Proof that the victim is a child in law;

b. Proof that there was contact between any body part of the accused person with the genital organ, breast or buttocks of the child victim (but that act must not be an act that caused penetration) or proof of exposure or display of any pornographic

material to a child;

c. Proof that the act(s) in (b) was/were intentional;

d. There should be no legal justification in the act(s) complained of.

The age of SA is not among the issues contested in this appeal. The trial court placed its reliance on the age assessment report that was produced in court and the same was also not contested during the trial. Therefore, the age of SA at the time of trial was 13 years thus a minor as envisioned by the law.

As to whether there was contact between the body part of the appellant and the breasts of SA, I shall refer to the record of evidence from the trial court where (PW1) and (PW2) to led evidence to the effect that the appellant grabbed (PW2) from behind, pinned her on the ground and touched her breasts and threatened to have carnal knowledge of her. In the accounts of the two witnesses, I found no contradictions nor discrepancies. Therefore, I find that there was contact in the body of the appellant and the breasts of (PW2).

The acts of the appellant were well calculated and intentional because despite the resistance by (PW2), he tore her clothes and threatened to harm her if she did not allow him have carnal knowledge of her. The actions of the appellant have no legal basis whatsoever.

Considering the facts outlined above, the circumstances of the case it is not known what the appellant would have done had he not been caught. He has also not shown any remorse for his actions his defence is mere denials and counter accusation of ill blood that he did not prove in any way. It is ostensible that the appellant deserves a sentence that would serve as a deterrence to other would be offenders.

I do note that the trial magistrate imposed the minimum sentence of the offence even when there was no remorse on the part of the appellant. There is no reason for me to upset the decision of the trial court.

The conviction and trial by the trial court is upheld and the appeal stands dismissed.

It is so ordered.

DATED, SIGNED AND DELIVERED AT GARSEN THIS 15TH DAY OF SEPT 2021

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R. NYAKUNDI

JUDGE

In the presence of

1. The Appellant
2. Mr. Mwangi for the state