REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.244 OF 2018

(An Appeal arising out of the conviction and sentence of Hon A. R. Kithinji (SPM) delivered on 28th July 2018 in Makadara Criminal Case No.1272 of 2014)

PAUL MWAIWO MAKANGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Paul Mwaiwo Makanga was charged with the **offence of committing unnatural offence** contrary to **Section 162(a)** of the **Penal Code**. The particulars of the offence were that on diverse dates between 12th January 2013 and 3rd March 2014 in Nairobi County, the Appellant had carnal knowledge of IK against the order of nature. He was alternatively charged with **committing an indecent act with a child** contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars of the offence were that on diverse dates between 12th January 2013 and 3rd March 2014 in Nairobi County, the Appellant unlawfully committed an indecent act by touching the anus of IK, a boy aged eleven (11) years, with his penis. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged on the alternative charge of **indecent assault**. He was sentenced to serve ten (10) years imprisonment. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal to this court challenging the same.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he was convicted on the basis of evidence that did not establish his guilt to the required standard of proof. He accused the trial court for shifting the burden of proof and thereby exonerating the prosecution from discharging its burden to establish the charge to the required standard of proof. The Appellant stated that the evidence adduced did not support the charge and therefore the trial court erred in law by convicting him. He was finally aggrieved that his defence was not taken into account before the trial court reached the impugned verdict. In the premises therefore, the Appellant urged the court to allow the appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, this court heard oral submission by Mr. Benji for the Appellant and Ms. Akunja for the State. Mr. Benji submitted that the trial court erred in law and in fact in convicting the Appellant on the basis of the evidence that did not support the charge. He pointed out that there were discrepancies between the evidence adduced by PW3 and PW4. He stated that there was no physical evidence supporting the allegation made by the complainant that he had indeed been sodomized. He noted that the medical report clearly exonerated the Appellant because it stated that there were no physical injuries found when the complainant was examined. Medical tests proved negative. Learned counsel was of the view that the charge brought against the Appellant was not proved. He further stated that the charges were trumped up against the Appellant. He urged the court to allow the appeal.

Ms. Akunja for the State opposed the appeal. She submitted that the prosecution had established to the required standard of proof that the Appellant had on several occasions attempted to sodomize the complainant. This resulted in the victim uncontrollably passing stool on himself. Medical examination established that the complainant had bruises on his anus. She urged the court to find that the testimony of the complainant established that indeed the Appellant had sexually assaulted him by sodomizing him. She urged the court to dismiss the appeal in its entirety as the sentence meted on the Appellant fitted the crime.

As the first appellate court, this court is required to re-evaluate the evidence adduced before the trial court and reach its own independent determination whether or not to uphold the conviction of the Appellant. In doing so, the court is required to be mindful of the fact that it neither saw nor heard the witnesses as they testified and therefore give due regard in that respect. (see **Njoroge -vs- Republic [1987] KLR 19).** In the present appeal, the issue for determination by this court is whether the prosecution established the charge of **indecent assault** contrary to **Section 11(1)** of the **Sexual Offences Act** to the required standard of proof beyond any reasonable doubt.

Section 11(1) of the **Sexual Offences Act** provides thus:

> ***"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 (10) years."***

Section 2 of the **Sexual Offences Act** defines **'indecent act'** to:

> ***"mean an unlawful intentional act which causes –***
>
> > ***(a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.***
> >
> > (b) ***exposure or display of phornographic material to any person against his or her will***."

In the present appeal, it was the prosecution's case that the Appellant, on several occasions, attempted to insert his penis into the anus of the complainant. According to the complainant (who was twelve (12) years old at the time), between 12th January 2013 and 4th May 2015, the Appellant did on several occasions take him to his house, which was neighbouring to where they were residing, remove his trousers before attempting to insert his penis into his anus. He did this a total of seven (7) times. On each of the occasions, the Appellant did not succeed in inserting the penis into his anus. On each occasion, the Appellant told him to go home and not tell anyone about the incident. The complainant did not tell anyone about the incident until when he started experiencing problems in passing stool. He told the court that he passed stool uncontrollably. His mother PW2 BNK noticed this. On making further inquiry, the complainant told her that the Appellant had sodomized the complainant. She made a report to the police.

The complainant was taken to MSF Clinic at Mathare where he was examined by a clinical officer. The medical treatment notes was produced into evidence by PW3 Selina Nyambura. The report noted that the physical examination of the anus showed minor healing bruises at the anal entry. This examination was done on 9th March 2014. On 11th March 2014, the complainant was seen by Dr. Joseph Maundu based at the Police Surgery. He did not observe any physical injuries on examining the complainant. The case was investigated by PW5 Senior Sgt Samuel Gitau of Mwiki Police Station who charged the Appellant after concluding investigations. When the Appellant was put on his defence, he denied committing the offence.

On evaluation of this evidence, the trial court made the following observations:

> ***"The evidence of the child is uncorroborated in this case. As a general rule embodied in Section 124 of the Evidence Act, an accused person shall not be liable to convicted on the basis of the evidence of the victim unless such evidence is corroborated… Further, in Mohamed –vs- Republic it was held "it is now settled that the courts shall no longer be hamstrung by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful." As I caution myself, I invoke the provisions of Section 124 of the Evidence Act and proceed to rely on the evidence adduced by PW1 as I deem it to be truthful. Consequently I find that the accused was well identified by the complainant."***

This court has carefully re-evaluated the evidence adduced before the trial court in light of the submission made before this court by the parties to this appeal. It was clear from the above finding by the trial magistrate that he relied solely on the evidence of the complainant having been persuaded of its truthfulness. *Is that the true position?*

The complainant told the court that the Appellant attempted to sodomize him seven (7) times before he was arrested. These attempts occurred in a span of two (2) years. During this period, according to the complainant, the Appellant did not at any time succeed in sodomizing him. From the complainant's testimony, it was evident that the Appellant did not coerce nor force the complainant to accompany him to his house. Neither did he induce him to go to his house. The complainant mentioned a friend by the name Martin who was with him on some of the occasions that the Appellant is said to have taken him to his house. This was a crucial witness who would have established the truthfulness of what the complainant was testifying to.

Medical evidence did not support the complainant's assertion that the Appellant had severally attempted to sodomize him. It was rather peculiar that in the period of two years that the Appellant is said to have attempted to sodomize the complainant, that the complainant did not confide to anyone. The trigger that compelled the complainant's mother to note that there was something amiss with the complainant, was the noted complainant's habit of uncontrollably passing stool on himself. This could be a medical condition that required treatment. The complainant attributed this to being sodomized by the Appellant. Yet in his evidence, he clearly stated that he had not been sodomized by the Appellant. He only stated that the Appellant attempted to sodomize him.

On this court's re-evaluation of the evidence adduced, it was clear that the trial court had no basis in reaching the conclusion that the complainant was telling the truth. His evidence was inconsistent and had no ring of truth in it. Being sodomized and attempted to be sodomized are two different things which cannot lead to the conclusion that the trial court reached.

Whereas this court agrees with the trial court that the evidence of the complainant need not be corroborated if the court was satisfied that the complainant was telling the truth in accordance with **Section 124** of the **Evidence Act**, in this appeal, the inconsistent nature of the testimony adduced by the complainant called for corroboration, at the very least by the complainant's friend Martin, to corroborate the complainant's testimony. This court formed the view that the complainant's testimony alone was not sufficient to secure the Appellant's conviction. The prosecution failed to establish the alternative charge of **indecent assault** to the required standard of proof beyond any reasonable doubt.

The Appellant is acquitted of the charge. He is ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 5TH DAY OF FEBRUARY 2020

L. KIMARU

JUDGE