



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINAL APPEAL NO. 53 OF 2019**

**CORAM: D.S. MAJANJA J.**

**BETWEEN**

**MOSES KIMATHI.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from the original conviction and sentence of Hon. E. W. Ndegwa, RM dated 5<sup>th</sup> March 2019 the Magistrate's Court at Githongo in Sexual Offence Case No. 15 of 2018)***

**JUDGMENT**

1. The appellant, **MUSA KIMATHI**, was charged, convicted and sentenced to 10 years' imprisonment for the offence of committing an indecent act with a child contrary to **section 11(1)** of the **Sexual Offences Act** ("the Act"). The particulars of the charge were that on 9<sup>th</sup> July 2018 at [particulars withheld] Market, Nkuene Location in Imenti Central Sub-County within Meru County, the appellant intentionally touched the buttocks, breasts and anus of BM.
2. The appellant appeals against conviction and sentence on grounds set out in his petition of his appeal dated 19<sup>th</sup> March 2019. The thrust of that appeal was that the prosecution failed to prove its case beyond reasonable doubt. He also complained that the sentence was excessive in the circumstances.
3. The respondent relied on written submissions and supported the conviction and sentence. It urged that the prosecution proved every element of the offence.
4. It is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see ***Okeno v Republic [1972] EA 32***).
5. The complainant, BM (PW 1), aged 13 years, testified on oath after a *voire dire*, that he knew the appellant as he had been engaged to tutor him as he had been sent home from school. On the material day, the appellant accompanied PW 1 to his house after the appellant had spoken to PW 1's mother, PW 2. The appellant started with the mathematics lesson then turned to the topic of sex. PW 1 started talking about female body parts and erotic reactions to being touched. The appellant gave PW 1 his phone and told him to go and lie down on his bed. As PW 1 was playing with the phone, the appellant starting touching him on his back. PW 1 pushed his hand away but the appellant continued to hold him on his breast and chest and told him to bend but he refused. He also attempted to remove his belt. While the appellant continued to hold him with both hand, PW 1 bit him on one hand causing the appellant to release him. The appellant also squeezed PW 1's private parts causing him to start crying. The appellant ordered him to take his books and leave.
6. PW 1 further stated that he started gathering his books, the appellant held his hand and started asking for forgiveness and pleading with him not to report the matter. He even offered to give him the phone but PW 1 refused. As he was leaving, the appellant put his phone in the bag. PW 1 went home and narrated to PW 2 what had taken place.
7. PW 2 testified that on the material day, the appellant came to see her at about 1.00pm and requested to take PW 1 to his house for maths and science tuition. They left together but after some time, PW 1 came back home crying. He narrated to her what had happened and also brought the phone and placed it on the table. She decided to go and report the incident to the police. A bar attendant, PW 3, recalled that on the material day, PW 2 called her and asked her to hear what PW 1 was telling her. She went to PW 2's house where PW 1 narrated his

ordeal. She recalled that PW 1 was crying. She accompanied PW 2 to the police station.

8. PW 4 was the doctor who produced the P3 medical form prepared by the doctor who examined PW 1 on 11<sup>th</sup> July 2018. The key observations and findings were that the genitalia were normal externally but when palpitated there was tenderness on the scrotum. PW 1 complained that he had pain in passing urine and that the urine was mixed with blood as disclosed by the urinalysis. There was also an inflammation on the right testis. The doctor concluded that this was an indication of trauma or an infection.

9. The investigating officer, PW 5, recalled that on 9<sup>th</sup> July 2018, he received PW 1 and PW 2. The appellant had also been brought to the police station. He took statements and issued the P3 medical form which was filled at the hospital. He caused the appellant to be charged.

10. When put on his defence, the appellant (DW 1) elected to give sworn testimony. He denied the offence. He stated that on the material morning, he was surprised to find PW 1 at his door at about 12.00 noon since he had locked the gate. PW 1 told him that he had jumped over the gate. He told the court that he warned PW 1 that he was not allowed to enter the compound without permission since the pastor lived there and that there were protocols to be followed. PW 1 started apologizing to him and he told him to go and apologize to his mother. He shut the door and went back to read. After a while, he heard a knock on the door. He shouted from inside that if it was PW 1, he should leave immediately. He heard PW 1 crying and when he opened the door, PW 1 came in and started asking for forgiveness from him. PW 1 knelt down and continued pleading for forgiveness but he rebuffed him and told him to go back to his mother. They had an altercation. He pushed PW 1 outside and his phone fell but before he could collect it PW 1 ran away with it.

11. The appellant further testified that when he followed PW 1, he found him with PW 2 and his sisters. PW 2 was already holding the phone and demanded to know if what PW 1 had told him was true. As they were talking, PW 1's father came and he was taken to the police station. He accused PW 2 of demanding Kshs. 200,000/- through an intermediary to end the case.

12. The appellant's witness, DW 2, testified on oath after a *voire dire*. He told the court that he was 14 years old and was in Class 7 and that he knew the appellant from church as he taught Sunday School. He informed the court that he knew PW 1 from school. He recalled that PW 1 had fought with another boy in school and had been suspended and was expected back to school with his parents. He later learnt from PW 1 that the appellant had been arrested. He also stated that he heard PW 1 tell other boys that the things he heard about the incident with the appellant were not true.

13. In order to succeed, the prosecution must prove that the accused person did the indecent act. The definition of an indecent act is found at **section 2(1)** of the **Act** which states as follows;

*“indecent act” means any 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 any pornographic material to any person against his or her will.*

14. From the evidence I have outlined, there is no dispute that the appellant and PW 1 were known to each other. In fact, the appellant admits that PW 1 was in his house on the material day. He however denied that he sexually assaulted PW 1. PW 1 narrated how the appellant touched him on the chest and genital organs after introducing the subject of sex to him and despite the fact that he had been rebuffed. His testimony was direct, clear and unshaken in cross-examination.

15. If any corroboration was required, it was to be found in the evidence of PW 2 who confirmed that PW 1 and the appellant left together to go to his house and that PW 1 came later in a state of distress with the appellant's phone and narrated to her what had taken place. PW 3 also confirmed that PW 1 was in a state of distress and he told her what had transpired. Finally, the medical evidence and in particular the P3 medical form produced in evidence shows that PW 1's testicles suffered some trauma consistent with PW 1's narration that the appellant held his testicles and caused him pain.

16. The thrust of the appellant's defence is that PW 1 trespassed on his property and he was injured in an altercation when the appellant sent him away. He also suggested that he was framed by PW 2 and that PW 1 was in fact injured in a fight with another person at school and only framed the appellant as he feared suspension from school. Like the trial magistrate, I reject the defence. First, his contention that PW 1 came to his house was controverted by the clear evidence of PW 1 and PW 2 clear that he went to the appellant's house together after discussions with PW 2. The contrary position was not suggested to either witness in cross-examination. Second, the issue of a frame up or fight was an afterthought as it was not raised in cross-examination. I too dismiss the defence.

17. Finally, there is no dispute that PW 1 was below the age of 18 years. He was still in primary school and the age was established by the birth certificate which showed that he was born on 10<sup>th</sup> April 2006. I therefore find and hold that the prosecution proved all the elements of the offence of indecent act with a child. I affirm the conviction.

18. As regards the sentence, the appellant was sentenced to the mandatory minimum sentence under **section 11(1)** of the **Act**. However, the Court of Appeal has since declared the mandatory minimum sentences unconstitutional in several cases among them; **BW v Republic KSM CA Criminal Appeal No. 313 of 2010 [2019] eKLR**, **Christopher Ochieng v Republic KSM CA Criminal Appeal No. 202 of 2011 [2018] eKLR** and in **Jared Koita Injiri v Republic, KSM CA Criminal Appeal No. 93 of 2014**.

19. In the circumstances, the trial magistrate is required to exercise discretion in sentencing bearing in mind the seriousness of sexual offences reflected in the prescribed sentences. The appellant was a first offender and he pleaded for leniency stating that he was a university student. On the other hand, the appellant took advantage of a young boy who had been entrusted to him by his mother to tutor. Taking both

aggravating and mitigating circumstances in to account, I quash the sentence of 10 years' imprisonment and impose a sentence of three (3) years imprisonment.

20. I affirm the conviction and allow the appeal to the extent that the sentence of 10 years' imprisonment is quashed and substituted with a sentence of **three (3) years** imprisonment to run from the date of conviction before the trial court.

**DATED and DELIVERED at NAIROBI this 14<sup>th</sup> day of MAY 2020.**

**D.S. MAJANJA**

**JUDGE**

Appellant in person.

Ms Nandwa, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.