



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO.57 OF 2018

OKOTH AILA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. H.M. Nyaga CM

delivered on 5th September 2017 in Makadara CM Cr. Case (S/O) No. 2876 of 2015)

JUDGMENT

The Appellant, Okoth Aila, was charged with the offence of **sexual assault** contrary to **Section 5(1)(a)(i)** as read together with **Section 5(2)** of the **Sexual Offences Act**. The particulars of the offence were that on 11th September 2015, at in Embakasi within Nairobi County, the Appellant unlawfully used his fingers to penetrate the vagina of D.W.W., a girl aged 5 years. In the alternative charge, the Appellant was charged with the offence of **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 11th September 2015, in Embakasi within Nairobi County, the Appellant unlawfully and intentionally touched the vagina of D.W.W., a child aged 5 years with his fingers. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, the Appellant was convicted as charged on the alternative charge of committing an indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act**. He was sentenced to serve ten (10) years imprisonment.

In his petition of Appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved by his conviction stating that the prosecution's case was inconsistent, full of contradictions and insufficient to sustain a conviction. He faulted the trial court for basing his conviction on the evidence of PW1 which was uncorroborated. He took issue with the fact that the trial court disregarded the evidence on record and relied on its own conjectures in arriving at its decision. He complained that the prosecution failed to avail crucial witnesses to adduce evidence before the trial court. He was further aggrieved that the trial court failed to properly evaluate his defence in arriving at its decision. In the premises, the Appellant urged this court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, the Appellant presented to court written submission in support of his appeal. He urged the court to allow his appeal. Ms. Njuguna for the State opposed the appeal. She

submitted that prosecution called seven witnesses who established the case against the Appellant to the required standard of proof beyond any reasonable doubt. She averred that the minor's age was established by the evidence of PW4 as well as the birth certificate that was produced into evidence. PW4 told the court that the complainant was born on 24th September 2010 and was therefore five (5) years of age at the time of the sexual assault incident. She asserted that the Appellant was positively identified as the perpetrator of the sexual assault. He was the complainant's neighbour and was therefore known to her. She identified him as '**Baba Immanuel**'.

Learned State Counsel further submitted that the complainant narrated to the court how the Appellant lured her to his stall and inserted his finger into her anus. She acknowledged that the complainant's testimony was inconsistent as to whether the Appellant inserted his finger in her anus or vagina. She pointed out that the Post Rape Care Form indicated that the complainant's vaginal wall was reddened. She averred that there was no evidence of bad blood between the Appellant and the complainant's grandmother. With regard to sentence, Learned State Counsel was of the view that the same was legal and appropriate in the circumstances. She therefore urged this court to dismiss the Appellant's appeal.

The facts of the case according to the prosecution are as follows. PW1, D.W.W, was the complainant. She gave an unsworn statement. She stated that she lived in Kayole with her grandmother and aunt. It was her testimony that the Appellant was a tailor. He operated a shop near to where they resided. On the material day, she was at the gate when the Appellant called her to his shop. He inserted his finger into her anus. She stated that she felt pain. He did not undress her. She stated that she was wearing a trouser and a panty. She informed her grandmother and aunt. She was taken to the hospital. When the complainant was recalled for further cross-examination, she stated that the Appellant inserted his finger into her anus and vagina.

PW2, Dr. Joseph Maundu, was a medical officer based at Police Surgery. He stated that he examined the Appellant on 17th September 2015. No visible physical injuries were noted on the Appellant. He produced the Appellant's P3 form into evidence. He further stated that the complainant was examined by Dr. Shako on 21st September 2015. No visible physical injuries were noted. Her genitalia was normal and her hymen was intact. He produced the complainant's P3 form into evidence.

PW4, CK is the complainant's mother. It was her testimony that the complainant was born on 24th October 2010. The complainant lived with her mother in K. On 14th September 2015, her mother called her and informed her that the complainant had been sexually assaulted. She immediately went to K. The complainant told her that the Appellant, whom she referred to as "**Baba Emmanuel**", had sexually assaulted her. She took the complainant to hospital for medical examination. PW4 stated that the Appellant was known to her. He worked as a tailor at K. He was her mother's neighbour (PW1's grandmother).

PW5, Caroline Kimiti is the complainant's grandmother. On 11th September 2015, the complainant informed her that she felt pain in her vagina while urinating. She informed her that the Appellant had inserted his finger into her vagina. The Appellant was her neighbour. She immediately went to the Appellant's stall and found his colleague. The complainant told her that it was the Appellant, and not his colleague, who had sexually assaulted her. PW5 reported the alleged incident to the police. On cross-examination, PW5 stated that the complainant informed her of the incident two days after it had allegedly occurred.

PW6, Emmy Kosgei, was a clinical officer based at MSF Clinic in Eastleigh. She adduced evidence on behalf of Irene Nyangwachi, who had examined the complainant but had since left employment at the clinic. She testified that she was familiar with Irene's handwriting and signature. It was her testimony that the complainant was examined at the clinic on 15th September 2015. Upon examination, no visible physical injuries were noted on her body. Her external genitalia was normal. Her vaginal walls were reddened and her hymen had notches of tears at 6 and 9 O'clock. Her anal region was normal. She produced into evidence the medical report as well as the complainant's Post Rape Care Form into evidence.

PW7, PC Fatuma Hussein investigated this case. She was based at Kayole Police Station. She stated that she was assigned the case on 15th September 2015. The Appellant was in custody. She interrogated the complainant who informed her that the Appellant had inserted his finger into her vagina. The Appellant was known to her (i.e. complainant). He operated a stall near where the complainant lived. After concluding her investigations, she charged the Appellant with the present case. PW7 produced the complainant's birth certificate into evidence.

The Appellant was put on his defence. He gave an unsworn statement. He stated that he resided in K. He worked as a tailor. On 15th September 2015, he was at the shop another tailor. A gentleman known as Brian, PW5 and the complainant came to the shop. The complainant claimed that he had inserted his finger into her anus. The said Brian and PW5 physically assaulted him. Later, eight men came to the shop. They beat him up and stole his property. He reported the matter to the police. It was the Appellant's testimony that there was bad blood between him and PW5. He told the court that he had earlier accused PW5's grandsons of breaking into his shop and stealing his property. They therefore did not get along. He denied the charges brought against him.

As the first appellate court, it is the duty of this court to subject the evidence adduced before the trial court to fresh scrutiny and re-evaluation, before reaching its own independent determination whether or not to uphold the conviction and sentence of the Appellant. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make comment regarding the demeanour of the witnesses (See **Okeno vs Republic [1972] EA 32**). In the present appeal, the issue for determination by this court is whether the prosecution established the charges brought against the Appellant to the required standard of proof beyond any reasonable doubt.

This court has re-evaluated the facts of this case. It has also considered rival submission made by parties to this appeal. **Section 5 of the Sexual Offences Act** provides that:-

(1) Any person who unlawfully;

a) penetrates the genital organs of another person with;

i. any part of the body of another or that person; or

ii. an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;

b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault.

(2) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.

In the present appeal, the prosecution was required to establish penetration of the complainants' vagina, by the body part, in this case finger, of the Appellant. The case by the prosecution was that the Appellant was a tailor who operated a shop next to the plot where the complainant lived with her grandmother (PW5). On the material day of 11th September 2015, the complainant was outside when the Appellant called her and lured her into his shop. She stated that she was wearing a trouser and a panty. The Appellant did not undress her. He however inserted his finger in her anus. When the complainant was recalled for further cross-examination, she stated that the appellant inserted his finger in her anus and vagina. She stated that the appellant threatened to stab her if she told anyone about the incident.

On 14th September 2015, the complainant informed her grandmother (PW5) that she was feeling pain while urinating. PW5 asked her what was wrong. The complainant told her that the Appellant inserted his finger in her vagina. PW5 called the complainant's mother (PW4) and told her what transpired. PW4

went to Kayole and took the complainant to MSF Clinic on the next day of 15th September 2015.

From the evidence adduced, it was clear that when the complainant was medically examined, by both Dr. Shako and Dr. Joseph Maundu, they found that the complainant's hymen was intact. They saw nothing remarkable in the complainant's anal region. It was clear to the court that the testimony of the complainant to the effect that she had been sexually assaulted by the Appellant was not supported by medical evidence. Whereas the **Proviso of Section 124 of the Evidence Act** allows the court to convict an accused person in a sexual offence where it is convinced that the victim was telling the truth, in the present appeal, this court is not persuaded that the complainant was telling the truth or knew the implication of what she was telling the court. The complainant testified twice before the court. In her first testimony, she told the court that the Appellant, without removing her pant, had used his fingers to manipulate her anus. In her latter testimony, she told the court that, apart from fingering her anus, the Appellant had used fingers to manipulate her vagina. As observed above, the two medical doctors who saw the complainant immediately after the alleged incident, noted nothing medically remarkable that would support the complainant's testimony.

In this court's assessment, it is within the realm of possibility that the complainant was influenced by adults in her life to adduce the said testimony against the Appellant. This court notes that the complainant was five years old at the time the incident was alleged to have occurred. She is a vulnerable and impressionable child. Further, as has correctly been observed by courts, the evidence of a child ought to be treated with caution because of several factors. The case of **FAPPYTON MUTUKU NGUI –VS- REPUBLIC – CRIMINAL APPEAL NO.296 OF 2010** is on point. The court held thus:

“Indeed courts should be cautious before convicting on the uncorroborated evidence of minors. There are many reasons for this. In J Heydon Evidence: Cases and material 2nd ed Butterworths London 1984, 84, the reasons were put this:

First, a child's power of observation and memory are less reliable than on adult's. Secondly, children are prone to live in a make-believe world, so that they magnify incidents which happen to them or invent them completely. Thirdly, they are also very egocentric, so that details seemingly unrelated to their own world are quickly forgotten by them. Fourthly, because of their immaturity they are very suggestible and can easily be influenced by adults and other children.”

In the present appeal, it was clear that the only evidence that pointed to the alleged guilt of the Appellant was that of the minor. That evidence was neither corroborated by medical evidence or by other evidence. Taking into consideration the contradictory nature of her testimony, it cannot be said that the complainant was telling the whole truth when she testified before the trial court. In the premises therefore, the allegation by the Appellant that he was framed after a dispute with the complainant's grandmother cannot be ruled out.

In the premises therefore, this court holds that the prosecution failed to prove, to the required standard of proof beyond any reasonable doubt, that indeed the events that the prosecution claims took place on the material day actually occurred. The evidence adduced by the prosecution witnesses, particularly the medical evidence raises reasonable doubt that the alleged offence actually occurred. The contradictory nature of the evidence adduced by the prosecution witnesses' leads this court to the conclusion that the events that are said to have taken place, may likely not to have occurred. In any event, the reasonable doubt raised in the prosecution's case must be resolved in the Appellant's favour. The Appellant's appeal against conviction therefore has merit. It is allowed.

The Appellant's conviction on the charge brought against him **of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act** is hereby quashed. He is acquitted of the charge. The custodial sentence that was imposed upon him is set aside. He is ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 6TH DAY OF MAY 2020

L. KIMARU

JUDGE