



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 15 OF 2019.

ISAACK KIPKEMEI CHEBOI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the conviction and sentence of the Resident Magistrate, Hon. E. KELLY delivered on 15th of May 2018 and 31st of May 2018 respectively in Nakuru Cr. Case No. 116 of 2014.)

JUDGMENT

1. The appellant was charged with three counts and alternative charges. Count 1 is the offence of **attempted defilement contrary to Section 9(1) (2) of the Sexual Offences Act No. 3 of 2006**. The particulars were that on diverse dates between 19th and 22nd May 2014 at [particulars withheld] in Rongai District within Nakuru County, unlawfully and intentionally attempted to cause his male genital organ (penis) to penetrate into the female genital organ (vagina) of **MMN** a child aged 9 years.
2. An alternative charge of committing an indecent act with a child contrary to **Section 11 (1) of the Sexual Offences Act No. 3 of 2006**. The particulars being that on 22nd of May 2014 at [particulars withheld] in Rongai District within Nakuru County, unlawfully and intentionally committed an indecent act to a child namely **MMN** a child aged 9 years by touching her vagina with his penis.
3. Count 2 is the offence of **attempted defilement contrary to Section 9(1) (2) of the Sexual Offences Act No. 3 of 2006**. The particulars were that on diverse dates between 19th and 22nd May 2014 at [particulars withheld] in Rongai District within Nakuru County, unlawfully and intentionally attempted to cause his male genital organ (penis) to penetrate into the female genital organ (vagina) of **VW** a child aged 10 years.
4. Alternative charge to count 2 is the offence of **committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006**. The particulars being that on 22nd of May 2014 at [particulars withheld] in Rongai District within Nakuru County, unlawfully and intentionally committed an indecent act to a child namely **VW** a child aged 10 years by touching her private part namely vagina with his male genital organ namely penis.
5. Count 3 is the offence of **attempted defilement contrary to Section 9(1) (2) of the Sexual Offences Act No. 3 of 2006**. The particulars were that on diverse dates between 19th and 22nd May 2014 at [particulars withheld] in Rongai District within Nakuru County, unlawfully and intentionally attempted to cause his male genital organ (penis) to penetrate into the female genital organ (vagina) of **SN** a child aged 10 years.
6. Alternative charge to count 3 is the offence of **committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006**. The particulars being that on 22nd of May 2014 at [particulars withheld] in Rongai District within Nakuru County, unlawfully and intentionally committed an indecent act to a child namely **SN** a child aged 10 years by touching her private part namely vagina with his male genital organ namely penis.
7. The appellant denied all the charges and the case proceeded for hearing with the prosecution calling 6 witnesses in support of their case while the appellant chose to remain silent in his defence. By the judgment delivered on 15th of May 2018 the trial magistrate found the appellant guilty of the alternative charge to each of the three main counts. On 31st May 2018, the appellant was sentenced to 10 years imprisonment for each of the alternative charge. The three sentences to run consecutively.
8. The appellant being aggrieved and dissatisfied with the conviction and sentence, acting in person filed a petition of appeal dated 5th February 2018 challenging the conviction and sentence on 6 grounds:

i. The learned trial magistrate erred both in law and in facts by failing to note that the prosecution did not prove its case to the

required standards of beyond reasonable doubt.

ii. *The learned trial magistrate erred both in law and in facts by failing to hold that the appellant defence was strong and unshaken by the prosecution.*

iii. *The learned trial magistrate erred both in law and in fact by relying on the speculative assumption in convicting the appellant.*

iv. *The learned trial magistrate erred both in law and in facts by failing in the inadequacies in the prosecution case.*

v. *The learned trial magistrate erred both in fact and in law by relying on the evidence of the incredible and unreliable witnesses to convict the appellant.*

vi. *That he prayed to be supplied with certified copy of the court proceedings to enable him file more grounds of appeal.*

9. The state opposed the appeal on both conviction and sentence. Both parties agreed to dispose of the appeal through submissions.

10. The appellant filed written submissions and amended grounds of appeal as follows:-

i. *That the learned trial magistrate erred in law by holding that the alternative charge was proved as against the appellant when there was no evidence to prove this charge as against the appellant.*

ii. *That the learned trial magistrate erred in law and fact by holding that the appellant serves a sentence of 10 years consequently but failed to appreciate the sentencing guidelines which calls the court to exercise its discretion and award concurrent sentences.*

iii. *That the learned trial magistrate erred in law by not taking into account the appellant's right to silence at the defence stage. This was misdirection and the appellant was prejudiced.*

11. During the hearing on 16th of March 2020, the appellant relied on the submissions and the grounds of appeal. The prosecution gave oral submissions.

APPELLANT'S SUBMISSIONS

12. The appellant submitted that the charge of committing an indecent act with children was not proved in that the prosecution did not table enough or sufficient evidence before the trial Court to warrant his conviction on the alternative charge of committing an indecent act. He submitted that PW3 told the Court she could not remember what transpired on that day and the trial Court ordered her to be remanded in order to give evidence. Even after such humiliation she did not tell the Court that she was indecently touched she only said M was touched by the appellant. On cross examination she said she did not witness the appellant touching M.

13. The appellant submitted that the evidence of PW2 was not also sufficient to sustain a conviction as she testified the Appellant touched her chest together with that of M and V. The appellant's submitted that the breast does not form part of private parts and a person cannot be convicted on the charge of an indecent act if it is alleged she touched a woman's breast.

14. The appellant further submitted that the complainant's evidence was contradictory in that PW1 told the Court the appellant touched the 3 complainants while the lights were off and neither of them screamed and she was touched her vagina yet she was covered with a blanket together with PW2 and PW3 and did not tell Court whether the said blanket was removed. Further that PW3 testified that she saw the appellant touch M but she was not touched. While PW2 testified the appellant only touched her breast.

15. Appellant submitted that PW1 testimony was relied on by the Court to convict the Appellant but she was not a truthful witness. He stated that the trial Court did not caution itself before convicting the Appellant on the allegation of indecent as the Court relied on the evidence of PW1 who testified that the incident occurred at night while the lights were off and did not disclose the source of light she used to see the Appellant committing the indecent act with the 3 complainants.

16. On sentence, the appellant submitted that the sentence was not awarded procedurally; that sentencing is a judicial practice to be exercised in rational and non-arbitrary manner; that the sentencing discretion should be guided by legislative or judicial precedents. The appellant submitted that although sentencing is a Court's discretion, the learned trial magistrate erred in law in ordering the said sentence to run consecutively for the three alternative counts bringing the total jail term to 30 years as opposed to running concurrently which would have been total of 10 years.

17. In respect to his choice to remain silent when **Section 211 of the Criminal Procedure Code** was explained to him, he submitted that the trial Court took his silence as a means of accepting that he committed the offence and stated that he had no duty under the criminal process to prove his innocence as the burden of prove lies on who alleges. He added that it was within his right to choose to remain silent and it was the duty of the trial Court to evaluate the evidence tendered and come up with a fair judgment.

18. The appellant submitted that the trial magistrate misdirected herself when she failed to critically evaluate the appellant's right to silence and held the appellant had committed the offence of indecent act with the three minors while there was no any evidence in support of such allegations, the prosecution did not prove their case to the required standard. The appellant urged the Court to find the appellant conviction and sentence was unsafe, quash the conviction and set aside the sentence and the appellant be set at liberty.

PROSECUTION'S SUBMISSIONS

19. The prosecution through state counsel prayed to the Court to dismiss the appellant's appeal. She submitted that the trial magistrate did not error in convicting and sentencing the appellant to 30 years of imprisonment for the 3 counts of alternative offence of committing an indecent act with children of tender ages.
20. On the issue of age PW1 testified that she was 8 years old. Health card produced confirmed that she was born on 24th October 2004. While PW2 and PW3 were 10 years' old each as confirmed by age assessment report produced in Court.
21. PW1 testified that the appellant touched her private parts. PW2 and PW3 said he touched their chest/breast and to that effect clinic cards for the 3 minors were produced.
22. On identification she submitted that PW1 testified the appellant was well known to her as he was her neighbour. PW2 and PW3 said they saw him pass. PW6 identified the appellant in Court as the one he had arrested after being taken to police station by neighbours.
23. She further submitted that the appellant who had the benefit of being represented by an Advocate opted to remain silent when asked to defend himself and that he fully participated in the proceedings.

DETERMINATION AND ANALYSIS.

24. This being the first appellate Court. I am expected to subject the entire evidence adduced before the trial Court to fresh evaluation and analysis. This I do while bearing in mind that I never had the opportunity to hear the witnesses and observe their demeanor. The principles that apply in the first appellate Court are set out in the case of **Okeno Vs Republic [1972] EA 32** where it was stated as follows: -

“The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)”

25. I have perused and considered the proceedings before the lower Court. I have also considered submissions by the appellant and the state and identified the following as issues for determination: -

- i. Whether the prosecution proved their case beyond reasonable doubt.
- ii. Whether the appellant sentence was harsh and unreasonable.

(i) Whether the prosecution proved their case beyond reasonable doubt.

26. Attempted defilement is as if there was a failed defilement, failed because there was no penetration. The prosecution in an offence of attempted defilement must prove;

- i. The age of the complainant;
- ii. Positive identification of the perpetrator by the complainant, and
- iii. Then prove steps taken by the perpetrator to execute the defilement which did not succeed.

27. The appellant submitted the prosecution did not prove their case beyond reasonable doubt as the evidence relied on was contradictory and could not warrant a conviction. Record show that, it was the testimony of PW1 that on Sunday at 4 pm, they were playing in the field at Kampi ya Moto with PW2 and PW3 when they were called by M, the Appellant's wife who was drunk to go to her house and help in cleaning utensils. She said M was alone in her house, and when it became dark they all ate and slept. She said that day the Appellant was not in the house.

28. PW1 said that together with the other 2 complainants, they stayed in M place until Wednesday. She further stated that the said M stole a neighbour's phone and left the house leaving the 3 complainants alone in the house. She said at 8pm, the appellant went to the house in the evening and started touching them. She said he touched the complainants' vaginas with his fingers, starting with PW2, then PW1 and finally PW3. The lights were off. PW1 said they did not scream on the first day but screamed on the 2nd day and neighbours went to their rescue and called police who took them to hospital for examination.

29. PW2 testified that it was on Sunday and they were in the shop with PW3 and PW1 in Wastelands. M asked them to go to her house; it was around 7:00p.m and they found the appellant in the house. M told them to cook which PW3 and PW2 cooked. M left the house and indicated to them she was attending a burial. After supper they all went to sleep and the complainants were to spend on the floor with beddings. At night the appellant started touching the complainants and PW2 was touched on her chest, while PW1 and PW3 were touched on their groins. She testified the lights were on when the Appellant touched them.

30. PW3 testified it was on Sunday and she was playing with PW1 and PW2 when M called PW1 and told her they go to her house. At M place they found the appellant. They spend the night on the floor where the beddings had been spread and M and the Appellant spend on the bed. They stayed at M place the next day until evening and M left them for a funeral with the appellant, at night they decided to sleep on M bed with the appellant. She testified that PW1 was touched by the Appellant. And in cross examination she admitted not seeing PW1 being touched.

31. PW4 who is PW2's mother stated that she was informed by her daughter that the appellant had touched her breast with his hands. PW2 was 10 years old. PW5 who is PW3's mother said while her daughter was playing the appellant touched her inappropriately. In cross examination she stated PW3 had informed her the Appellant had touched her vagina and had asked her to be his wife.

32. PW6 the medical doctor examined the 3 complainants and concluded there wasn't any defilement but maybe there could have been attempted defilement.

33. From the foregoing it is quite clear that despite the three complainants being together, they adduced contradictory evidence. While PW1 says they never saw the appellant at M house when they were first taken there by M, PW2 said they found him in the house. Further PW3 testified that on the first day, M and the appellant slept on the bed while the three girls slept on the floor and on the next day M went for a funeral; that night the three complainants slept in the bed with the appellant.

34. PW1 further testified that the 3 complainants were touched. He specified that the appellant touched her in their vagina but never indicated which private parts of PW2 and PW3 was touched. She said the light were off.

35. PW2 on the other hand said they found appellant in the house and M later left. She said they slept on the floor and when the appellant touched them PW1 said they should all go and sleep in the bed with the appellant and they all went to sleep in the bed with the appellant; she said appellant touched her on the chest while PW1 and PW3 were touched on the groins. She further said that they kept switching lights on and off as appellant insisted that they switch off lights. On cross examination she said when the appellant first touched them, the lights were on but they covered themselves with blanket and switched off the lights when he touched them

36. PW3 was touched on the groin. PW3 on the other hand said appellant touched her but never specified where she was touched. On cross examination PW3 stated not seeing PW1 being touched.

37. In my view conflicting testimonies given by the 3 complainants who were in the same room at the same time with the same person casts doubt in their evidence. I find that it was unsafe to rely on their evidence to find a conviction. From the foregoing I find that the alternative charges against the appellant were not proved beyond reasonable doubt. Having found the above, I will not therefore consider appeal on sentence.

38. FINAL ORDERS

1. Appeal on conviction in respect to the three alternative charges is allowed.
2. Conviction is quashed and sentence imposed set aside.

Judgment dated, signed and delivered via zoom at Nakuru This 16th day of July, 2020

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RACHEL NGETICH

JUDGE

In the presence of:

Jeniffer - Court Assistant

Rita for State

Appellant in person