



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT GARSEN**

**CRIMINAL APPEAL NO. 49 OF 2016**

**ROBERT GWIYO HIRIBAE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence in the Principal Magistrate Court at Garsen Criminal Case No. 5 of 2015 by Hon. S.M. Nyaga (PM) dated 23<sup>rd</sup> September 2016)*

**JUDGEMENT**

1. The Appellant was charged with attempted defilement contrary to section 8 (1) (2) of the Sexual Offences Act (SOA) No. 3 of 2006. The particulars of the offence were that on 13<sup>th</sup> March 2015 in Tana Delta Sub County within Tana River County attempted to cause his penis to penetrate the vagina of SM a child of 10 years.
2. He faced an alternative charge of sexual assault contrary to section 5(1)(a)(i)(2) of the Sexual Offences Act. The particulars of the offence were that on 13<sup>th</sup> March 2015 in Tana Delta Sub County within Tana River County unlawfully used his finger to penetrate the vagina of SM a child of 10 years.
3. The Appellant pleaded not guilty to the charges and the case proceeded to full trial with the prosecution calling six witnesses.
4. The complainant S.M, testified on oath as PW1 after a *voire dire* examination. She told the court that she was 10 years old and lived with the grandmother MAB at [particulars withheld] as her mother was in Saudi Arabia. She was in class four at [particulars withheld] and knew the Appellant as he was her head teacher since standard 2 at [particulars withheld] Academy before she joined [particulars withheld] Academy. She stated that on Friday 13<sup>th</sup> March 2015 after lunch, the Appellant called her from class and asked her to collect books from his house. She informed the Appellant that she required permission from Mr. Brian her class teacher and the Appellant went to Mr. Brian who gave him permission. She then accompanied the Appellant to his house at Jua Kali Estate. There was no one else in the house.
5. PW1 stated that the Appellant sat on the bed and convinced her to sit on his bed also. He started caressing her shoulder and asked her to remove her pants. When she refused the complainant removed them by force. She tried to cover her private parts with her hands but he removed her hands and penetrated her vagina with his fingers. That the Appellant forced her to lie on the bed while facing up and penetrated her vagina with his hand again. He asked her to put on her pant, gave her the books plus Ksh. 50/- and warned her not to tell anyone.
6. PW1 further stated that she took the books and money and reported the incident at Garsen Police Station where she was interrogated by a lady police officer. That together with the police they went in search of the Appellant but did not find him at home or at the school but they later met him on the way when he was arrested. The complainant stated that she was taken to Garsen Health Centre where she was examined and treated but she was told she did not have any injuries. She told court that she had injuries on her private parts and suffered pain but she did not bleed. She went back to the station and recorded her statement. PW1 stated that after 3 days on the 16<sup>th</sup> March 2015, she went to the hospital again and was examined by a different doctor and a P3 was filled. She said she did not have any grudges with the Appellant.
7. In cross-examination she reiterated that the Appellant inserted his finger in her vagina and that she was in pain. She further stated that the Appellant used to buy books for students who did not have and that the Appellant asked her to buy a book for Ksh. 10 while Ksh. 40 was to conceal the incident.
8. The complainant's grandmother MAB (PW2) told the court that the complaint was 10 years old and that her mother was in Saudi Arabia. She knew the Appellant as he was the headmaster at [particulars withheld] Academy and also a customer at her hotel and that she had no grudge with him. She learned of the incident on the 13<sup>th</sup> March 2015 from HO, the complainant's step-mother. On rushing to Garsen Police Station where they were informed that the complainant had been escorted to the hospital. On reaching the hospital, they found the

complainant being examined and when they went back home, she examined the child's vagina and saw scratches but that there were blood stains on the complainant's pant.

9. PW2 stated in cross-examination that the complainant had informed her the Appellant had tried to seduce her in the past which had led to the complainant absconding school but that the issue was resolved. She also denied having a grudge with the Appellant over unpaid school fees.

10. PW3, HS, was a teacher at Universal Academy. He confirmed that the Appellant was the headmaster while the complainant was a student and that on 13<sup>th</sup> March 2015, the Appellant told him that he needed the complainant to assist him on some assignment. He later saw the complainant being escorted back to school by police officers who were looking for the Appellant. At 3:00pm he went to the police station to follow up and recorded his statement.

11. BOO (PW4) also a teacher at Universal Academy told the court that the complainant was a class 4 pupil at the school but that she had transferred while the Appellant and PW3 were his colleagues. He stated that on the 13<sup>th</sup> March 2015 at around 1:00pm while he was coming back from lunch he met with the complainant coming from the school. He also met the Appellant a few meters away who said he was going home for some errands.

12. No. [xxxx] PC Damaris Ngweno (PW5) of Garsen Police Station was the Investigating Officer. She told the court that on the 13<sup>th</sup> March 2015 she was at the station when the complainant came to report the incident while crying. They went to the school with the complainant to look for the Appellant but they did not find him. They later met him on the way and escorted him to his house from where they arrested him in the presence of one J, his relative. That at the police station, the Appellant made a confession before the O.C.S Chief Inspector Joseph Langat, and in the presence of his relative J. PW5 stated that she conducted her investigations and charged the Appellant. She produced the complainant's clinic card (P.Exh1) which showed that she was 10 years old, 7 quire Kasuku hardcover A4 books (P.Exh6) and a KSh,50 note serial no. EJ358523 (P.Exh5) which the Appellant had given to the complainant. She also produced the Appellant's confessional statement (P.Exh4).

13. PW6, was Buya Said Shevo a clinical officer at Garsen Health Centre. He stated that he filled the P3 on the 16<sup>th</sup> March 2015 after examining the complainant. There was no tear in her genitals, her hymen was intact and there was no discharge. He concluded that there was no sign of penetration.

14. At the close of the prosecution's case, the trial magistrate found that the Appellant had a case to answer and he was put on his defence.

15. The Appellant chose to give a sworn statement in his defence. He informed the court that he was a retired teacher before he was hired at [particulars withheld] Academy. He stated that PW2 had fees arrears of Kshs.10,000/- for her children and grandchildren despite the complainant's mother sending school fees. He said that a week prior to the incident he had confronted PW2 about the fees when PW2 threatened to ensure he stopped following up on fees. That immediately after he was arrested, she transferred all her children to another school and that it was a sign that PW2 wanted to fix him.

16. In cross-examination by the prosecution, he stated that the 7 quire books were taken to his home by the owner of the school. That he called the complainant to collect them from his house as the teachers were busy and pupils were in class. He stated that he had authority over students and could send them to his house to do tasks like picking books. He stated that he rushed home for a personal emergency and that it was urgent that the books were picked. He told the court that he was in-charge of collecting fees but he had no evidence of the fee balances.

17. At the end of the trial, the learned magistrate acquitted the Appellant on the main charge but found the Appellant guilty on the alternate charge. He was convicted and sentenced him to 10 years' imprisonment.

18. Aggrieved by the conviction and sentence, the Appellant lodged his homemade petition of appeal on 18<sup>th</sup> July 2018. On the 5<sup>th</sup> November 2019 he filed an amended Petition of Appeal on three grounds which can be rephrased as follows:-

i. That the learned trial magistrate erred in law and fact by failing to consider that section 8(1)(2) of the Sexual Offences Act was prejudicial to the appellant for failure to take into consideration the provisions of section 216 and 329 of the Criminal Procedure Code which required him to consider evidence relevant to proper sentence.

ii. That the prosecution did not prove its case to the required legal standard.

iii. That the prosecution case had massive contradictions.

19. The Appellant filed written submissions on the 7<sup>th</sup> February 2020 in support of his appeal. In summary, his submissions were to the effect that the prosecution had failed to prove its case beyond reasonable doubt. He submitted that the medical evidence tendered by PW6 showed that there was no penetration and that there was contradiction between the evidence of PW2 and PW5 on whether or not the complainant had bled. He also faulted the trial magistrate for failing to find that PW2 had framed him for following up on school fees arrears. He submitted that the burden of proof rested with the prosecution and that the prosecution had failed to discharge it. Finally, the Appellant submitted that his strong defence was not considered by the trial magistrate.

20. The Respondent opposed the appeal in its entirety and filed its written submissions on the 14<sup>th</sup> May 2020. It was the Respondent's submission that the prosecution had discharged its burden of proof. On penetration, it was submitted that penetration could be partial or complete and therefore could be achieved without causing lacerations or tearing the hymen. On the contradictions, the Respondent contended that the inconsistencies pointed out by the Appellant were minor and did not go to the heart of the case. They relied on the case of **Erick Onyango Ondeng vs Rep (2014) eKLR**.

21. On whether the Appellant's defence was considered, the Respondent submitted that the Appellant failed to tender evidence of the fees arrears and that the defence was a mere denial. It was submitted that the Appellant was positively identified through recognition as he was known by the complainant as the head teacher of the school. Lastly, it was submitted that the trial magistrate correctly relied on the evidence of the complainant and recorded the reasons for believing the complainant as provided for under section 124 of the Evidence Act. In addition, the Respondent submitted that the trial magistrate had conducted a *voire dire* examination and formed the correct opinion that the complainant was intelligent enough to differentiate between truth and lies.

22. This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluate and analyse it and come to its own conclusions. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanour 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.**

23. I have considered the grounds of appeal, respective submissions, and the record. The only issue for my determination is whether the prosecution proved its case beyond reasonable doubt.

24. As earlier stated, the Appellant was acquitted of the main charge of attempted defilement and convicted of the alternative charge of sexual assault. The only element to be proved therefore was whether there was penetration of the genital organs of the complainant by any part of the body by the Appellant, and; whether there was positive identification of the Appellant.

25. In **John Irungu v Republic [2016] eKLR** the Court of Appeal of Appeal interpreted section 5 of the SOA as follows:-

***“Sexual Assault on the other hand is provided for in section 5 of the Act... The offence is constituted by committing an act which causes penetration of the genital organs of any person by any part of the body of the perpetrator or of any other person or by an object manipulated to achieve penetration. Thus, for purposes of sexual assault, the penetration is not limited to penetration of genitals by genitals. It extends to penetration of the victim's genital organs by any part of the body of the perpetrator of the offence, or of any other person or even by objects manipulated for that purpose.”***

26. In the present case, evidence of penetration was given by the complainant(PW1), and the clinical officer (PW6) who gave the medical evidence. PW1 testified how the Appellant called her from class and lured her to his home to collect books. That once in the house, the Appellant convinced PW1 to sit on his bed before forcefully removing PW1's underwear and inserting his finger in her vagina. He then forced her to lie down facing up and inserted his finger again into her vagina before telling her to get dressed and go. She told the court that she felt pain when the Appellant inserted his finger in her private parts.

27. The medical evidence was adduced by PW6 the Clinical officer at Garsen Hospital. However, I note that while the P3 form was marked for identification as MFI-3, the same was never produced in court as an exhibit. It is trite that documents that have been marked for identification but not produced as evidence have very little evidentiary value. In **Kenneth Nyaga Mwige v Austin Kiguta & 2 others [2015] eKLR** the Court of Appeal stated that:-

***“19. The marking of a document is only for purposes of identification and is not proof of the contents of the document. The reason for marking is that while reading the record, the parties and the court should be able to identify and know which was the document before the witness. The marking of a document for identification has no relation to its proof; a document is not proved merely because it has been marked for identification.***

***20. Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case... If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an unauthenticated account.***

21....

***22. Guided by the decisions cited above, a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness..... Until a document marked for identification is formally produced, it is of very little, if any, evidential value.”***

28. Following the above, I must agree with the Appellant's submission that the trial magistrate erred in relying on the P3 form which was not produced as an exhibit as it was of little probative value. Consequently, the only proof for penetration was the evidence of PW1, the complainant which I must keenly examine.

29. As already stated, Section 124 of the Evidence Act, allows a court to convict on the sole evidence of a victim of a sexual offence as long as the court is convinced the victim is telling the truth and records reasons for such belief. See **Arthur Mshila Manga v Republic [2016] eKLR.**

30. I have looked at the record. In his judgment, the learned magistrate recorded the reasons he believed the complainant and stated, albeit in flowery language, that:-

***“The little queen still looked traumatized and according to this court, she was very candid on that line of the story....”***

31. I have no reason to doubt the trial magistrate's assessment of the demeanour of the complainant. A further look at the testimony of the

complainant shows that it remained unshaken by the intense cross examination by the Appellant.

32. There was evidence of surrounding circumstances which linked the Appellant to the commission of the offence. It was the evidence of PW3, the Deputy head teacher and colleague of the Appellant, that on 13<sup>th</sup> March, 2015, the Appellant left school at 9.00am to attend to a personal matter and returned at around 1.00pm. That later when PW3 left class, he saw the Appellant sitting under a tree. At that point, the Appellant called the complainant and informed PW3 that he (the Appellant) wanted the complainant(PW1) to assist him with some assignment. Yet another teacher BOO (PW4) testified while on his way back to school from lunch, he met the complainant walking away from school. She was being followed a few metres back by the Appellant who told him(PW4) that he was going home to run some errands.

33. It is apparent from the events as narrated by the two witnesses above, that the Appellant procured the company of the complainant whom he invited to his house from school on the pretext of going to collect text books. This circumstantial evidence shows that the Appellant had less than noble intentions when he pulled the child out of school to the privacy of his house where there was no other person.

34. The Complainant's narration of the events of the material date is corroborated in material aspects by the testimonies of PW2, PW3, PW4 and PW5. Further, PW5 produced the Appellant's confession (P.Exh4) which was not retracted or repudiated by the Appellant and was accepted by the learned magistrate under section 29 of the Evidence Act.

35. The question whether or not the confession was made within the law was not raised at trial. I have however closely scrutinized the record to satisfy myself whether there was observance of the law. I have found nothing in the record to suggest that the same was not made without threat, intimidation or promise. The recording officer being a chief inspector of police was qualified according to section 29 of the Evidence Act. The Appellant elected to have his grandson one DJS ID No. [xxxx] present as the 3<sup>rd</sup> party; the caution was administered and there were three signatures appended belonging to the recording officer, the Appellant and the 3<sup>rd</sup> Party. There was no complaint at the trial by the Appellant that he did not give the statement voluntarily. I would therefore rule that the confession (Exhibit 4) was admissible.

36. In the confession made before Chief Inspector Joseph Langat, O.C.S Garsen Police Station, the Appellant stated that:-

***“ As we got in the house I sat on the bed and the minor also sat on the bed. I told her, you are my granddaughter remove your pant. While she was trying to remove I assisted her to do so. The minor threw her pant to the floor and slept on the bed facing upward. As she slept I saw her nakedness and I told her you are a very young child, what I have been hearing that you are moving with boys. Leave the habit. I told her to put on her pant ...”***

37. The statement above admits that the Appellant took the complainant to his house ostensibly to collect some books. It also admits that the Appellant asked the complainant to lie on his bed and remove her pants. That he removed her pants and inspected her genitals. Why did the poor child lie naked facing upwards? Why did he inspect her genitals? The Appellant may not have specifically stated that he inserted his fingers in the genitals of the complainant but properly interpreted, the words and actions of the appellant amount to an admission of the sexual assault. His admission is in line with the testimony of the complainant.

38. In view of all the foregoing direct and circumstantial evidence, I find that penetration was proved.

39. On the issue of identification, recognition has been held by courts to be more reliable than identification of a stranger as long as the court is convinced that the circumstances of identification were favourable. See **Francis Muchiri Joseph – V- Republic [2014] eKLR** and **Wamunga –vs- R, [1989] KLR**

40. There is no doubt that the complainant knew the Appellant as her head teacher at [particulars withheld] Academy. This is confirmed by the Appellant who stated in his defence that he was the head teacher at [particulars withheld] Academy and that he had called the complainant to collect books from his house. Further, the Appellant told the court that he confronted PW2, the complainant's grandmother, regarding school fees arrears for the complainant. Further still, PW3 and PW4 identified the complainant as their former student and the Appellant as their colleague. From the evidence adduced it is clear that the Appellant was the complainant's teacher was well known well to her. She could not have mistaken him for anyone else.

41. The Appellant submitted that there was a contradiction relating to the evidence of PW2 and PW5. He contended that PW2 testified that PW1 had bled and there was blood on the complainant's pants and further that the complainant had sustained injuries on her vagina. PW5 on her part stated that there was no blood on the complainant's pants and that was the reason she did not adduce the pants as evidence. She also in cross-examination that there were no injuries or blood stains but she left it to the doctor to give his expert opinion. The complainant also testified that she was injured and felt pain. The issue that arises is whether the contradiction was material.

42. On dealing with contradictions, the Court of Appeal in **Jackson Mwanzia Musembi Vs Republic (2017)eKLR** cited with approval the Ugandan case of **Twahangane Alfred Vs Uganda , Cr. Appeal No. 139 of 2001( 2003) UG CA,6** where the court held that:

***“ with regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.”(Emphasis mine)***

43. The contradiction as to whether the complainant was injured and bled upon being sexually assaulted or not does not affect the main substance of the case. Section 2 of the SOA defines penetration as ***“the partial or complete insertion of the genital organs of a person into the genital organs of another person;”***

44. Further, it has been held that penetration need not to be deep into a girl's sexual organ but can be on the surface. See **Mark Oiruri Mose**

**v Republic [2013] eKLR.** In this case therefore it is immaterial whether or not the complainant bled. It was sufficient that there was prove that the Appellant inserted his fingers into her genital organ. As earlier stated her evidence was credible and the court could convict on her sole evidence as provided for under section 124 of the Evidence Act.

45. On the last issue, the Appellant submitted that his defence was not considered by the trial magistrate. The Appellant devoted his defence to accusing PW2 of setting him up allegedly after he sought to follow up on school fees areas for PW1. He claims that the fact that PW2 transferred her children and grandchildren to another school after he was arrested confirmed her scheme.

46. I have considered the Appellant's defence and I find it a mere denial. It might well be true that PW2 had fee arrears. However, the evidence against the Appellant was overwhelming. He lured a hapless child to his house and sexually assaulted her. What did a 10year old have to do with fee disagreements? His defence, which I have nonetheless considered, is for dismissal as it does not in any way cast doubt in the prosecution's case.

47. In the final analysis, I uphold the judgment of the trial court and confirm the Appellant's conviction.

48. On sentence, I observe that the Appellant was sentenced to the mandatory 10 years' imprisonment under section 5(2) of the SOA. He was granted bond pending appeal. His bond is hereby cancelled pending the filing of a probation report, including a victim impact statement and any further mitigation to enable this court undertake resentencing.

49. Orders accordingly.

**Judgment delivered, dated and signed at Garsen this 10<sup>th</sup> day of September, 2020.**

**R. LAGAT KORIR**

**JUDGE**

In the presence of the Appellant in person, Mr Sirima holding brief for Mr. Mwangi for the Respondent and J.Kambi (Court Assistant).