



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 52 OF 2018

PIUS MACHARIA KAROKI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Appeal against original conviction and sentence in Principal Magistrates' Court Criminal Case No. 9 of 2018 (Hon. B.M. Ochoi, Principal Magistrate) on 1 August 2018)

JUDGMENT

The appellant was charged in the Magistrates' Court with 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 were that on an unknown date in November 2017 in Mukurweini Subcounty of the Nyeri County, he intentionally and unlawfully pressed with his hands the penis of VMC a child aged 12.

He pleaded not guilty to the charge. However, the trial court found him guilty as charged at the conclusion of his trial and was convicted accordingly; he was sentenced to ten years imprisonment. The appellant has now appealed against the conviction and sentence. In the petition of appeal filed in court on 3 December 2018, he raised the following grounds:

1. The learned magistrate erred in law and in fact in convicting and sentencing him yet the prosecution evidence was inconclusive.
2. The learned trial magistrate erred both in law and in fact in relying on the uncorroborated evidence of the complainant to convict the appellant.
3. The learned magistrate erred both in law and in fact in convicting the appellant without considering that the assistant chief (PW4) was the complainant's uncle.
4. The learned trial magistrate erred in law and in fact in disregarding the appellant's sworn evidence and the evidence of his witness who exonerated him; in disregarding his defence without any reasons the learned magistrate was faulted for ignoring section 169 of the Criminal Procedure Code, cap. 75 Laws of Kenya.

When the appeal came up for hearing the appellant relied on his written submissions which he briefly highlighted orally mainly elaborating the grounds of his appeal. He added that his son had just completed school and he needed to find a college for him. He also urged that the sentence meted out against him was harsh and excessive considering that he was a first offender.

Ms Martha Ndungu, the learned counsel for the state opposed the appeal saying that the prosecution proved its case beyond reasonable doubt. On the sentence, she submitted that the sentence was lawful and was the very minimum sentence the trial court could possibly pass under the law.

The primary obligation of this honourable court in an appeal such as the present one is to consider the evidence and evaluate it afresh and in so doing come to its own conclusions of fact. Its conclusions may or may not be consistent with those reached by the trial court but whichever conclusions it makes, this court has to bear in mind that only the trial court had the advantage of seeing and hearing the witnesses. (See **Okeno versus Republic (1972) E.A.32**).

The complainant was the first prosecution witness. He testified that he was 12 years old. He recalled that sometimes in November 2017 at about 4:00 PM he was at home when PM, his uncle, came and told him that the appellant wanted to buy a puppy from him. At that time, the complainant had four puppies which he was selling. He left for the appellant's home to confirm whether indeed he needed a puppy. The appellant not only confirmed that he wanted it, but he also negotiated its price with the complainant who agreed to sell it at Kshs. 300/=. He did not have the money at the time though and so he asked the complainant to come back for it later. The complainant went to his house twice at around 5:00 PM but he did not find him.

At about 7:00 PM PM came with the appellant; they were both drunk. The appellant went to Mathu's house briefly before he left for his house together with the complainant. The appellant was the complainant's neighbour and their houses were only 3 meters apart. The appellant entered his house and came out with the money. He gave it to the complainant. Before the complainant left the appellant asked him to sit down; he then asked him whether he had ever slept with a girl. The complainant responded that he hadn't but the appellant insisted that he had slept with at least two girls. He opened the complainant's trouser and started fondling his penis as he repeatedly asked him whether he had ever slept with a girl.

The complainant ran away and while on his way home he heard his grandmother calling him from Mathu's place. After a while, the appellant and the complainant's grandmother together with the Mathu came home. His grandmother was angry and was armed with a stick. She asked the complainant to go and sleep. The complainant did not tell her what had happened for fear of being beaten.

Sometimes in 2008, the complainant heard that the appellant had also fondled the penis of another pupil with whom the complainant shared a school. The complainant's aunt CW asked him whether such a thing had ever happened to him; he responded in the positive and narrated how it happened. It is then that they proceeded to the complainant's grandmother and reported the incident.

On the evening the complainant reported matter, the assistant chief's wife told him that he was required at Mukurweini police station. He went to the police station apparently accompanied by his grandmother and recorded a statement with the police. He was then referred to Mukurweini subcounty hospital where he was examined and treated.

Upon cross-examination he denied that he went to the appellant's house with Kevin and Maina. He testified further that the appellant had asked him to collect part of the purchase price from a certain shop and so he went to the appellant's house to collect the balance. He recalled that the balance was paid on 30 December 2017; it is the same day that the incident happened.

VNM (PW2), the complainant's grandmother, testified that on 30 December 2017, she went for milk at around 1:00PM but that when she returned home she did not find the complainant who is her grandson. She enquired from one of her children where the complainant was and she was told that the complainant had left with the appellant and her son Mathu (DW2). She was also told that he had gone to collect his money. By 10:00 PM the complainant had not returned. She armed herself with a cane and went to Mathu's house. Mathu told her that the complainant had left with the appellant. Mathu called the appellant on his phone and enquired where the complainant was; he responded that the complainant had left much earlier. When she went back home she found the complainant asleep but she woke him up and asked him why he came back home late. The appellant and Mathu asked her not to beat him.

On 12 May 2018, a lady called Margaret Wambui who was also known as Mama Ian reported to her, in her capacity as a community policing elder, that the appellant had squeezed Margaret's son's private parts. When the complainant with whom she was accompanied when Wambui made her report, he also told his grandmother that the appellant had also assaulted him in a similar manner.

She went to the appellant and told him about Wambui's complaint; he denied having assaulted Wambui's son. Apparently, she did not ask him about whether he had assaulted the complainant. Wambui took up the matter with the chief who summoned the appellant. The chief asked Wambui whether the appellant had done a similar thing to anybody else and she responded that he had assaulted the complainant as well. The chief referred the matter to the police and it is then that the appellant was arrested and charged.

Dr. Michael Gachara Muchira (PW3) testified that he examined the complainant on 15 May 2018. All that was checked on him was found to be normal. To be specific, he was in a fair general condition; there were no bruises or discharge or lacerations on his genitalia. The doctor relied on treatment notes from Mukurweini sub county hospital in filling the P3 form.

Eliud Matu Mwangi (PW4) testified that he was the senior assistant chief of Kariara sub location and that on 13 May 2018, Veronica (PW2) had reported that the appellant had sexually molested her grandson. She reported that the incident happened in December 2017, but the complainant had not reported for fear of being punished. He had received a similar report earlier from Mama Ian.

On 18 May 2018, Veronica gave him a letter from Mukurweini police station asking him to arrest the appellant. He called the appellant to his office from where he and police constable **Erastus Muthei (PW5)** arrested him. It was his evidence that the accused was single and was suspected to be a bhang smoker.

Muthei (PW5) himself confirmed that he effected the warrant of arrest of the appellant on 18 May 2018. He handed him over to police officers from Mukurweini police station.

The investigation officer was inspector Sally Kemei who was then attached to Mukureini police station. He reiterated what the previous witnesses had said and, in particular, that Veronica (PW2) and the complaint had reported a case of indecent assault on 14 May 2018; that the complainant had gone to the appellant's house where the latter had sexually molested him. However, she added that the appellant had allegedly warned the complainant of dire consequences if he reported the matter to anyone. She established that the complainant was born on 14 August 2005 and produced a birth certificate to that effect.

When the appellant was put on his defence he chose to give sworn evidence. It was his evidence that on 30 December 2017 he had been with Mathu (DW2) and asked him to tell the complainant to come for his money. On the same day he and Mathu came back home at around 9:00 PM; he passed by Mathu's place and while he was there the complainant came and asked to be paid his money. After he finished with Mathu, he went with the complaint to his house; he gave him his money after which the complainant left immediately. Later, Mathu called him to ask where the complainant was; his grandmother was apparently looking for him. He told Mathu that Victor had left. He joined Mathu and the complainant's grandmother outside. They all went to the complainant's grandmother's home where they found the complainant sleeping. She wanted to beat him but the appellant and Mathu persuaded her not to. The complainant brought the puppy four days after he was paid. He denied having molested the complainant or any child for that matter.

PMM (DW2) testified in support of the appellant's case. It was his evidence that he had known the appellant for over 40 years. The complainant was his nephew and the Njeri (PW2) was his mother. He was aware that the complainant was selling a puppy to the appellant. On 30 December 2017 he was with the appellant; they had been working together before they decided to go for a haircut. Before they left, the complainant asked for the balance of his money from the appellant. He directed him to a particular shop where he collected part of the money; he was to be paid the balance in the evening. When they came back, the appellant passed through his house and spent some time there. The complainant joined them there at about 8:45 PM and asked for the balance of his money. Mathu asked him to go for the money the following day but he insisted that he wanted to be paid that night and he was ready to go with the appellant to get the money. He even declined Mathu's offer to accompany him to the appellant's house. The appellant then left with the complainant.

After a while, Njeri (PW2) came to his house to enquire whether the complainant was there. He told her that he had gone to the appellant's place to collect his money. They both left for the appellant's house. While on the way, he called the appellant to ask him where the complainant was. The appellant told him that the complainant had returned home. He joined them at the roadside. When Njeri called the complainant out, he responded from her house. And when he was asked why he returned to the house late, the complainant said that he feared his grandmother would punish him because he had not completed an assignment she had given him earlier. As a matter of fact, Njeri wanted to punish him for not doing the assignment but the appellant and Mathu prevailed upon her not to beat him. They then left for their houses. Six months later, he heard of the complaint against the appellant by the complainant. When he asked the complainant about the allegations, the complainant told him that the area assistant chief, who is also his stepbrother, had asked him and Njeri (PW2) to go to Mukurweini police station and record a statement. According to him the allegations against the appellant were all lies.

He spoke to the other boy who is alleged to have been assaulted and he confessed that they had stolen sweets from some shop and when his mother learnt of it he decided to lie and implicate the appellant to avoid being punished.

Section 11(1) of the Sexual Offence Act No. 3 of 2006 under which the appellant was charged reads as follows:

11.(1) 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 of not less than ten years.

The burden on the prosecution was to prove that the appellant committed an indecent act with a child. Section 2. (1) defines what amounts to "an indecent act". It states as follows:

2.(1) "indecent act" means any unlawful intentional act which causes-

(a) any contact between the genital organs of a person, his or her breasts and buttocks with that of another person;

(b) exposure or display of any pornographic material to any person against his or her will, but does not include an act which causes penetration;

According to the same interpretation section, the word "child" has the meaning assigned to it in the Children Act, cap 141; section 2 of the Act defines a child as any human being who is below eighteen years.

The evidence that the complainant was a child at the time the offence is alleged to have been committed was never controverted as a certificate of his birth showing that he was born on 14 August 2008 was produced and admitted in evidence. The complainant was aged 12 at the material time and therefore within the age bracket of a person who is in law regarded as a child.

The only controversial issue was whether it was proved beyond doubt that there was any contact between the genital organs of the appellant, his breasts and buttocks with that of the complainant.

When I assess the evidence on record with regard to this question I am inclined to conclude that there are several contradictions and inconsistencies in the prosecution evidence which ought to have created a reasonable doubt in the trial court's mind that the appellant was culpable for the offence of which he was charged. Certainly, in my humble view, it is not the sort of evidence that would found a safe conviction.

To begin with the offence is said to have been committed either in November or December 2017; the complaint stated in his evidence-in-chief that it was sometimes in November 2017 on a date he could not remember which is the same narrative that was given in the particulars of the offence. But in cross-examination and re-examination, he was emphatic that the offence occurred on 30 December 2017; he even remembered that it was a Saturday. This goes to show that the complainant not only contradicted himself but his testimony was also inconsistent with the particulars of the offence. These contradictions and inconsistencies could not be overlooked as immaterial particularly when the appellant himself denied that he committed the offence on the alleged date or at all.

Secondly, regardless of whether the offence was committed in November or December, 2017, I am not satisfied with the explanation given for the delay in reporting of the offence. According to the complainant, it is only in May 2018 that he reported the incident to his grandmother. His explanation was that he was scared his grandmother would punish him if he ever reported the matter. Assuming that his grandmother was so ruthless that she could not entertain such a complaint from her grandson, the complainant had the option of informing anybody else including his siblings, his uncle Mathu or even his teachers.

The complainant's evidence on whom he made the report to also is shrouded in doubt. According to his testimony, when he finally opened up, the complainant informed his aunt whom he identified as CW. The appellant's claim that the complainant's and his grandmother's testimony was deliberately or orchestrated to set him up is best understood when one reads the excerpts of their testimony with respect to how this information was relayed. On his part the complainant stated as follows:

“In May I heard that the accused had touched another pupil in my school called (IG) in his private parts. When I heard that I decided to tell my aunt CW who was the one who asked me whether such an incident had happened to me and I told her it had and I told her how it had happened. She asked me whether I had told my grandmother but I told her that I had not because I feared to be beaten. I asked her to go with me to my grandmother and tell her not to beat me. My aunt also asked her son called Martin whether the incident had occurred to him but he said it had not. I went with my aunt to my grandmother but she was informed mama (IG) went to report at the chief’s place and was asked whether it was something the accused was used to and he also said that it had happened to me. Later that evening I went for milk at the sub chief’s place. The chief’s wife told me that we were needed at Mukurweini police station. I went to Mukurweini police station and recorded statements.”

If the complainant is taken at his word, the first person who heard his complainant was his aunt CW. He then accompanied Wanjira to his grandmother to inform her of the assault. When they informed the complainant’s grandmother, it turned out that she was already aware that the complainant had been assaulted by the appellant because she had not only been informed by Mama (IG) but Mama (IG) had taken it upon herself to report the incident to the chief who in turn asked the complainant to make a report of the assault with the police.

The immediate questions that arise from this narrative is this: if the first and the only person the complainant related the assault incident to was CW, how did Mama (IG) learn of the story before the complainant opened up to Wanjira and even before Wanjira herself informed anybody of what the complainant had told her? On what basis did Mama I.G. complain to the chief about the conduct of the appellant when nobody had told her that the appellant had allegedly assaulted the complainant? Why would the chief’s wife ask the complainant to proceed to a police station to lodge a complaint yet neither the complainant himself nor his grandmother had made any complaint concerning the appellant to the chief? Had the court considered these questions, it would certainly come to the conclusion that the factual basis upon which the appellant was charged was highly doubtful.

Besides these unanswered questions, the complainant’s grandmother’s testimony is totally different from that of her grandson on how she got to know of the alleged sexual assault. This what she said:

“I was with VMC when I met Margaret and when he heard me being sent to Macharia he told me that the accused had also unzipped his trouser and squeezed his penis while asking him whether he had slept with girls. I asked VMC why he had not told me but he told me that it was because he feared I will beat him up.”

The contradiction here is too apparent to ignore; contrary to the complainant’s testimony that he only broke the story of his encounter with the appellant to CW, and who, together with complainant himself proceeded to inform the appellant’s grandmother, the latter said that in fact, the complainant himself told her what the appellant had done to her when she heard Margaret who I suppose is the same person as Mama IG. complain that the appellant had assaulted her son.

It is worth noting that neither Margaret nor CW testified to shed light on the circumstances in which they came to know that the complainant had been molested by the appellant or to corroborate the evidence of the complainant or her grandmother. Going by the complainant’s evidence the appellant was arrested on the basis of Margaret’s report to the chief who in turn took up the matter with the police. It follows that considering the role she played in the arrest and subsequent prosecution of the appellant it ought to have bothered the trial court why Margaret was not called as a state witness. Failure to call Margaret and Wanjira or any of them could only lead to the conclusion that their testimony would have been unfavorable to the prosecution case.

Further it is puzzling that although Margaret came into the picture only because the appellant is alleged to have molested her son and, as a matter of fact, it is because of her son’s case that the molestation of the complaint came to light, there is no evidence whatsoever and neither was it ever suggested that the appellant was ever charged for any offence connected with sexually assaulting Margaret’s son. There was no evidence that a report of such assault was even made to the police.

In the face of this inconsistent and uncorroborated evidence; considering the absence of crucial witnesses; and, also considering that the credibility of the witnesses who testified against the appellant was in doubt, the learned magistrate should not have ignored the appellant’s defence that the charge against him had no factual basis but was probably as a result of a grudge the assistant chief had against him. The assistant chief was not only related to the complainant’s family but it was obvious from his testimony he was out to have the appellant jailed. Without any provocation he described the appellant as a person who “was always suspected to be a bhang smoker.”

It is also interesting to note that nobody else came to the rescue of the appellant other than the complainant’s grandmother’s son, MM (DW2). His evidence in defence of the appellant was never shaken and at the very least raised a reasonable doubt on whether the allegations against the appellant had any basis.

He corroborated the appellant’s testimony that the complainant insisted on going to the appellant’s house and that he spent the shortest time possible there. His evidence that the appellant was framed was never considered. He also corroborated the appellant’s testimony that the assistant chief had a grudge against the appellant. As matter of fact, he is the one who revealed that the assistant chief who instigated the appellant’s prosecution was his step-brother, a fact that the assistant chief himself never disclosed when he testified.

I am satisfied that the appellant has made out a case that his conviction was not safe. I hold his appeal to be meritorious and it is hereby allowed. The conviction is quashed and sentence set aside. The appellant is therefore set at liberty unless he is lawfully held. It is so ordered.

Signed, dated and delivered on 2nd October 2020

Ngaah Jairus

JUDGE