REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CRIMINAL APPEAL NO 33 OF 2017

MK...APPELLANT

VERSUS

REPUBLIC

(Being an Appeal from Original Conviction and Sentence in Kyuso Principal Magistrate's

Court Criminal Case (S.O.) No. 2 of 2017 by Hon. John Aringo (R M) on 29/6/2017)

JUDGMENT

1. **MK,** the Appellant was arraigned in court having been accused of attempting to defile a child aged **three** (**3) years,** in the alternative committing an indecent act with the same child and assaulting **MM.**

2. Facts of the case were that on the 14th day of March, 2017, **PW1 KK** the mother of the child victim left her at his brother **B K's** home. As she got out of the gate she heard the child screaming and the appellant who was drunk was at the gate. The appellant took the child and went close to the fence. Thereafter she saw the appellant having lowered the pants of the child and his own pants. He grappled with the child. PW1 took away the child and the Appellant jumped over the offence and left. She took her to **PW2 MM** the complainant in the 2nd count and her younger mother who advised her to call her father. The Appellant went to where PW1 was and punched her head thrice and stepped on his shoulder and waist. She ran away and was rescued by the Community Policing agents. Village elders of the area reported the matter to PW3 Joseph **Musyoka Munyasya** who visited the scene and reported to the officer commanding **Mumoni Police Station.** Investigations were carried over which culminated into the Appellant being charged.

3. When put on his defence the Appellant who gave unsworn evidence stated that on the material date he went to herd animals. He tethered his goats then called PW1 to collect her goats and she shouted at him stating that it was dry. At 3.00pm he untied his goats and went to graze and PW1's goats followed his. At **6.00pm** he found the goats damaging cowpeas. He pushed them out and on reaching close to the goats he saw PW2 who sought to know why he was quarrelling PW1. When he explained that the goats were damaging things she claimed that he had been caught with PW1's child. They argued, jostled and PW2 fell down. PW4, **Nduku Muema** found them and used a brick to hit him. PW1 returned with village elders who alleged that he had defiled a child. Nobody listened to his explanation. They arrested him.

4. The learned trial magistrate considered evidence adduced and reached a finding that the Appellant committed the offence of indecent act with a child and that of assaulting the complainant in the second count. He convicted and sentenced him to **ten (10) years** imprisonment and **12 months imprisonment** on the **2nd count.** Sentences were to run concurrently.

5. Aggrieved, the Appellant appealed on grounds that; evidence adduced by the investigation officer was hearsay; the learned magistrate failed to consider that there was enmity between PW1, the mother of the minor and the Appellant; crucial witnesses were family members who could conspire; and that the evidence of the clinical officer who stated that the genitalia of the child was intact hence no fingers were inserted therein was disregarded.

6. The appeal was canvassed by the Appellant by way of written submissions. He urged that evidence of the PW1 that she found dirt on the clothes of the child was controverted by that of PW2 who only stated that she remained with the child. That the investigation officer was not a witness of fact when it comes to the arrest; the damage caused by the goats of PW1 was not taken into consideration; and that the charge of committing an indecent act with a child as interpreted by the law was not committed.

7. The State through learned counsel, **Mr. Mamba** opposed the appeal. He reiterated facts of the case as presented by the prosecution and urged that evidence adduced was conclusive. That the issue of enmity between the mother of the child and the Appellant does not arise as the incident happened as the mother of the child was going for a meeting and the issue of alibi defence was disapproved as the Appellant was caught with the minor.

8. This being the first Appeal, I am under a duty to subject the evidence adduced at trial to a fresh scrutiny and make my own conclusion bearing in mind the important fact that I never observed the witnesses who testified at trial therefore I am unable to that extent to assess their credibility or veracity of their evidence. (See **Okeno vs. Republic (1972) EA 32**).

9. Regarding the main count of attempted defilement, it was alleged that the Appellant attempted to cause his penis to penetrate the vagina of the complainant a child aged **three (3)** years. The learned magistrate considered evidence adduced and found that the offence was disclosed. He considered the fact that the appellant did not put his intention into execution as contemplated by the law. In the case of **Republic vs Whybrow1951 35,Cr. App. Rep 141 Lord Goddard** stated that :-

> ***"...but if the charge is one of attempted murder, the intent becomes the principal ingredient of the crime***".

10. The evidence adduced of the mother of the complaint (PW1) having seen the child's panty lowered and the Appellant's trouser who was stated to have been drunk did not suggest any manifestation of his intention by some overt act to commit the stated offence which he did not fulfil (see **Section 388** of the **Penal Code)**. In the premises the learned trial magistrate correctly addressed the issue.

11. With regard to alternative charge of committing an indecent Act with a child, it was alleged that the Appellant intentionally touched the vagina of the complainant with his hands. **Section 2** of the **Sexual offences Act** defines indecent act as:-

> ***"Any contact between any part of person with genital organs, breasts or buttocks of another, but does not include any act that causes penetration".***

12. The subject child did not testify by virtue of her age. According to the evidence adduced by the mother of the complainant, as she was leaving, she saw the Appellant who was drunk jump over the fence. He told **Vundi** to stay with the cows as he (appellant) stayed with the child. The fact that PW1 heard the appellant instruct the individual known as **Vundi** was evidence that she could see clearly what was happening to the child. That she moved close and saw the Appellant lower the child's pants and his pants. He grappled with the child who was crying. At that point in time she took away the child. What is not clear is how he was grappling with the child. It is not clear whether he fought or struggled or wrestled the child. What is however clear is the fact that by the time she took away the child, she did not see the Appellant touch the child's vagina. On cross examination she stated that:-

> ***"Child said you were removing her panties and inserting finger child talked at Katse****...(sic)*

There is absolutely nothing to suggest that the appellant touched the vagina of the complainant with his fingers. In the premises, I find the learned magistrate having fallen into error by returning a verdict of guilty. The appeal succeeds. Therefore I quash the conviction and set aside the sentence imposed.

13. Regarding the offence of **assault** contrary to **section 251** of the **Penal Code.** Evidence adduced by PW2; the complainant, was that the Appellant hit her on the head thrice, the blows made her fall down and he stepped on her shoulder and waist. Her evidence was corroborated by that of PW1 who found him beating her and that of PW4, **Nduku Muema** who arrived at the scene and witnessed as the Appellant stepped on the complainant. According to her as he hit the complainant he vowed to kill her.

14. An examination done by **PW5 Francis Sako,** the clinical officer **three (3) hours** later, showed that the complainant had tenderness on the right side of the face, chest and abdomen. He described the degree of injury sustained as harm. In the case of ***Republic vs Chan Fook[1994] 2ALL ER 557***. It was stated that:-

> *"... **Harm is synonym for injury. The word 'actual' indicates that the injury (although there is no need for it to be permanent) should not be so trivial as to be wholly insignificant".***

15. The clinical practitioner found that indeed what the complainant sustained was actual bodily harm. The appellant physically attacked the complainant prior to occasioning her the actual bodily harm that she suffered. Therefore the learned trial magistrate reached a correct finding in convicting him. The sentence imposed was legal therefore on that particular count the appeal is unmeritorious. The conviction and sentence meted out is affirmed. Accordingly the appeal on the **second count** is dismissed.

16. From the foregoing if the sentences on the **second count** has been served, the Appellant shall be released forthwith unless otherwise lawfully held.

17. It is so ordered.

DATED, SIGNED and DELIVERED at KITUI this 16TH day of JANUARY, 2019.

L. N. MUTENDE

JUDGE