REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO. 183 OF 2017

ABSOLOM INGUTIA MUGOYA..........APPELLANT

VERSUS

REPUBLIC..PROSECUTOR

(Being an appeal from the original conviction and sentence in Sexual Offence Number 44 of 2017 in the Chief Magistrate's court at Mombasa – Hon. E. Kagoni (SRM)

JUDGMENT

1. The appellant herein, **ABSOLOM INGUTIA MUGOYA**, was charged with two counts of sexual assault contrary to Section 5(1) (a) (i) as read with Section 5(2) of the Sexual Offences Act. The particulars of the 1st count were that on unknown dates between 1st March 2017 and 29th March 2017 at [Particulars Withheld] area in Kisauni Sub-County within Mombasa County, he intentionally and unlawfully used his finger to penetrate the vagina of **AWK** (*particulars withheld*) a child aged 5 years. The appellant also faced the alternative charge of committing an indecent act with a child.

2. On the 2nd count, the particulars were that on unknown dates between 1st March 2017 and 29th March 2017 at [Particulars Withheld] Area in Kisauni Sub-County within Mombasa County, the appellant unlawfully used his finger to penetrate the vagina of **ZM** (*particulars withheld*) a child aged 4 years. He similarly face the alternative charge of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act.

3. The appellant pleaded not guilty to both the main counts and the alternative charges and a trial was thereafter conducted in which the prosecution tendered the evidence of 5 witnesses as follows:

4. PW1, the mother of AWK (PW2), the complainant in the first count, testified that on 29th March 2017, her neighbour called Mama Z (PW3) called her and informed that her daughter, one ZM., the complainant in the 2nd count had informed her that an old man they call *babu* had one day called her and AWK to his house and inserted his fingers into their private parts. According to PW1, AWK confirmed that '*babu'* had inserted his fingers into her vagina. She further testified that she took AWK to hospital where upon examination, it was established that the child had been sexually assaulted using dirty fingers.

5. PW2,AWK, testified that on a day she could not recall, *babu* called her and ZM to his house and made them sit on his laps before he inserted fingers into their *"susu"*, meaning, vagina.

6. PW4, ZM, the complainant in the 2nd count, similarly testified that on a date she could not recall *babu* inserted his fingers into her vagina. PW3, the mother of PW4 testified that she was on 29th March 2017 bathing PW4 when PW4 informed her that 'babu' was not a good person because he usually inserts fingers into their genitalia. According to PW3, she went to the house of *babu* together with other neighbours and arrested the appellant whom they escorted to the police station.

7. PW5, Sergeant Vincent Maganga, testified that the appellant was brought to the police station by members of the public on allegations of defilement. He re-arrested the appellant and issued the complainants with P3 forms.

8. PW6, Dr. Rehema Omar, produced P3 forms in respect to the 2 complainants. The forms showed that the hymen was intact but that both minors had lacerations in the vaginal canal. According to PW6, the abrasions indicated that there was no penetration.

9. When placed on his defence, the appellant denied committing the offences and testified that he had travelled to Kembe for a funeral only to be arrested upon his return allegations of sexual assault.

10. At the close of the trial, the trial magistrate found that the prosecution had proved it's case against the appellant beyond reasonable doubt

after which he was convicted and sentenced to 10 years imprisonment on each of the main counts with a rider that the sentences would run concurrently.

11. Aggrieved by both the conviction and sentence, the appellant filed the instant appeal in which he faults the trial court for convicting him when the charges were not proved to the required standards and for failing to note that the case was a fabrication.

12. At the hearing of the appeal, the appellant submitted that the evidence in record did not support the facts of the charge as the medical evidence showed that there was not penetration.

13. The appellant also took issue with the fact that he was arrested on 29th March 2017 and charged in count on 4th April 2017 long before the P3 forms were filled on 13th July 2017. According to the appellant, the long delay in the filling of the P3 forms was not explained.

14. Lastly, the appellant submitted that the voir dire examination of the complainants did not follow the laid down procedure as envisaged in the Oaths and Statutory Declarations Act, and the Evidence Act.

15. On his part, Mr. Isaboke, learned counsel for the state, submitted that all the ingredients of the offence namely; penetration and identification of the appellant as the perpetrator of the offence were proved beyond reasonable doubt. On penetration, counsel submitted that the mere fact that the hymen was intact did not mean that there was no penetration as even the slightest or partial penetration can constitute the offence.

16. On the alleged contradictions in the prosecution's case, counsel submitted that the said discrepancies were minor and did not go to the root of the case. For this argument counsel relied on the Tanzanian decision in the case of **Dickson Elia Nzamba Shapwata & Another vs The Republic Cr. App. No. 92 of 2007.**

17. On voir dire examination, counsel submitted that the same was properly conducted and that the mere fact that the questions put to minors were not recorded did not vitiate the minors' evidence. For this argument counsel relied on the decision in the case of **James Mwangi Muriithi vs Republic [2016]eKLR** wherein it was held that:

> ***" There was however no hard rule laid down in the Kathurima case(supra) that in all cases where voir dire procedure had not been properly administered before reception of a minor's evidence, the prosecution case stood vitiated. Each case has to depend on its own set of facts and that it why the court observed thus:-***
>
> ***"It is best though not mandatory in our context that the questions put and the answers given by the child during the voir dire examination be recorded…."***

18. As the first appellate court the duty of this court is to re-analyze and re-evaluate the evidence adduced before the trial court afresh and to arrive at its own independent findings while bearing in mind the fact that I neither saw nor heard any of the witnesses. In **Kiilu & Another vs. Republic [2005]1 KLR 174,** the Court of Appeal stated thus:

> ***"1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.***
>
> ***2. 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; 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.***

Analysis and determination

19. I have considered the instant appeal and the rival submissions of the appellant and the counsel for the state. The main issue for determination is whether the prosecution proved its case against the appellant beyond reasonable doubt. Sections 5(1) (a) (i) and Sections 5 (2) of the Sexual Offences Act under which the appellant was charged stipulate as follows.

> ***1. " Any person who unlawfully-***
>
> ***a) Penetrates the genital organs of another person with-***
>
> ***i. Any party 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 party of his or her body or the body of another person so as to cause penetration of the genital organ into or by any party 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.

20. In the instant case, it was alleged that the appellant used his fingers to penetrate the vaginas of PW2 and PW4. The appellant gave the definition of penetration to mean, **"to go into or through something."**

21. The Sexual Offences Act on the other hand defines penetration as; **"the partial or complete insertion of the male organ into the vagina of the victim".**

22. In this case, however, the penetration in question was not the alleged insertion of the male organ but of the appellant's fingers. The question to be answered is whether it was proved that the appellant used his fingers to penetrate the vaginas of the complainants.

23. From a perusal of the evidence of the complainants and the doctor (PW6) however, it is not very clear if there was penetration of the complainant's vaginas as alleged. I say so because while on one hand PW6 testified that the minors had a history of attempted defilement and that abrasions were present in the vaginal canals, she at the same time stated that the hymens were intact and that ***" the abrasions indicate that there was no penetration***". This contradicts the findings of the trial court which stated as follows in the judgment:

> ***"AK had abrasions in the vaginal canal which indicates forced but not successful penetration."***

24. I find that the above finding by the trial court materially contradicts the medical evidence which was categorical that there was no penetration.

25. This court notes that the prosecution witnesses were not very clear on the actual date that minors were allegedly sexually assaulted. The lack of clarity is also evident from the wording of the charge sheet on the particulars of the offence where the date is stated to be between 1st March 2017 and 29th March 2017. I find that even though the trial magistrate excused the minors' lack of knowledge of the exact and attributed it to their tender age, the failure by the doctor to indicate the approximate age of the complainant's alleged injuries was not explained yet this would have gone a long way in corroborating the minors' claim that they had been sexually assaulted by the appellant during the period indicated in the charge sheet.

26. Turning to the appellant's argument that voir dire examination of the minors by the trial magistrate was not properly conducted, I have perused the lower proceedings and I note that in respect to the 1st complainant (PW2) the court record is as follows:

> **"Prosecution: witness is 6 years old**
>
> **COURT: Considering her age during interaction with her she will give an unsworn statement. The answers to the questions/ posed to her are written on the sheet of paper filed in the file."**

27. In respect to the 2nd complainant, the court record is as follows:

> **"voir dire was conducted. I am called ZM pupil at Tamar at Kindergarten Bamburi in KG2. I am 5 years I go to church in Freetown.**"

28. The appellant's case was that the defect in the manner in which the voir dire was conducted was fatal to the prosecution's case. Section 124 of the Evidence Act stipulates as follows:

> ***Notwithstanding the provisions of Section 19 of Oaths and Statutory Declarations Act(Cap 15), where the Evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him: Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.***

29. From the above cited provision, it is clear that the purpose of voir dire examination is to establish if the minor in question understands the nature of oath and by extension, the duty to speak the truth. In my humble view, the purpose of voir dire examination is not only to gauge the intelligence of the minor, but most importantly, is to determine if the minor is aware of the need to speak the truth. In the instant case, I am not satisfied that the voir dire examination was properly conducted. I say so because in respect to PW2, it is not clear if any questions were put to her or if any voir dire examination was conducted while for the second complainant (PW4) it is not clear if she was examined on her ability to speak the truth. My further finding is that since the prosecution's case was mainly based on the evidence of the 2 minors who were the only eye witnesses to the alleged assault, it was necessary that the rules of conducting the voir dire examination be adhered to. This is not to say that the failure to indicate the questions put to the minors totally vitiated the prosecution's case as the court could still rely on the evidence of other witnesses to corroborate the minors' evidence.

30. My above findings on the issue of penetration and voir dire examination would have been sufficient to determine this appeal, but I am still minded to address the issue of whether or not the appellant was properly identified as the minors' assailant. I say so because according to the proceedings, the alleged victims of the sexual assault PW2 and PW4, reported to their respective mothers that one "babu" had inserted his fingers into their vaginas. This court takes judicial notice of the fact that the term/name *"babu"* is a Kiswahili word meaning grandfather or an elderly person. This court, however, takes further judicial notice of the fact that in certain instances, a young person or even a child may be called *"babu"* as a pet name or if he is named after an elderly person. In this regard I find that it was critical for the prosecution to

prove, beyond reasonable doubt, that the appellant was the only person known to the minors or their parents as *"babu"* or better still, that the name *"babu"* referred only to the appellant and no-one else. I find that this inquiry was not done and that PW1 and PW3, upon being informed by PW2 and PW4 that one 'babu' had inserted his fingers into their vaginas, quickly jumped to the conclusion that *"babu"* referred the appellant as they did not state that they enquired into who the name *"babu"* referred to. PW3 testified as follows:

> ***"Mama Ann also came to my place and informed me that Anne had confirmed that Babu had inserted his fingers in her vagina. We then went to babu's house, found him and arrested him to Bamburi Police station."***

31. The court record does not show that PW1 and PW3 sought any clarification from the minors on who exactly they meant when they claimed that *"babu"* assaulted them. PW3 further testified as follows in an attempt to explain who the name "Babu" referred to:

> ***"I know Babu. He spends a lot of time near my food kiosk and he likes playing with children. I do not know his real name. We call him Babu because of his age."***

32. My finding is that considering the tender age of the complainants, who were reported to be 5 and 6 years respectively, and considering the admission by PW3 that she did not know the real name of the person that they knew as "Babu", it was necessary for the prosecution to prove, beyond reasonable doubt, that the name 'babu' actually referred to the appellant.

33. Having regard to findings and observations that I have made in this judgment, I find that the appellant's conviction was not safe and that the instant appeal is therefore merited. Consequently, I allow the appeal, quash the conviction, set aside the sentence and direct that the appellant may be set at liberty forthwith unless he is otherwise lawfully held.

Dated and signed at Nairobi this 11th day of March 2019

W. A. OKWANY

JUDGE

Dated, signed and delivered in open court at Mombasa this 8th day of April 2019

NJOKI MWANGI

JUDGE

<u>**In the presence of:**</u>

Appellant present

Ms Marindah for the Director of Public Prosecution

Mr Oliver Musundi – Court Assistant