



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.18 OF 2019**

*(An Appeal arising out of the conviction and sentence of Hon.J. Kibosia (SRM) delivered on 13<sup>th</sup> January 2019 in Makadara Criminal Case No.2255 of 2013)*

**FRANCISCA NDUNGWA KILONZO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Francisca Ndungwa Kilonzo was charged with **sexual assault** contrary to **Section 5(1)(a)(i)** as read with **Section 5(2)** of the **Sexual Offences Act**. The particulars of the offence were that on 10<sup>th</sup> May 2013 at Embakasi in Nairobi County, the Appellant unlawfully used her fingers to penetrate the vagina of RA, a child aged three (3) years. In the alternative, she was charged with **committing an indecent act with a child** contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars of the offence were that on the same day and in the same place, the Appellant intentionally touched the vagina of RA (the complainant) with her fingers. When the Appellant was arraigned before the trial magistrate's court, she pleaded not guilty to the charge. After full trial, she was convicted on the main charge. She was sentenced to serve ten (10) years imprisonment. The Appellant was aggrieved by her conviction and sentence. She has filed an appeal to this court.

In her petition of appeal, the Appellant raised several grounds of appeal challenging her conviction and sentence. She was aggrieved that she had been convicted on the basis of facts that were totally at variance with the charge that was lodged against the Appellant. She took issue with the manner in which the medical evidence, which in her view did not support the finding reached by the trial court. She faulted the trial magistrate for convicting her on the basis of evidence that did not establish her guilt to the required standard of proof. She was of the view that the evidence that was adduced against her was inconsistent and did not establish her guilt. She was aggrieved that the evidence that she had adduced in her defence was completely ignored when the trial court was analyzing the evidence. She was of the view that crucial witnesses were not called to testify in the case thus the verdict reached was not supported by evidence. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed upon her.

During the hearing the appeal, this court heard oral rival submission made by Mr. Muoki for the Appellant and by Mr. Momanyi for the State. Mr. Muoki submitted that the evidence that was led throughout by the prosecution witnesses was at variance with the particulars provided in the charge sheet. He pointed out that the evidence adduced by PW1, PW2 and PW3 was to the effect that the Appellant had allegedly used a stick to poke at the complainant's private parts. According to the complainant, she was poked with a stick while she was asleep. PW2, the mother of the complainant told the court that the complainant had told her that the Appellant had allegedly used a stick to poke her. The clinical officer who testified as PW3 also told the court that she was told by the complainant that she had been poked with a stick. There was no mention that fingers were used to penetrate the complainant's genitalia. The charge as framed was therefore defective and could not form a basis for a conviction.

Learned counsel urged the court to find that the evidence that was adduced by the prosecution witnesses was full of contradictions and inconsistencies. He explained that the narrative by the complainant could not be believed because she said that she was asleep when she was injured. Learned counsel was of the view that the evidence of the complainant appeared couched. He urged the court to draw an adverse inference from the failure by the prosecution to produce the investigating officer and the arresting officer before the trial court to give their testimony. He pointed out that the Appellant's account as to what happened on the particular day was not taken into consideration by the trial court before she reached her verdict to convict her. Had the trial court taken into account the defence, which was to the effect that nothing happened on the particular day because there were many people at the alleged scene of crime, the trial court would most probably have reached a different verdict. He explained that the trial court totally ignored the evidence adduced by the Appellant's witnesses who were teachers at the school. He therefore urged the court to find that the prosecution had failed to establish its case to the required standard of proof. The appeal should therefore be allowed.

Mr. Momanyi for the State opposed the appeal. He submitted that the prosecution had established to the required standard of proof that

indeed the Appellant had sexually assaulted the complainant. On the material day, the Appellant called the complainant who was playing with other children to go to a classroom and sleep. While she was asleep, the Appellant poked the complainant's private part with a stick. The Appellant was bending towards the complainant when she woke up. He track suit had been drawn down. When she woke up, she saw the Appellant pointing a stick towards her genitalia. She went home. While being bathed, the househelp saw blood stains on her private parts. She informed the parents. The parents confronted the Appellant. The Appellant dismissed the mother's complaint. Learned State Counsel submitted that the testimony of PW3 and PW4 corroborated the complainant's testimony that she had indeed been sexually assaulted. The stick was used to penetrate her. He submitted that the charge sheet was not defective and any irregularities that may be established can be cured under **Section 382** of the **Criminal Procedure Code**. He urged the court to dismiss the appeal.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. As was held by the Court of Appeal in **Njoroge -Vs- Republic [1987] KLR 19 at P.22**:

***“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwala v R [1957] EA 570)”.***

In the present appeal, the issue for determination by this court is whether the prosecution established the case against the Appellant on the charge of **sexual assault** contrary to **Section 5(1)(a)(i)** as read with **Section 5(2)** of the **Sexual Offences Act** to the required standard of proof beyond any reasonable doubt.

**Section 5(1)** of the **Sexual Offences Act** provides that:

***“Any person who unlawfully –***

***(a) penetrates the genital organs of another person –***

***(i) any part 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 parts of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault.”***

The prosecution was required to establish that the person accused penetrated the genitals of the complainant using a part of her body or using an object manipulated so that it caused penetration of the genital organ of the complainant. In the present appeal, according to the charge sheet, the Appellant used her fingers to penetrate the vagina of the complainant. The evidence adduced however was at variance with the charge sheet. According to the testimony of the complainant and her mother PW2 MO, the complainant was penetrated using a stick. This court is of the view that the charge sheet was therefore fatally defective as the evidence adduced did not support the particulars of the charge. However, this court shall determine this appeal based on the facts of the case.

According to the complainant she was poked in her private parts by the Appellant. From her testimony she told the court that she was poked with a stick by the Appellant while she was asleep. At the time of the alleged incident, the complainant was four (4) years old. It was clear from the evidence adduced that other than the complainant's testimony, there was no other evidence which was adduced by the prosecution witnesses to corroborate her testimony in regard to who injured her. The teachers who were at the school with the Appellant i.e. DW2 Abigael Juliet Okumbe and DW3 Dorcas Mutwiri told the court that no incident was reported about any child being injured at the school on the particular day. The complainant was a child of young and tender years. Her evidence ought to have been treated with circumspection by the trial court. Children of such age are prone to be influenced by the adults who live with them. They are impressionable. That the child was injured is not in doubt. Medical evidence produced by PW3 Edward Kinuthia, a Clinical Officer based at Nairobi Women Hospital and PW4 Dr. Zephania Kamau clearly showed that the complainant was injured on her genitalia. She had bruises on her labia majora and vulva. The hymen was however intact. She had blood stains in her pant. The issue for determination by this court is whether the injury was caused by the Appellant. As explained by the Appellant in her defence, she was in a school environment where there were many people. The complainant was with other children in the school. No complaint was lodged about any incident at the school at the time the incident is alleged to have occurred. It cannot be ruled out that the complainant was injured while playing with other children. The Appellant's co-teachers testified that no incident occurred on that day.

It was clear to this court that the Appellant was convicted on the sole evidence of the complainant who is a child of young and tender years. Although this court, in sexual offences, can convict a perpetrator of sexual offence against a child on the basis of that child's evidence, upon re-evaluation of the evidence adduced, this court was not persuaded that the complainant was telling the truth. The surrounding circumstance precludes this court from reaching such a verdict. There too many inconsistencies in the narrative given by the complainant that this court does not believe that the complainant may have been telling the whole truth. That fact, coupled with the fact that the particulars of the charge sheet were incurably defective leads this court to the verdict that the prosecution failed to establish its case to the required standard of proof.

In the premises therefore, the Appellant's appeal has merit. It is hereby allowed. The Appellant's conviction is quashed. The custodial sentence imposed on her is set aside. She is acquitted of the charge. She is ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 2<sup>ND</sup> DAY OF MAY 2019

L. KIMARU

JUDGE