REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

CRIMINAL APPEA NO. 14 OF 2017

BETWEEN

EVERLINE WARIURI KAMAU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's Court

at Murang'a Sexual Offence No. 23 of 2013 delivered by A.K.Mwicigi on 22nd February, 2017)

JUDGMENT

Background

1. The Appellant was charged in count I with the offence of 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 diverse dates between 01.08.2013 and 04.09.2013 she intentionally inserted the penis of RK a child aged 9 years into her vagina.

2. In Count II she was charged with the offence of promoting a sexual offence with a child contrary to Section 12(b) of the Sexual Offences Act in that on diverse dates between 10.8.2013 she displayed pornographic films to RK aged 9 years which was intended to enable RK to perform such sexual acts.

3. The Appellant was dissatisfied with both the conviction and sentence against which she preferred the instant appeal. She set out three grounds of appeal in her Amended Grounds of Appeal dated 5th September, 2019. I duplicate them as under.

a. That the learned trial magistrate erred in law and fact when he convicted and sentenced the Appellant relying on the evidence adduced by the prosecution witnesses mostly PW1, PW2, and PW3 which was riddled with a lot of doubts.

b. That the learned trial magistrate erred in law and fact when he failed to note that investigations conducted were not complete as required.

c. That the prosecution's side failed to prove its case beyond reasonable doubt as required in law.

Submissions

4. The appeal was canvassed before me on 5th September, 2019. The Appellant was in person whilst learned State Counsel, Mr. Mutinda represented the Respondent. The Appellant adopted her written submissions filed alongside the Amended Grounds of Appeal.

5. The Appellant in her submissions challenged the evidence of PW1 that he did not explain if he himself was undressed or not and the duration it took to perform the act. She asserted that the evidence of the prosecution witnesses had inconsistencies in the manner in which the alleged acts of sexual offences were committed. She pointed to the lack of evidence to link her to the recovered DVD. Further that the evidence did not disclose the date of the offence. She also accused the trial magistrate of giving a verdict that was biased and in favour of the prosecution.

6. As regards the sentence, the Appellant pleaded for a lenient sentence as she was in custody with an infant aged two years eight months

who has eye problems and had not received proper treatment while in custody. She further stated that she has other children at home who entirely relied on her.

7. Mr. Mutinda submitted that the Appellant was lawfully convicted and sentenced urging that the prosecution witnesses had proved the offences beyond a reasonable doubt. He submitted that the Appellant did not in any way challenge the prosecution evidence in her defence. He urged the court to consider that the Appellant was the domestic servant of PW2, the mother of PW1 who breached the duty of care and trust and abused the young child.

8. As regards the sentences, Mr. Mutinda submitted that they were well within the law and urged the court not to upset them. It was his submission that the conviction was safe and prayed that both the conviction and sentence be upheld.

Summary of evidence

9. PW1- RK, the complainant in the case was a 9 year old boy schooling in class three. He referred to the Appellant as 'auntie' meaning the house help. His evidence was that during the August holidays the Appellant would remove his shirt and then remove his "kasusu" meaning the penis and put it on her "kasusu", meaning the vagina. He would be lying on top of her while she lay on top of the bed. She would then release her to go watch television. On another day she displayed for him to watch a DVD which showed people doing "tabia mbaya". She then called him to the bedroom but being afraid of doing "tabia mbaya" he went outside. On a different day the Appellant forced him to suck her "nyonyo" which she had removed out without undressing. PW1 later informed his mother, PW2 what was happening while the Appellant was away. He added that the DVD belonged to the Appellant and she was keeping it in her bag.

10. PW2, JWM entirely corroborated the evidence of PW2. She confirmed that PW2 fetched out the pornographic DVD from the Appellant's bag which she in turn handed over to the police. She also informed her husband, **PW3, PMK,** what was happening. The latter also corroborated her evidence.

11. PW4, Edward Kiptum was a forensic expert from the CID Headquarters who produced and replayed the DVD in court and confirmed that it indeed contained pornographic content. He also adduced a certificate confirming that he had made the report of the content of the DVD.

12. PW5, PC Elijah Opicho and **PW6, IP Radhia Ali** were both investigating officers. They each summed up the evidence of other prosecution witnesses. PW5 in addition stated that he is the one who recovered the DVD and sent it for forensic examination.

13. In her sworn defence, the Appellant testified that she had been engaged in disagreements with PW2, her employer, who was quarrelsome. She stated that she required her to perform *ad hoc* duties and used to issue threats to her. She claimed to have made some reports to the police station. That PW2 even accused her of sleeping with her husband. That before her arrest she had asked for permission to attend to her ailing father but PW2 declined after which her father died. She stated that PW2 even refused her permission to go home until the following day. While attending to the burial arrangements PW2 kept calling her to resume work but she declined. Later PW2 called her and she agreed to meet her at her office. On arrival she found police officers who arrested her and informed her that something had been recovered from her employer's son. She claimed that police officers demanded for Kshs. 15,000/- for her release.

14. DW2, Gladys Waigwe Kamau a cousin to the Appellant testified that while they were at home the Appellant received a call from her employer, PW2, who demanded that she goes back to work before finalizing the burial arrangements for her father. That PW2 also threatened to teach the Appellant a lesson for having an affair with her husband as she was aware her husband intended to open a business for her. She called her a prostitute and threatened to ensure she rots in jail before the business was financed. The witness stated that the Appellant went to meet up with PW2 the following day and later informed her that she was arrested and did not attend her father's burial.

Analysis and determination

15. This is a case in which there was no eye witness. The minor (PW1) narrated to his mother how the Appellant as she bathed him would remove her clothes and do "tabia mbaya" which means bad manners. The phrase bad manners is interpreted to imply sexual intercourse in cases where witnesses especially children are not able to express themselves in plain words. He also stated that she would force him to suck her "nyonyo" meaning breasts. In cross examination the minor was candid that the Appellant would tell him to do the bad manners because his parents too used to do it. He also stated that he would prevent him from going out to play with other children during which time he would take him to the bedroom, cause him to lie on the bed, undress him, remove his penis and force him to do the bad manners.

16. Under Section 11(1) of the Sexual Offences Act, *"any person who commits an indecent act with a child is guilty of committing an indecent act with a child…"* The provision does not define the offence of indecent act which definition is found at Section 2 in the following words.

> **"(a) Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.**
>
> **(b) Exposure or display of any pornographic material to any person against his or her will."**

17. In his *voire dire* examination, PW1 stated that he knew what to tell the truth and lies implied. He added that he knew he would be punished by God if he told lies. He was candid that the Appellant who was their house-help would take him to her bedroom where she forced him not only to do the bad manners but also to suck her breasts. He also was candid that he would display to him a DVD film with pornographic materials. He specifically stated that the DVD showed people doing bad manners. He did not contradict his statement in cross examination. He equally narrated the same story to PW2 and PW3 who were his parents.

18. On the part of this court, I have no reason to doubt that PW1 was not framing the Appellant. On her part, the Appellant asserted that she had a bad relationship with PW2, her employer but this assertion in my view was a second thought. Although she called one witness to support her assertion the witness only stated that she heard a conversation between the Appellant and PW2. It is common sense that unless a person narrates to the other what the conversation on phone is about it is difficult for the listener to conclusively state the words of the conversation. Respectively, I conclude that what DW2 told the court is what she had been told by the Appellant; and the Appellant could only have told her what suited her.

19. Suffice it to state, under the proviso to Section 124 of the Evidence Act, in a criminal case involving a sexual offence where the only evidence is of the minor victim the court shall receive that evidence and proceed to convict the accused person if it is satisfied that the victim is telling the truth. Just as the learned trial magistrate believed the testimony of the minor, so is this court.

20. With respect the Count II, the same was corroborated by PW2 who was a forensic expert who displayed the pornographic DVD in court and produced a certificate pursuant to Section 106 of the Evidence Act confirming that the same had not been altered in any form.

21. In sum, I find this appeal without merit. I further find that the prosecution proved their case beyond a reasonable doubt that the Appellant was culpable. I accordingly uphold the conviction.

22. As regards the sentence, the trial court imposed the minimum sentence provided under the Sexual Offences Act which is 5 and 10 years respectively. This is a case in which the Appellant indecently assaulted a young child and exposed him to pornography at a very early age which actions are likely to influence the entire psychological development of the child. It is a case that requires stringent penalty to act as deterrence to other would be offenders. It is a case I would be easily inclined to enhance the sentence. However, it is hoped that for the period the Appellant shall be in prison shall serve as a lesson to her in future. Her mitigation that she has children who relies on her of whom one suffers from an eye problem is outweighed by the gravity of the offence. I find no reason to upset the sentence.

23. The upshot I find the entire appeal meritorious and dismiss it. It is so ordered.

Dated and Delivered at Murang'a this 10th Day of September, 2019.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. The Appellant in person.

2. Mr. Mutinda for the Respondent.