REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

HCCRA NO. 63 OF 2018

PATRICK JAVA KILIBWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment dated 30th March,2017 by Hon. D. Ogal, Resident Magistrate at Hamisi RM's Criminal Case No. 654 of 2015).

JUDGMENT

1. Patrick Java Kilibwa the appellant was charged with the following offences:

Count I:

Sexual assault contrary to section 5(1)(2) of the Sexual Offences Act No.3 of 2006 laws of Kenya. The particulars were that the appellant on the 17thday of June,2015 at Gimarakwa village in Hamisi Sub-county within the Vihiga County, intentionally and unlawfully used his fingers to penetrate the Vigina of C.I.O a child aged five(5) years.

Count 2:

Causing an indecent act contrary to section 6(a) of the Sexual offences Act No.3 of 2006 Laws of Kenya.

The particulars were that the appellant on the 17th day of June 2015 at [particulars withheld] village in Hamisi Sub – County within the Vihiga County, caused C.I.O to view pornographic pictures from his mobile phone against her will, an act which was indecent.

2. The appellant pleaded not **guilty** and the matter proceeded t full hearing as a result of which he was convicted on the 1st count and sentenced to ten (10) years imprisonment. He was acquitted of the offence in the 2nd count.

3. Being aggrieved by the judgment he filed this appeal citing the following grounds:

> ***1. That the trial magistrate erred in law by convicting him without noting that the investigating officer who is a crucial witness in any criminal case was not summoned to testify.***
>
> ***2. That the trial magistrate erred in law by relying on medical evidence whose author did not come and testify hence its authenticity was doubtful.***
>
> ***3. That the trial magistrate erred in law by not appreciating that this case was instigated againsthim as there existed a grudge between him and the mother of the complainant as she was his employer.***
>
> ***4. That the trial magistrate erred in law by not giving him an opportunity to cross examine PW1 evidence hence section 208 of the CPC not complied with.***
>
> ***5. That his defense evidence was not given a due consideration yet it was cogent enough to award him an acquittal.***

4. The prosecution called a total of four (4) witnesses while the appellant gave a sworn statement of defense without calling any witness.

PW2(C.I.O.) the complainant testified after a voire dire examination. She gave unsworn evidence but was cross examined by the appellant.

Her evidence was very brief and to the point. It was that the appellant whom she knew as Patrick touched her private parts and showed her bad photographs on his phone, during, the day.

5. The mother **B M** testified as PW1. She works at Avenue Hospital Kisumu as a patient attendant. It was her evidence that she returned home from work on 17th June 2015 at 8.30 p.m. All her children were in the house but she noted that PW2 was not as jovial as always. She refused to eat and she had a high temperature and was in pain. She gave her paracetamol at about 9 p.m.

6. The next morning she refused to wake up, and asked PW1 not to leave behind the appellant who had done something bad to her. She further informed her that the appellant had called her to the kitchen from where he showed her bad pictures on his phone. He then told her that they were to try and emulate what they had seen in the photos. He proceeded to finger her using his fingers. The witness confirmed that the appellant was her herdsman at the time, and was the only one who used to remain athome.

7. PW1 stated that she removed PW2's clothes and examined her vagina which she noted had bruises. She took the child to Tigoi health centre and thereafter to Avenue Health Centre Kisumu for further tests. Urinalysis and HIV tests were done. A report was made at Gambogi police station from where she was issued with a p3 Form (EXb2). In cross examinationshe admitted that the phone that was allegedly used to watch pornographic material was not an exhibit. She added that PW2 had a discharge when she examined her.

8. On the issue of payment of the appellant's salary she admitted that the same had been discussed butsaid that payment for the previous month had been made.

9. PW3 **No.35937 PC Peter Gitau** of Gambogi patrol base confirmed that this case was reported at the patrol base on 18.6.2015. On 19.6.2015 him and others went to PW1's home at around 6p.m. and waited for the appellant. PW2's pants (Exhibit 4) were handed to him. He stated that the appellant had used his hands to sexually assault PW2. In cross examination he said the issue of pornography was not captured in the investigation dairy.

10. PW4**Lydia Mutuku**, a Clinical Officer at Tigoi health centre stated that she examined C.I.O (PW2) on 20th June 2015,she had been treated at Avenue hospital. The history given was one of defilement by a person known to her, and she used treatment notes (Exhibit 3a) to fill the P3 form. She observed that the doctor who first examined PW2 noted that there was some whitish discharge. Secondly it was noted that there were no bruises on PW2's private parts but the hymen was missing.

11. Her conclusion was that PW2 had been defiled because her hymen was missing. In cross examination she stated that PW2 had already been treated at Avenue hospital before she came to Tigoi hospital.

The officer in-charge of Avenue hospital Kisumu was summoned to come to court but he/she never came though served. This was followed by issuance of a warrant of arrest, twice with no success. The prosecution case was then closed, at that point.

12. When placed on his defence the appellant gave a sworn statement. He stated that he was working for PW1 for the sole purpose of raising school fees. He worked for her from 3rd March 2012 uptothe date of arrest, without being paid his salary. Some times in June 2015 he asked PW1 for his money and she told him to wait until 20th June 2015, for her to pay him the whole amount. He had noted that from 6th June 2015. PW1 had started complaining about his performance. On 19th June 2015 he worked upto6.30p.m. and thereafter went for a walk.

13. Upon his return PW1 called him and asked him to go to the sitting room and wait for his money. He found two visitors and PW1's family members there. He was then arrested and later charged by one of the visitors. He believed he was framed for demanding for his money.

14. A summary of the appellant's written submission is that the investigating officer who is a crucial witness was never called. He cited the case of **Bukenya & Another Vs Uganda 1972 EA 549** to support this submission. He further submitted that failure to call Dr. Oketch Orom from Avenue health centre was **fatal** to the prosecution case. He therefore submitted that the evidence of PW4 did not have a backup and should not be relied on. Further that PW1'S connection with Avenue hospital led to the failure of the doctor to appear to testify.

15. He also argued that the case was fabricated against him by PW1 who used PW2. That he had explained all this in his defence. He submitted having been denied an opportunity to cross examine PW2.

16. He finally submitted that despite his defense being plausible, the same was not considered.

17. Learned Prosecuting Counsel Mr. Mwaura for the respondent opposed the appeal saying the evidence was well evaluated by the learned trial magistrate. That there was evidence that PW2 was shown pornographic materials, the appellant insertedhis fingers in her vagina and the child was discharging from her vagina. Her pant was produced as Exhibit B4.

ANALYSIS AND DETERMINATION

18. This being a first appeal this court has a duty to re-examine and re-evaluate the evidence on record to arrive at its own conclusion. An allowance must be given since this court did not have the privilege of seeing or hearing the witnesses.

In the case of **Mwangi Vs R (2004) 2 KLR 28** the Court of Appeal held as follows:

> ***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 have the appellate court's own decision on the evidence***

2). The first appellate court must itself weigh the conflicting evidence and draw its own conclusion.

3). It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion; it must make its own findings and draw its own 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 had the advantage of hearing and seeing the witness.

19. Having considered the evidence on record, grounds of appeal and the submissions, I find the main issue for determination to be whether the prosecution proved its case beyond reasonable doubt.

20. The appellant was charged with sexual assault under section 5(1)(a)(i) as read with 5(2) of the Sexual Offences Act. For purposes of clarity, I wish to state what the sections provide;

Section 5(1) Any person who unlawfully –

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

(i) Any part of the body of another or that person;

(ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;

(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.

21. This is the finding by the learned trial magistrate at page 20 of line 9 – page 21 – line 1 of the record.

"*I had the advantage of hearing evidence of PW2 and I was convinced that the accused touched her vagina. She told both the police and the doctor about what had happebed to her with consistency which further convinced me that she told the truth"* (emphasis is mine).

22. Sexual assault under section 5 of the Sexual offences Act is about penetrating the genital organ with either of the objects stated under section 5(1)(a)(i) or (ii) of the Sexual Offences Act. It is never about touching. When it comes to **touching** then the relevant provision is section 11 of the Sexual Offences Act which deals with "an indecent act".

Was this then a case of indecent act or sexual assault?

23. The learned trial magistrate found it to be an indecent act but convicted for sexual assault.

I now move to re-evaluate the evidence on record.

24. There is no dispute that the appellant was employed by PW1 as a herdsman. Further it is not disputed that PW2 was a minor having been born in 2010. PW1, PW2 and the appellant knew each other well.

From the evidence on record the alleged incident occurred when only PW2 and the appellant were at home. It is therefore true that the evidence of PW2 is key in this case.

25. This is what the record shows at page 7 of the recorded proceedings, and what PW2 said:

Line 11 – 12

"He did touch "*minor points at her private parts.*"

I note that the key word in this evidence is"touch."

26. PW1 who received the complaint from PW2 states at page 6 line 8-9 as follows:

"*He removed her inner pants and started fingering her using his fingers"*

Line 12 –

"*I removed the minor's clothes and looked at her vagina and noted that it had bruises"*.

27. It can clearly be seen that the victim stated that she was only touched. However PW1 the mother who only received the report says she

was told that the appellant inserted his fingers in PW2's vagina. Secondly that she saw bruises on PW2's vagina, meaning the vagina had been injured.

28. What does the medical report show?

First of all, the treatment notes from Avenue health Centre were never produced though PW4 purportedly produced them as Exhibit 3b.

Secondly the treatment notes from Tigoi Health Centre dated 20th June 2015 and produced as Exhibit 3a **CANNOT** be the record PW1 talked about. The reason is very simple. PW1 said she took PW2 for treatment at Tigoi Health Centre on 18th June 2015 and thereafter took her to Avenue health centre for further tests. If Exhibit 3a was a genuine record it could be reading 18th June 2015 and not 20th June 2015 as is the case. Even if for a moment it was assumed that the date was erroneously indicated as 20.6.2015 the record shows, the following:

- No bruises or lacerations

- Missing hymen

29. The Clinical Officer who examined PW2 for purposes of filling the P3 form (Exhibit B2) is PW4 **Lydia Mutuku.** Her evidence is key to this case. She said she examined PW2 on 20th June 2015 when the patient had already been treated and tested at Avenue health centre. It was her evidence that the doctor who first examined PW2 noted there was some whitish discharge in her vagina. Again there was no treatment record produced to confirm this. If any tests were done at Avenue health centre, the notes and test results were never produced before the court. The reason being that the prosecution was unable to secure a doctor from the said health facility where PW1 the mother to the complainant worksas a patient attendant…so unfortunate!

30. PW4 told the court that the only reason that made her deduce that PW2 had been defiled was because *"her hymen was missing"*PW2 was aged 5 years as at the time of the alleged incident. The child had no bruises nor bleeding in her vagina which would not be the case if indeed she had been penetrated. The issue of the white discharge is neither here nor there. Even if it was, there was no result from Avenue health centre where she was examined and tested to confirm what it was. Lastly PW2 never at anytime stated that the appellant inserted his fingers in her private parts. It is the mother (PW1) who came up with this narrative.

31. The appellant's defence was that the charge was fabricated because of nonpayment of his pending salary arrears. He denied committing the offence. The alleged offence occurred on 17th June 2015. He was arrested on 19th June 2015 at 8.00 p.m. from PW1's home, meaning he never disappeared. All these pieces of evidence put together lead me to the conclusion that the evidence by PW1 was exaggerated for ensuring that the appellant was incarcerated.

32. PW4 did not give a professional finding after examining PW2. She had a pre-determined mind. A missing hymen per se is not proof of penetration. The victim (PW2) herself told the court that she was *"touched"*. Based on that the appellant should have been charged with indecent assault and I cannot substitute it since the State never cross appealed, on the same.

33. The offence in the 2nd count was properly dismissed as there was no evidence to support it.

34. In the final analysis, I find that the charge against the appellant was not satisfactorily proved beyond reasonable doubt. The appeal has merit and I allow it. The conviction is quashed and sentence set aside

35. The appellant to be released forth with unless otherwise lawfully held under a separate warrant.Orders accordingly.

Delivered, signed and dated this 12th day of September 2019 in open court at Kakamega.

H.I. ONG'UDI

JUDGE