REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO. 57 OF 2018

TABITHA WANJIKU MBURU.....APPELLANT

=VRS=

THE REPUBLIC.....RESPONDENT

{Being an appeal against the Judgement of Hon. E. Nyongesa – SRM Gatundu dated and delivered on the 6th day of August 2018 in the original Gatundu Principal Magistrate's Court Criminal Case No. 151 of 2015}

JUDGEMENT

The appellant was convicted and sentenced to imprisonment for thirty (30) years for the offence of Committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act.

The particulars of the charge were that on 31st January 2015 at around 1400hrs in Gatundu North Sub-county within Kiambu County the appellant intentionally manipulated the hands of AMK a child aged 4 ½ years to touch her breasts and forced him to lick her vagina with his tongue.

Her appeal which is against the conviction as well as the sentence is premised on grounds that: -

"1. The Learned Magistrate erred in Law and fact in finding that the prosecution had proved it's case beyond any shadow of doubt in circumstances where the evidence presented was clearly inadequate to sustain and prove the charges preferred.

2. The learned Magistrate erred in law and fact in relying on and giving due credence to the prosecutions evidence which was full of contradictions and loose ends incapable of proving the charges against the appellant.

3. The Learned trial Magistrate erred in Law and fact in finding that the prosecution witnesses' testimony had been consistent when in fact there were flaring contradictions, exaggerations and misinformation in the whole case and evidence.

4. That the trial magistrate erred in law and fact by disregarding and failing to consider the sworn testimonies of the appellant's witness and the sworn statement of the appellant which testimonies were unshaken by the prosecution in her judgement.

5. The Learned Magistrate erred in Law by shifting the burden of disapproving the charges to the accused/appellant.

6. The Learned Magistrate erred in law and fact by reaching conclusions on facts and giving opinions not founded in or supported by the evidence tendered by any witnesses.

7. The learned Magistrate erred in law and fact by convicting the appellant of the charges without the benefit of any evidence to support the charges.

8. Without prejudice to all the foregoing the learned Magistrate erred in law and fact by imposing an excessive sentence of thirty (30) years imprisonment without any basis.

9. That the learned magistrate erred in law by failing to give the accused the benefit of doubt considering the generality of the circumstances of the case and the fact that the prosecution did not prove its case beyond all reasonable doubt.

10. That the learned magistrate erred in law and fact by not recording the reasons which made the court to believe the complainant's evidence.

11. That the learned magistrate erred in law and fact by relying on the unsworn evidence of a child witness she had concluded was not possessed of sufficient intelligence to testify."

The appeal is vehemently opposed and while Counsel for the appellant preferred written submissions, Counsel for the respondent submitted orally. However, as an appellate court I am not confined to the submissions. To the contrary I am required to analyse the evidence in the lower court so as to arrive at my own independent conclusion all the while bearing in mind that I did not see or hear the witnesses and making provision for that **(see Okeno v Republic [1972] EA 32).**

The evidence in the court below was that the mother of the complainant who, as per the Certificate of Birth produced in evidence was born on 22nd May 2010, and the appellant were neighbours; that on the material day the appellant requested the complainant's mother to go and repair her brassiers and as the complainant's mother (Pw2) was going about it the appellant sat on the chair and put the complainant on her laps and asked him to suckle her breasts an offer he turned down saying he was big. After repairing the brassiers the complainant's mother went away and left the complainant playing outside the appellant's house. After a while the boy went and told his mother the appellant was calling her but she told him to go tell her she was busy. Later when the complainant went home he told her (Pw2) that the appellant had asked him to suckle her breast **"(kanyonyo)"** and lick her vagina **"(kanyunyu)".** She did not take him seriously until the next day when he found her dressing and repeated the same thing and insisted on sucking hers. She reported the matter to Kanyeria Police Post then took the child to Ngorongo Health Centre where the child was examined and put on anti-retrovirals. His P3 Form was subsequently filled at Igegania Hospital. The complainant told the court that he was alone with the appellant when she asked him to suck her ***"kanyunyu"*** and then gave him her breast to suckle. He stated that the appellant was seated on a chair in her sitting room and when asked what ***"kanyunyu"*** was he pointed to the genital area.

In her defence, the appellant stated that the complainant's mother had framed her and fabricated evidence against her because of reporting her to the police concerning an assault incident that had occurred in her school. She stated that because of that report the complainant's mother had to part with Kshs. 50,000/= so that she could not be charged. The appellant also testified that the complainant's mother had asked her for Kshs. 150,000/= to resolve this matter but she refused to pay as she was innocent. Her husband (Dw2) testified that he was at home at the material time and the appellant did not commit the offence. He too contended that she was framed for causing the complainant's mother to spend Kshs. 50,000/= and for refusing to part with Kshs. 150,000/=.

The gist of this appeal is that the trial court improperly received the evidence of the complainant even upon conducting a voire dire and finding that he was not intelligent enough; that his evidence was not corroborated and that her defence was ignored.

In the case of **Johnson Muiruri v Republic [1983] KLR 445** the Court of Appeal set out the manner of conducting a voire dire and stated: -

"1. Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a *voire dire* examination, whether the child understands the nature of an oath in which even his sworn evidence may be received. If the court is not so satisfied, his unsworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him.

2. It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided.

3. Where a child of tender years gives unsworn evidence, then corroboration of that evidence is an essential requisite. But if a child gives sworn evidence, no corroboration is required but the assessors must be directed that it would be unsafe to convict unless there was corroboration.

4. When dealing with the taking of an oath by a child of tender years, the inquiry as to the child's ability to understand the solemnity of the oath and the nature of it must be recorded, so that the cause the court took is clearly understood.

5. A child ought only to be sworn and deemed properly sworn if the child understands and appreciates the solemnity of the occasion and the responsibility to tell the truth involved in the oath apart from the ordinary social duty to tell the truth."

In **Julius Kiunga M'rithia v Republic [2011] eKLR** the court observed that there were two reasons for conducting a voire dire. It held: -

"Under Section 19 of the Oaths and Statutory Declarations Act, *(Cap 14 Laws of Kenya)*, where a child of tender years is called as a witness in a proceeding there are two things the trial court must be severally satisfied about—

(1) Whether the child understands the nature of an oath; or

(2) If the child in the opinion of the court does not understand the nature of an oath, whether the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth."

It is clear from the questions put to the complainant that he understood the duty of speaking the truth. I am also satisfied that although the trial Magistrate did not expressly state that the child was intelligent enough he was sufficiently intelligent to justify reception of his evidence though not on oath. Indeed, the only question he did not get right was what day of the week it was as it turned out the day was a Tuesday but not a Wednesday. The test is not whether the child is very intelligent and true the voire dire could have been better conducted but I am satisfied that the record suffices to demonstrate that the child was possessed of sufficient intelligence and that his evidence was properly received by the court.

On the issue of corroboration, **Section 124 of the Evidence Act** states: -

> **"124. Corroboration required in criminal cases**
>
> **Notwithstanding the provisions of section 19 of the 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."**

The appellant having been charged with a sexual offence there was no requirement for corroboration and having analysed and evaluated the evidence myself, I am satisfied that it was proved beyond reasonable doubt that the appellant intentionally caused the complainant to commit an indecent act with her.

The complainant who was only five years old vividly narrated how when they were alone in the appellant's house she sat on a chair and made him to lick her genital organ and suckle her breast. When he went home he told his mother (Pw2) who at first did not believe him, only to do so when he repeated it after finding her dressing. He told the same thing to the medic who attended to him first at Ngorongo Health Centre as can be seen in the treatment book marked EXB2 and later to the doctor who examined him and filled his P3 Form at Igegania Sub-district Hospital as can be seen in the P3 Form produced as (Exhibit 3). In court he remained consistent both during the initial cross examination and later when he was recalled for cross examination by Counsel for the appellant. His evidence was not shaken. I am therefore satisfied beyond reasonable doubt that he was telling the truth. The allegation by the appellant and her husband that she was framed cannot hold true in the face of such cogent evidence. Moreover, the appellant herself told this court that the complainant's mother was her friend hence the reason she called her to repair her brassier. She also testified that the complainant's mother used to leave the complainant with her whenever she went away which I find is inconsistent with any evidence of a grudge between them. Moreover, the issue concerning the assault incident and the money expended by the complainant's mother as a result, was never put to her during cross examination and it could only have been an afterthought.

Section 2 of the Sexual Offences Act defines **"indecent act"** as an unlawful intentional act which causes—

> **(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.**

From the facts of this case and the above definition the indecent act was committed by the complainant but not the appellant and the appropriate charge should have been under **Section 6 (a) of the Sexual Offences Act** which states: -

> **"6. A person who intentionally and unlawfully compels, induces or causes another person to engage in an indecent act with —**
>
> **(a) the person compelling, inducing or causing the other person to engage in the act; is guilty of an offence and is liable upon conviction to imprisonment for a term which shall not be less than five years."**

The above offence is a minor offence to committing an indecent act although unfortunately the Section does not make a distinction when it involves an adult or a child and the sentence is the same. Be that as it may and finding that this is the offence that was committed by the appellant, **I hereby set aside the conviction and sentence imposed for committing an indecent act with a child** and in its place **substitute it with a conviction for intentionally and unlawfully compelling another person to engage in an indecent act contrary to Section 6 (a) of the Sexual offences Act.**

The trial Magistrate sentenced the appellant to thirty (30) years imprisonment based on the minimum sentence of ten years prescribed by **Section 11 (1) of the Act.** It was contended that this sentence is excessive. In **Evans Wanjala Wanyonyi v Republic [2019] eKLR** the Court of Appeal deprecated mandatory minimum sentences in sexual offences and held that courts should be at liberty to determine the appropriate sentence based on the nature and circumstances of the offence. I have in this case considered that the appellant was a first offender and also the age of her victim and sentenced her to a term of imprisonment for ten (10) years from the date she was sentenced by the lower court. It is so ordered.

Signed and dated this 15th day of October 2019.

E. N. MAINA

JUDGE

Dated and delivered in Kiambu this 17th day of October 2019.

C. W. MEOLI

JUDGE