



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CRIMINAL APPEAL NO. 2 OF 2019

WILSON MWOLOLO MASESI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of Hon. C. A. Mayamba (SRM) in the Senior Resident Magistrate's Court at Kilungu Sexual Offence Case No.18 of 2018, delivered on 17th day of December, 2018)

JUDGEMENT

1. On **Count I** the appellant was charged with sexual assault contrary to section 5 (1) (a) (i) (2) of the Sexual Offences Act No. 3 of 2006.
 - The particulars of the offence were that on the 3rd day of April 2018 at [particulars withheld] Primary School in Kasikeu Location, Makueni County unlawfully used his finger to penetrate the vagina of PMM, a child aged 8 years.
2. On the alternative he was charged of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006.
 - Particulars were that on the 3rd day of April 2018 at [particulars withheld] Primary School in Kasikeu Location, Makueni County intentionally touched the vagina of PMM a child aged 8 years with his fingers.
3. On **Count II** he was charged with sexual assault contrary to section 5 (1) (a) (i) (2) of the Sexual Offences Act No. 3 of 2006.
 - Particulars being that on the 3rd day of April 2018 at [particulars withheld] Primary School, Kasikeu Location, Makueni County unlawfully used his fingers to penetrate the vagina of JMM a child aged 9 years.
4. On the alternative he was charged of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006.
 - The particulars being that on the 3rd day of April 2018 at [particulars withheld] Primary School in Kasikeu Location, Makueni County intentionally touched the vagina of JMM1 a child aged 9 years with his fingers.
5. On **Count III** he was charged with sexual assault contrary to section 5 (1) (a) (i) (2) of the Sexual Offences Act No. 3 of 2006.
 - The particulars were that on the 3rd day of April 2018 at [particulars withheld] Primary School, Kasikeu Location, Makueni County unlawfully used his fingers to penetrate the vagina of JMM2 a child aged 9 years.
6. On the alternative appellant was charged of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006.
 - The particulars were that on the 3rd day of April 2018 at [particulars withheld] Primary School in Kasikeu Location, Makueni County intentionally touched the vagina of JMM2 a child aged 9 years with his fingers.
7. He pleaded not guilty and matter went to full trial. He was found guilty and thus convicted and sentenced to serve Count 1 (10) years, Count 2 (2) years and Count 3 (3) years imprisonments but to run concurrently.

8. He was aggrieved by said verdict and thus filed instant appeal setting up 7 grounds of appeal.

(1) That this honourable court to consider the period that he had spent in remand custody under section 333 (2) of the Criminal Procedure Code.

(2) That before his arrest and subsequent conviction he was the sole breadwinner of his family, bestowed with a heavy responsibility of taking care of his five (5) children and 2 of his daughter's children who is deceased.

(3) That he has now fully rehabilitated and now an Ambassador of Christ.

(4) That he is a widower thus struggling alone to care for his children and aged parents who are tent to suffer untold calamities if he continues to suffer behind bars.

(5) That he is deeply remorseful, repentant and regret his action.

(6) That he prays for a non-custodial sentence or an option of a fine.

(7) That he is ready to comply with any other opinion that the court will deem fit to his circumstances.

9. The parties agreed to canvass appeal via submissions but only appellant filed his submissions and the respondent relied on evidence on record to oppose the appeal.

The Duty of the First Appellate Court:

10. I am guided by the Court of Appeal case of Okeno vs Republic (1972) E.A. 32 where the Court set out the duties of a first appellate court thus:-

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) E.A. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs. R. (1957) E.A. 570). 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 finding 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 court has had the advantage of hearing and seeing the witnesses, See Peters V. Sunday Post, (1958) E.A. 434”

Prosecution's Case:

11. **PW1** stated that their teacher used to insert his fingers under their dress. It was her testimony that her teacher was called Masesi. She stated that her teacher used to mark their work while at the same time inserting his hands under their dress. It was her testimony that the teacher used to call them one by one to the front of the class where he was.

12. She stated that she was wearing a pant and a biker of which she stated that the teacher used to insert his hand to touch her genitals. She informed their headteacher and mother. She also informed the police and was taken to the hospital for a check-up.

13. **PW2** stated that their teacher used to give them work to do. It was her testimony that the teacher could insert his fingers under her dress if you get any working wrong. She stated that she was wearing a short under the dress. They proceeded to report to the headteacher and also informed her mother as he did it frequently. It was her testimony that her teacher was called Mr. Masesi.

14. **PW3** stated that her teacher used to ask her to remove her pant and go to sleep on NM who is also a fellow pupil while asking her to do bad things.

15. It was her testimony that Mr. Masesi used to insert his fingers under her dress while touching her genitals. She stated that she was wearing pant and biker. She stated that she was sitting in front of the class and when reading English paper, he used to call them one by one.

16. It was her testimony that the teacher used to insert his fingers when one got the answer wrong while reading English or Kiswahili. She stated that appellant asked her whether she was feeling pain of which she did not reply as he continued. She stated that there was a time they were doing dictation and the teacher used to call them in front of class and insert his fingers underneath the dress.

17. **PW4** stated that she arrived home when the daughter informed her that Mr. Masesi was a bad person. She informed her that the teacher used to insert his fingers under her dress. She took her daughter to the hospital. She stated that her daughter was 9 years old and confirmed that she was born on the 9/10/2009.

18. **PW5** stated that she passed by the shop of Juliana when her granddaughter came. It was her testimony that the granddaughter asked her whether her daughter had informed her. She stated that the child informed her that their teacher used to insert his fingers under their dress.

19. She went home and asked her daughter who informed her how their teacher was inserting his fingers under their dress while touching her genitals. She went to the school the following day and was informed that the issue was known to them. It was her testimony that the

headteacher asked them not to pursue the case as the same shall give their school a bad name. She refused to his demands and demanded for her child.

20. **PW6** stated that he was the headteacher of the school. It was his testimony that on that day a group of children from Std. 3 went to report appellant to him. They informed him that Mr. Masesi was troubling them. He went to see Mr. Masesi whom he asked what he was doing to the children but he did not respond. He went to the senior teacher Mrs. Hilda who informed him that there was much to get from the children.

21. The following day parents came while annoyed which prompted him to report to the chief. **PW7** examined the complainants. On **PW1** he noted that her hymen was broken. It was his testimony that the child had confided in him someone known to her was inserting his fingers into her genitals. He tendered her treatment notes as Pex 2, and PRC form as Pex 3 and P3 form as Pex 4.

22. He also examined **PW2** who had her hymen broken with no other notable injuries. She tendered the health card confirming that the child was born on the 15/1/2009 as Pex 5, treatment notes as Pex 6, PRC form as Pex 7 and the P3 form as Pex 9. He also examined **PW3** whose hymen was intact with no other injuries. He tendered her P3 form as Pex 10, PRC form Pex 11, lab request form as Pex 13. After examination he equated the case as sexual assault.

23. **PW8** stated that she was in the office when two parents came to report together with their children. They reported to her that the teacher was inserting his fingers into their genitals. She booked the report and took the children for medical examination.

24. The following day, appellant was arrested by members of the public over another case of stealing of which she rearrested him and preferred the current charges earlier reported. She tendered the birth certificate of **PW1** as Pex 1 and the copy of the birth certificate for **PW3** as Pex 14.

Defence Case:

25. **DW1** stated that he had prepared to go to work that day as he was preparing for the closure of the school for holidays. He prepared the result slip before making the merit list. He prepared the report forms before leaving the school at around 4.10 pm. He denied having any knowledge about the case and that he heard the issue later on.

Issues:

26. After going through the evidence on record and tendered submissions, I find the issues are; ***whether the prosecution proved beyond reasonable doubt the charges appellant was facing? Was sentence excessive in the circumstances?***

Analysis and Determination:

27. In this instant case, we shall focus on the child within the meaning ascribed to the Children's Act, Chapter 141 Laws of Kenya. **PW1** herein was said to be 9 years as per health card tendered herein as Pex 5. The trial court also observed the child who appeared before him and observed that she was of tender age from a casual observation.

28. **PW2** on her part was aged 8 years old as per the copy of the birth certificate tendered herein as Pex 14. Thus the complainants were covered by section 43 (1) of the Sexual Offences Act, and so anything done to them regardless as to whether she could speak or not came within an unlawful act whether intentional or not.

29. Section 5 of the Sexual Offences Act provides for the offence of sexual assault;

(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; 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 part 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.

(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.

30. It was the prosecution's case that appellant inserted his fingers into the genitals of the complainants while he was marking their exams of which they contended that he was handling them one by one.

31. The act of inserting fingers into the genitals of the minor if established amounts to sexual assault as envisaged under section 5 of the Sexual Offences Act No. 3 of 2006 provided as follows:-

“Manipulates any part 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 assaults.”

On oral testimony:

32. PW1 stated that appellant who was their Class 3 teacher used to mark their work while at the same time inserting his fingers under their dress. It was her testimony which remained unshaken that he used to call them one by one to the front of the class where he was.

33. PW1 further informed this court that she was wearing a biker and a pant of which the appellant breached to her genitals. She reported to their headteacher, mother and also recounted to the police. In cross examination by the learned counsel for the defence, this child was steadfast and at no time was the evidence challenged.

34. PW2 on her part stated that appellant who was their class teacher used to give them work to do. He called them into the classroom one by one. She stated that appellant could insert his fingers under your dress and insert his fingers beneath, something he did frequently. They went to report to the headteacher as girls before informing the mother and the police later on. The evidence of this child was not challenged.

35. PW3 stated that she was also summoned by the teacher who asked her to remove her pant and advised her to go and sleep on NM who is also a fellow pupil while asking her to do bad things. It was her testimony that she informed her friend M. She further informed this court that the teacher during English or Kiswahili could do the same thing to her when she was unable to read any word in either of the languages, suffice to note that this evidence was also not challenged in cross examination as the child remained steadfast in her recount.

On medical findings:

36. The trial court analysed the contention herein and more importantly the medical officer’s testimony in PW6. It was noted that PW1 had her hymen broken together with PW2 which clearly confirmed that some acts of penetration had occurred. PW3 on her part had her hymen intact save that she also made similar complaint against the appellant herein. It suffices therefore that save for the medical findings of PW3, the two other girls actually had corroborative elements in the medical findings which supported their recount.

37. Section 124 of the Evidence Act, Chapter 80 Laws of Kenya states:-

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration 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 appellant shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him. Proof 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 appellant person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

38. The question before trial court was whether the children were telling the truth or not. The trial court analysed the evidence as presented by the prosecution in relation to this offence. There was one thing that stood out which was consistency. PW1, 2 and 3 testified before trial court on the 23/5/2018 but at that time appellant failed to cross examine them.

39. On the 6/6/2018, the children were again recalled to allow the defence counsel to cross examine which was more than 2 weeks from the initial testimony but one thing still stood out that these children still narrated their ordeal concretely and precisely. In his defence, the appellant remained silent on those issues raised only denying that he had not committed the offence. He did not allude to the children having any grudge as against him or telling lies. Thus the trial court therefore was confident that these children were truthful.

40. The evidence as presented by PW4 who was his head teacher was also not challenged. PW4 stated that these children went to report to him about what their teacher was doing to them. He proceeded to as the appellant about the allegations of which appellant remained mum. It is noted that the act of remaining mum and not challenging the fact that these children had reported to PW4, lent credence to the evidence as presented by the three complainants.

41. PW5 also stated that she received the information from her daughter and together with other parents went to school. It was her testimony that she found the teacher missing from the school and the headteacher who testified as PW4 tried to convince them to drop the issue as the same would have given the school a bad name. The evidence clearly pointed at the credibility of this claim which this court noted.

42. Having held as above the trial court also inclined to give the defence a consideration to check its credibility. Appellant stated that he went to work that day and was in school upto 4 pm when he went home, a fact that confirms his presence in the school on the 3/4/2018. He denied the offence without challenging the evidence as presented by the three complainants.

43. The children did not make any mistake in regard to his identity as he confirmed that he was their class teacher. He did not raise any sinister motive harboured by the children and even their parents which further compounds the claim herein as being unchallenged. The defence clearly was an afterthought which this court rejects.

44. This court finds that the trial court never erred in arriving at the conclusion it made thus the conviction was justified and thus appeal on conviction fails. On sentence the provision under which he was charged provided a minimum sentence of 10 years on conviction.

45. He was awarded the mandatory minimum sentence .The mandatory sentence has been held unconstitutional in recent authorities.

However in the circumstances of this case I find the sentence was appropriate if not lenient.

46. Thus the court finds no merit on appeal save that the save run from the date appellant was arrested. Therefore the court makes the orders;

i) Appeal is dismissed, conviction is upheld and sentence confirmed but to run from the date of arrest 9/4/2018.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKUENI THIS 11TH DAY OF OCTOBER, 2019.

.....

C. KARIUKI

JUDGE