REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.82 OF 2015

(An Appeal arising out of the conviction and sentence of Hon. E.N. Nyongesa - SRM delivered on 7th April 2015 in Makadara CM. CR. Case No.1952 of 2012)

KENNETH MWANIKI NJOROGE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Kennedy Mwaniki Njoroge was charged with the offence of **sexual assault** contrary to **Section 5(1)(a)(ii)(2)** of the **Sexual Offences Act**. The particulars of the offence were that on 3rd April 2012, at [particulars withheld] Primary School in Nairobi within Nairobi County, the Appellant unlawfully and intentionally used his finger to penetrate the vagina of A W N, a child aged 10 years. He was alternatively charged with **committing an indecent act with a child** aged 10 years, contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars of the offence were that on 3rd April 2012, at [particulars withheld] Primary School in Nairobi within Nairobi County, the Appellant unlawfully and intentionally committed an indecent act by touching the vagina of A W N, a child aged 10 years.

When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted of the alternative count of **committing an indecent act with a child**. He was sentenced to serve 15 years imprisonment. The Appellant was aggrieved by his conviction and sentence and has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted and sentenced on an alternative charge that was not established to the required standard of proof. This, he stated, was despite the fact that the court found material contradictions in the evidence placed before it thereby creating doubt as to whether the offence had actually been committed. He faulted the trial magistrate for relying on evidence which, in his view, was uncorroborated, contradictory, fabricated and speculative in convicting him. He took issue with the fact that the court failed to put his defence into consideration before arriving at the decision that he had indeed committed the offence. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, Mr. Kibe, Advocate for the Appellant, made oral submissions in support of the appeal. He told the court that the Appellant had been convicted on a defective charge. In particular, he stated that there was no allegation that the Appellant's genital organs had contact with the genital organs of the minor. He further argued that the Appellant's **"finger"** as alleged, did not fall within the definition of a genital organ under **Section 2** of the **Sexual Offences Act**. In the premises therefore, the main charge was incurably defective as it did not fall within the definition of the law, and the conviction should therefore be set aside. Mr. Kibe further argued that there could not be a valid alternative charge to an incurably defective main charge and urged the court to find the alternative charge equally defective as the particulars for both charges were the same.

Mr. Kibe further cast aspersions on the testimony of the complainant. He submitted that the evidence of the minor was uncorroborated in material particulars and was contradictory to her main evidence in that she claimed that the Appellant had penetrated her vagina and yet the doctor's evidence did not establish penetration. He submitted that the evidence of the complainant and that of the investigating officer was also contradictory. He stated that the court had used conjecture to arrive at its determination and that cogent evidence had not been adduced in support of the charge. In conclusion, he urged the court to accord the Appellant all the rights under **Articles 27** and **50** of the **Constitution** and allow the appeal.

Ms. Nyauncho for the State opposed the appeal. She submitted that the prosecution was able to prove that the Appellant, who was the complainant's teacher, committed an indecent act with the complainant, a child of tender years. She further submitted that the charge sheet was not defective as it correctly defined the offence, the Appellant understood what he was being charged with and that he had participated actively during the trial. She stated that **Section 2** of the **Act** defined the offence of indecent act as one that occurs when there is contact

between any part of the body of one person with the genital organs of another person: that is exactly what happened when the Appellant's fingers got into contact with the complainant's genitals.

On the issue of corroboration, she submitted that it was not mandatory for the evidence of a child to be corroborated as long as the court was satisfied that the child was telling the truth. She stated that during the trial, the testimony of the complainant was not shaken on cross-examination. She further submitted that the Appellant was found guilty of the alternative charge and not the main charge due to the fact that the court found the evidence of the two medical doctors contradictory and thus disregarded it.

In conclusion, she submitted that there was no evidence of pressure on the trial court and that the Appellant was accorded a fair trial. She urged the court to dismiss the appeal.

In a rejoinder, Mr. Kibe submitted that the definition of indecent assault came through an amendment to the **Act**. He stated that at the time the Appellant was charged, the definition of the offence was different from the one that had been cited by the Respondent and the issue of indecent assault was not established. He stated that the pressure referred to could be inferred from the reading of the proceedings of the trial court. He asked the court to take judicial notice of the fact that the sexual offences are emotive and to apply its mind to the evidence before it.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced by the prosecution witnesses and by the defence before the trial court, so as to arrive at its own independent determination on whether or not to uphold the conviction of the Appellant. In so doing, the court is mindful of the fact that it neither saw nor heard the witnesses as they testified and therefore cannot give an opinion as regarding the demeanour of the said witnesses. (See **Okeno –vs- Republic [1972] EA 32).** In the present appeal, the issue for determination by this court is whether the prosecution established a case for this court to convict the Appellant on the charge of committing an indecent act with a child to the required standard of proof beyond any reasonable doubt.

The facts of the case are as follows: the complainant, Ms. A W N, was at the time a child aged 10 years. Her age was confirmed by her mother, PW2 C W W, who produced a birth notification form indicating that the complainant was born on 25th December 2001. The birth notification form was produced as ***Prosecution's Exhibit No.3***. At the material time, the complainant was a Standard 5 pupil at [particulars withheld] Primary School. The Appellant was a teacher in the same school. According to her testimony, on 3rd April 2012, at about 7.00 a.m., while at the aforementioned school and while in her class, situate on the upper floor, the Appellant called her to his class, located on the lower floor. She responded to the summon. There were two other students sweeping the classroom when she got there. The complainant stated that the Appellant briefly chatted with her before thereafter pulling down her pants with one hand, and inserting his finger into her vagina. He warned her not to scream or tell anyone what had transpired. She recalled that while he was at it, another pupil walked in and the Appellant pretended to instruct her, using the same hand he had inserted into her vagina. The Appellant later closed the classroom door upon noticing the complainant was unsettled and wanted to take off. The complainant told the court that the Appellant inserted his fingers into her vagina for the second time, and when he was done, opened the door for her and asked her to leave, while warning not to tell anyone about the said incident.

The complainant told the court that although the Appellant had told her not to leave school early on that day because he was to call her again at about 4.00 p.m., she left the class and hid in the parking yard within the school compound. She left for home only when she was sure that everyone had left the school compound. The complainant went on to testify that even though the Appellant had warned her not to tell anyone about the incident, she told her friend, one E N, and upon reaching her home, narrated the incident to their house help, Ms. S N, since she felt pain while passing urine. It was the said house help who later informed the complainant's mother, C W W (PW2) about the said incident after she came home from work. PW2 then rushed the complainant to a nearby clinic, where she was advised to go to Nairobi Women's Hospital for further treatment. At the hospital, the complainant was medically examined, treated and discharged and a report prepared to that effect. The incident was then reported at Kamukunji Police Station, where PC Zahura Wachiali, PW3, was assigned to investigate the case. After concluding her investigations, she formed the view that indeed a case had been established for the Appellant to be charged with the offences herein.

When the Appellant was put on his defence, he denied committing the offence and told the court that on the day the offence was committed, he had reported to school at 8.20 a.m. and not 7.00 a.m. as alleged by the complainant. He produced a defence exhibit, a copy of the school register as evidence to that effect. He denied having made any attempts to have the matter settled out of court, but admitted to having heard the involvement of the school Headteacher and his wife in pursuit of the same.

Upon re-evaluation of the facts of this case, it was clear to the court that for the prosecution to prove its case on the charge of committing an indecent act with a minor, it was required to establish that there was contact between any part of the body of the Appellant, with the genital organs, breasts or buttocks of the complainant.

The first issue that falls for determination before this court is whether the charge was defective. **Section 134** of the **Criminal Procedure Code** provides for the ingredients of a charge sheet as follows:

> ***"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."***

It is permissible to lay offences in the alternative, as opposed to consecutively or cumulatively, where the exact acts or omissions with which an accused person is charged may constitute more than one offence. In the present appeal, the Appellant was charged with **sexual assault** contrary to **Section 5(1)(a)(ii)(2)** of the **Sexual Offences Act** and in the alternative, **committing an indecent act with a child,** contrary to **Section 11(1)** of the **Sexual Offences Act**.

The Appellant was convicted on the alternative count of **committing an indecent act with a child**, contrary to **Section 11(1)** of the **Sexual Offences Act**.

Section 2(1) of the **Sexual Offences Act** defines indecent act as ***"an unlawful intentional act which causes 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."***

The particulars of the offence are that the Appellant unlawfully and intentionally touched the vagina of the complainant, a child aged 10 years. It was evident that the charge sheet was not materially defective as the offence alleged therein is known in law. It was disclosed and stated in a clear and unambiguous manner. The Appellant was able to understand and plead to the charge and was not prejudiced in any way with the way the charge sheet was framed.

The Appellant faulted the trial court for convicting him on an alternative charge despite acquitting him on the main charge. It is trite law that where the evidence does not support the main charge, the court convicts on the alternative charge if there is sufficient evidence to support the charge. (See **Nzuki Mutambu –vs- Republic [2013] eKLR)**. Further to the foregoing, where charges are preferred against an accused person in the alternative, a conviction should be entered on one charge only and no finding should be made on the alternative count. The Appellant in this case was acquitted on the main charge and convicted on the alternative count. The variance and contradictions in the two medical reports presented as evidence before the trial court, created doubt as to whether the complainant was indeed sexually assaulted in accordance with the main charge. It was on this basis therefore, that the trial court concluded that there was contact only and thus found the Appellant guilty on the alternative count.

The Appellant faulted the trial magistrate for relying on evidence which, in his view, was uncorroborated, contradictory, fabricated and speculative in convicting him. What falls for determination before this court is whether the trial court erred in relying on the uncorroborated evidence of PW1, the victim, as the sole basis of the Appellant's conviction. Section 124 of the Evidence Act (Cap.46) provides as follows:

> ***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 accuse person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."***

This proviso is to the effect that the courts shall no longer be hamstrung by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful (See **Mohammed –vs- Republic [2006] 2 KLR 138).**

In the present appeal, the trial court conducted a *voire dire* examination in compliance with **Section 19** of the **Oaths and Statutory Declarations Act (Cap.15)**, in order to satisfy itself that the child possessed sufficient intelligence to understand the nature of the proceedings and that the child appreciates the need of telling the truth and the importance of taking the oath.

The complainant identified the Appellant as the person who had touched her vagina. The Appellant was well known to her and in fact he was one who called her and opened the classroom door for her. Her evidence, as appears from the record of the trial court was cogent, vivid and consistent in the description of what the Appellant had done to her. The trial court specifically recorded that it found the allegations of extortion by the defence as malicious and farfetched. In essence, the trial court found the complainant trustworthy and her evidence reliable. This was buttressed by the comparison between the Appellant's defence and the complainant's allegations. I therefore find that the trial court was alive to its duty under the Proviso of **Section 124** of the **Evidence Act** in convicting the Appellant on the uncorroborated evidence of the complainant.

The Appellant contends that the trial court erred in convicting him by relying on contradictory evidence. In his submissions, the Appellant stated that in the absence of incriminating evidence in the form of a certified medical report, the trial court ought to have given him the benefit of the doubt and acquitted him on both counts. Noteworthy is the fact that medical evidence is neither mandatory nor the only evidence upon which an accused person can properly be convicted. The court can convict on the evidence of the victim alone, if it believes the victim and records the reason for such belief. (See **Geoffrey Kioji –vs- Republic [2010] unreported)**.

From the record before this court, it is clear that the trial court was alive to the fact that the medical evidence adduced was contradictory, as indicated in the judgment as follows: - ***"the variance and contradictions in the two medical reports are very material to the case because they relate to how and whether the incident did occur. The said contradictions thus create doubts as to whether the complainant was indeed sexually assaulted or not***." The court disregarded the medical evidence and for that particular reason, the trial court ruled in favour of the Appellant by acquitting him of the main charge. However, there was sufficient cogent and credible evidence to convict the Appellant on the alternative charge of committing an indecent act with a child.

The Appellant contends that he was denied a fair trial and that the trial court failed to put his defence into consideration in making the decision to convict him on the alternative charge. The evidence on record clearly shows that the trial court found the Appellant's defence of extortion farfetched and malicious. The Appellant told the court that there were no disagreements between himself and the complainant or any of the complainant's family members. This led the court to arrive at the conclusion that there existed no bad blood between the two parties to warrant the complainant or her family to frame the charges against him. The Appellant further failed to adduce any evidence to support his claims of being denied a fair trial in accordance with **Article 50** of the **Constitution**. From the record of the trial court, the Appellant was fully aware of the proceedings and even had legal representation.

This court is of the view that the defence put forward by the Appellant does not dent the otherwise strong evidence adduced by the prosecution connecting him with the offence. His culpability was established to the required standard of proof beyond any reasonable doubt. His appeal on conviction lacks merit and is hereby dismissed.

As regards sentence, **Section 11(1)** of the **Sexual Offences Act** provides for imprisonment for a term of not less than ten (10) years for any

person convicted of committing an indecent act with a child. The complainant was 10 years old at the time the offence was committed. The trial court sentenced the Appellant to serve fifteen (15) years imprisonment. There was no reason why the trial court did not sentence the Appellant to serve the minimum sentence provided by the law. There were no aggravating circumstances to require the Appellant to serve a harsher sentence than the minimum provided by the law. In the premises therefore, this court finds there is justification in interfering with the custodial sentence imposed by the trial court. That sentence is set aside and substituted by a sentence of this court sentencing the Appellant to serve ten (10) years imprisonment with effect from 7th April 2015. It is so ordered.

DATED AT NAIROBI THIS 8TH DAY OF JUNE 2018

L. KIMARU

JUDGE