Njoroge v Republic (Criminal Appeal 183 of 2014)
[2018] KEHC 4929 (KLR) (Crim) (18 July 2018) (Judgment)

John Kimani Njoroge v Republic [2018] eKLR

Neutral citation: [2018] KEHC 4929 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL 183 OF 2014

GWN MACHARIA, J

JULY 18, 2018

BETWEEN

JOHN KIMANI NJOROGE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Kibera Cr. Sexual Offence No. 14 of 2013 delivered by Hon. E. Juma, Ag SPM on 8th December, 2014)

Kissing and indecently touching another person against his/her will is not an offence under section 2 of the Sexual Offences Act

The decision discussed whether it is an offence to indecently touch another person against his/her will or other parts of the body other than those provided under section 2 of the Sexual Offences Act. The court held it was not an offence to kiss and hold another person, including a minor. An offence of an indecent act created under section 2 of the Act was only committed only if the contact was between any part of the body with the genital organs, breasts, and buttocks of another person or exposure or display of any pornographic material.

Reported by Ian Kiptoo

Statutes *- interpretation of statutes - interpretation of section 2(1) of the Sexual Offences Act - definition of an offence that amounted to an indecent act - where an accused was convicted for kissing and holding a minor - claim that the evidence adduced did not disclose an offence - whether an accused person could be convicted of an indecent act that was not defined in the Sexual Offences Act - Sexual Offences Act, cap 63A, sections 2 (1) and 11.*

Brief facts

The appellant was charged with the offence of indecent act with a child contrary to section 11(1) of the Sexual Offences Act. He was charged with intentionally and unlawfully kissing on the mouth and holding the waist

of MM, a child aged 13 years, with his hands. He was found guilty, convicted and sentenced to 10 years imprisonment.

The appellant's grounds for appeal were that; the trial court erred by introducing a new definition of what constituted an indecent act; that the definition was not founded in law; that the trial court erred in failing to appreciate and find that the particulars of the charge did not support the offence in question.

Issues

i. What were the elements of the offence of committing an indecent act with a child as provided for under section 11(1) as read with section 2 of the Sexual offences Act?

ii. Whether in light of section 2 of the Sexual offences Act, kissing a minor and touching her waist could constitute particulars for the offence of indecent act with a child contrary to section 11(1) of the Sexual Offences Act.

Relevant provisions of the Law

Sexual Offences Act

Section 2 - Interpretation

"*Indecent act" means any 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."*

Section 11 - Indecent act with child or adult

(1) "Any person who commits an indecent act with a child is liable upon conviction to imprisonment for a term of not less than ten years."

Held

1. The appellant was charged under section 11(1) of the Sexual Offences Act, which set out the offence of committing an indecent act with a child. Contrary to the appellant's submissions that no offence was set out under section 11(1) of the Sexual Offences, that provision set out the offence of committing an indecent act with a child, for which the appellant was charged. Therefore, what was in issue before the court was whether the evidence that was adduced disclosed the offence charged.
2. The decisions in *Hilda Atieno v Republic* [2016] KEHC 7249 (KLR) and *Zachariah Otieno Charles v Republic* [2011] KEHC 4062 (KLR) cases could be distinguished from the instant appeal in that in both cases the appellants had been charged under section 27(1)(b)(4) of the Alcoholic Drinks Control Act, cap 121, and section 8(2) of the Sexual Offences Act, respectively, which provisions provided for penalties as opposed to defining the offences.
3. Section 2(1) of the Sexual Offences Act provided that an offence was committed if the contact was between any part of the body with the genital organs, breasts and buttocks of another person or (unwilling) exposure or display of any pornographic material. In the instant case, the evidence adduced was that the appellant held the complainant by her waist, pulled her towards him, and kissed her on the lips.
4. The complainant was categorical that the appellant only kissed her. There was no evidence that he touched her genital organ or buttocks or breasts with any of his body parts. No doubt the evidence did not disclose the offence charged. It was a case that ought not to have been filed.
5. It was unfortunate that the Sexual Offences Act did not provide for offences occasioned by when a person indecently touched another person against his/her will or other parts of the body other than those provided under section 2 of the Act . Probably it was time for such offences to be provided for as they offended the decency of a woman or a man.
6. The duty of the court was to do justice to the law. In as much as the complainant was offended by the acts of the appellant, the law as it was handed a total blow to the evidence adduced. Thus, the case was not proved beyond a reasonable doubt.

Appeal allowed.

Orders

Conviction quashed, sentence set aside and the appellant was set free unless otherwise lawfully held.

Citations

Cases

Kenya

1. *Atieno, Hilda v Republic* Criminal Appeal 104 of 2015; [2016] KEHC 7249 (KLR) - (Applied)
2. *Watu, Philip Nzaka v Republic* Criminal Appeal 29 of 2015; [2016] KECA 696 (KLR) - (Applied)
3. *Zachariah Otieno Charles v Republic* Criminal Appeal 179 of 2008; [2011] KEHC 4062 (KLR) - (Applied)

Uganda

Twehangane Alfred v Uganda [2003] UGCA 6 - (Applied)

Statutes

Kenya

1. Alcoholic Drinks Control Act (cap 121) section 27(1)(b)(4)- (Interpreted)
2. Penal Code (cap 63) section 144(1)(3)- (Interpreted)
3. Sexual Offences Act (cap 63A) sections 2(1); 8(2); 11(1) - (Interpreted)

Advocates

M/s Kigei h/b for *Mr. Muriuki* for the appellant
Mr. Sigei for the respondent

JUDGMENT

Background

1. The appellant herein was charged with the offence of indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the offence were that on July 13, 2013 at N Road in Dagoretti District within Nairobi County, intentionally and unlawfully kissed on the mouth and held the waist of MM, a child aged 13 years with his hands. He was found guilty, convicted and sentenced to 10 years imprisonment. Being dissatisfied with the conviction and sentence he proffered the instant appeal.

2. His grounds of appeal were set out in a Petition of Appeal filed on December 22, 2014. I set them out as under;

    i. the trial magistrate erred when she introduced a definition for "indecent act" not found in the Sexual Offences Act and convicted the appellant pursuant to said definition.

    ii. the trial magistrate erred in failing to appreciate and find that the particulars of the charge did not support the offence in question.

    iii. the learned magistrate erred in convicting the appellant whereas the charge and evidence did not tally.

    iv. the learned magistrate failed to consider that the doctor who counseled the complainant did not testify and psychological records were not produced that could have exonerated the appellant.

v. the learned magistrate failed to consider that the prosecution failed to establish the complainant's age.

vi. the learned magistrate failed to consider the appellant's defence.

vii. the learned magistrate failed to note that there existed serious inconsistencies and contradictions in the prosecution's case, and

viii. the sentence meted out was extremely harsh in the circumstances.

Submissions

3. The appeal was canvassed on April 18, 2018 with Mr Muriuki advocate acting for the appellant and Ms Sigei for the respondent. Both parties filed written submissions. Mr Muriuki did highlight the appellant's submissions orally. Suffice it to note, the respondent conceded to the appeal consequent which Mr Muriuki submitted only on two points, namely; (i) that the evidence adduced did not support the offence of indecent assault and (ii) the fact that the appellant's defence was not considered.

4. In the written submissions Mr Muriuki pointed to the inconsistencies and contradictions in the prosecution case pointing to the fact that the appellant gave a plausible defence which vindicated him. He submitted that the trial magistrate erred when he found that the appellant had sent PW3 to call the complainant contrary to the evidence and therefore arrived at the wrong conclusion that the appellant was trying to seclude the complainant in order to molest her. That in reaching this conclusion the court disregarded the evidence of the defence witnesses. He in particular pointed that the evidence of PW3 supported the appellant's defence. He relied on the cases of *Hilda Atieno v Republic*[2016]eKLR and *Zachariah Otieno Charles v Republic*[2011] eKLR to buttress the submission that the charge was based on non-existent offence.

5. The respondent conceded to the fact that the evidence adduced by the complainant could not support the offence of an indecent act under the Sexual Offences Act. With respect to the appellant's defence it was submitted that whereas DW3 was in the library during the incident he testified that he was doing his English examinations which he concentrated on and only looked up occasionally. That DW2 had various duties at the library and could have easily failed to notice what was going on at the library. Further that the evidence of PW3 about the appellant sending him to call PW2 clearly showed an intention on the part of the appellant to seclude the complainant. As such, the defence offered by the appellant was not plausible.

6. With regards to the complainant's age she submitted that it was sufficiently established by the oral evidence adduced. On the contradictions, it was submitted that the same were so minor and did not materially affect the strength of the prosecution case. The cases of *Philip Nzaka Watu v Republic*[2016] eKLR and *Twehangane Alfred v Uganda*[2003] UGCA 6 were cited to buttress this submission. The respondent urged the court to allow the appeal.

Evidence.

7. PW1, LM was the complainant's mother. Her testimony was that on July 13, 2013 she dropped her children at the Language Center for [particulars withheld] classes and went to work. When she returned at 11.00 AM her two daughters were the first to return to the car when her son arrived and informed her that one of her daughter's, PW2, was being called back by the librarian to go and pick a book. That PW2 ran into the library and came back holding her waist. When she enquired as to what had happened she told her that the librarian had kissed her. She reported the matter to the receptionists who were not co-operating. She thus confronted the librarian and while the administrator's tried to

calm her down she declined to discuss the issue with them and reported the matter at Kilimani Police Station where she recorded a statement as did the complainant and her son. The complainant was still traumatized and she had to call a psychologist to counsel her. She testified that the complainant was 13 years old and was born on June 10, 2000.

8. PW2, MGM in sworn testimony testified that she was a student and was born in the year 2000. She corroborated the testimony of PW1. She added that when she went back to the library she saw that the book she had been asked to go back for was not hers. She found the appellant at the counter who held her by the waist and told her he loved her and pulled his body next to hers and kissed her. She freed herself and ran to the car where she told her mother what had occurred. Her mother confronted the appellant and they later reported the matter at the police station. She testified that there was another man at the library but he was far and could not see what was happening. That she used to go to the Language Centre every Saturday where the appellant worked. She had seen the appellant on two occasions.

9. PW3, JM was a brother to PW2. He corroborated the testimonies of PW1 and PW2. He confirmed that the appellant called him to ask him to call PW2 to go back to the library to collect a book she had left behind. He also stated that PW2 told her that the appellant had touched her waist with both hands.

10. PW4, Kilimani Police Station visited the appellant's place of work on July 15, 2013 with a view to arresting him. He did not find him but requested that he reports to the police station which he did on the following day. PW5, PC Susan Ndungu also Kilimani Police Station Gender and Children's desk had also been assigned to arrest the appellant. She investigated the case. She interrogated the appellant who denied committing the offence although he did admit that PW2 was at the library on the material date.

11. After the close of the prosecution case, the court ruled that a prima facie case had been established and put the appellant on his defence. He testified as DW1 in his case and called three other witnesses. He stated that he was employed at the Language Centre as a librarian and had been working there for 17 years. He recalled that on July 13, 2013 he was on duty and that he served PW2, PW3 and their sister at the library at around 10.00 AM. That PW2 and PW3 sat together reading books for about 30 minutes after which PW2 asked if she could use the computer and the three of them browsed on the computer before she returned to ask if she could print a song. When she had picked up the print out they saw the mother drive in and the two girls left first. That he noticed a book on the table and asked PW3 if the book was his but it was not. He asked PW3 to ask his sisters if they had left the book. PW2 came to the library and informed him where she had found the book before bidding him goodbye. He stated that he was far from PW2 who stood next to the door that was open. After a few minutes he heard noises and suddenly a bang as the library door was opened. A lady stormed in and asked who was messing with his daughter. He was in shock and the lady threatened to hit him with a chair. A teacher intervened. He recalled that there was a Sudanese man who was sitting his placement examination. He testified that the book that was left behind did not belong to the institution. He recalled that it was the first time he saw the children in the library but he knew their father. He however acknowledged that he used to see the children playing outside.

12. DW2, Magdalene Njeri Kimaru was a receptionist at the Language Center who manned the front desk. She testified that the reception desk was five or six steps from the library and that inside the library is a counter at which the librarian sits. She recalled that on July 13, 2013 she was at work and that she saw the children access the library at around 10.00 AM. That at 10.30 AM a new student arrived with the intention to join the English class. She escorted him to the library where she saw the appellant and the three children. She set him at a desk with the placement examination and left. She testified that after a while she saw the children ran towards the parking lot. She was pinning a timetable on the notice

board which was seven or eight steps from the library when she saw PW2 enter the library. She also saw the appellant standing at the counter. After about two minutes she saw the girl ran to the parking. She had just gotten back to her office when a lady came in and asked for the librarian. She also saw PW2 covering her mouth with both hands. The lady went into the library and she could hear a commotion at the library and a teacher went in. She stated that she had never seen the children in the library before.

13. DW3, Mohamed Elbushra from Khartoum, Sudan testified that on July 13, 2013 he was studying at the Language Centre and was sitting an English examination. He saw the appellant and about three children in the library. He was seated about four meters from the appellant. That he never witnessed the appellant touch a child as he sat inside the counter while the children were outside. He again stated that he was busy doing his exams and did not look up to see what was happening. That he could not see the reception area from where he was seated.

14. DW4, Masala Mufungizi was of Congolese descent and a teacher at the Language Centre. He was working on the material day and had just completed a class at 11.00 a.m. when he heard a quarrel in the library. He entered the library and found the appellant arguing with a lady who was holding a chair. He pleaded with her not to hit the appellant and she put the chair down. He asked the lady to accompany her to the staff room. She informed him that the appellant had kissed her daughter. He stated that he had known the appellant for about two years and had never heard adverse comments about him.

Determination.

15. I have appraised myself with the evidence on record and the respective submissions. I have concluded that the issues arising for determination are whether the evidence adduced supported the charge of an indecent act under the *Sexual Offences Act*, whether the appellant's defence was considered and whether the offence was proved beyond a reasonable doubt.

16. On the first issue for determination, the appellant's submission, which the respondent conceded to, was that the trial magistrate introduced in her judgment a new definition of what constitutes an indecent act. That the definition was not founded in law and that the appellant was charged of committing an offence not known in law. He argued that the repealed section 144(1)(3) of the *Penal Code*, setting out the offence of Outraging the modesty of a female would have sufficed. The respondent in its submission set out the definition of an indecent act as provided in section 2(1) of the *Sexual Offences Act* and submitted that what was adduced in evidence could not constitute the offence.

17. The appellant was charged under section 11(1) of the *Sexual Offences Act*, which sets out the offence of committing an indecent act with a child as follows;

> "Any person who commits an indecent act with a child is liable upon conviction to imprisonment for a term of not less than ten years."

18. Clearly the section provides for an offence, which is contrary to the appellant's submissions that no offence is set out under the provision. What is in issue therefore is whether the evidence that was adduced disclosed the offence charged. The appellant's counsel, in advancing the argument cited the cases under reference. They can distinguished from the present case in that in both cases of *Hilda Otieno* and *Zechariah Otieno Charles* (*supra*) the appellants had been charged under section 27(1)(b)(4) of the *Alcoholic Drinks Control Act, 2010* and section 8(2) of the *Sexual Offences Act* respectively which provisions, as was argued, provided for penalties as opposed to defining the offences.

19. It now behooves the court to define what constitutes the offence of an indecent act. The definition is found at section 2(1) of the *Sexual Offences Act* defines in the following words;

> " indecent act" means any 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."

20. In the instant case, the evidence adduced in court according to PW2 was that the appellant held her by her waist, pulled her towards him and kissed her on the lips. Under the provision, an offence is constituted if the contact is "between any part of the body with the genital organs, breasts and buttocks of another person or (unwilling) exposure or display of any pornographic material". The complainant was categorical that the appellant only kissed her. There entirely lacked the evidence that he touched her genital organ or buttocks or breasts with any of his body parts. No doubt the evidence did not disclose the offence charged. It is a case that ought not to have been filed.

21. It is unfortunate that the *Act* does not provide for offences occasioned by when a person indecently touches another person against his/her will of other parts of the body other than those provided under section 2. Probably it is the ripe time that such offences are provided as they offend the decency of a woman or a man.

22. Needless to state is that the duty of the court is to do justice to the law. In as much as the complainant was offended by the acts of the appellant, the law as it is hands a total blow to the evidence adduced. I accordingly find that the case was not proved beyond a reasonable doubt. I quash the conviction, set aside the sentence and order that the appellant be forthwith set free unless otherwise lawfully held.

DATED AND DELIVERED THIS 18TH DAY OF JULY, 2018

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. M/s Kigei h/b for Mr. Muriuki for the appellant.

2. Mr. Sigei for the respondent.