



**REPUBLIC OF KENYA**

**IN THE HIGH OF KENYA AT NYERI**

**CRIMINAL APPEAL NO. 34 OF 2015**

**JOSEPH NJAGI MACHARIA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

(Appeal from the judgment of the Chief Magistrate's Court at Nyeri (C.Mburu R.M.) delivered on 12<sup>th</sup> June, 2015 in Criminal Case No. 13 of 2014)

**JUDGMENT**

1. The appellant, **Joseph Njagi Macharia** was charged with the offence of attempted defilement contrary to **Section 9(1)(2) the Sexual Offences Act**. The particulars of the charge were that on the 20<sup>th</sup> March, 2014 at [Particulars withheld] Village in Tetu District within Nyeri County he intentionally attempted to cause his member to penetrate the private parts of **MNG** a child aged 3 years.

2. In the alternative, the appellant was charged with Indecent Act with a child contrary to **Section 11(1) of the Sexual Offences Act, 2006**.

3. The facts of the case as recorded by the trial magistrate are that the complainant (**PW1**) told the court that on the material date she was headed to school from home when the appellant grabbed her and took her into the coffee plantation where he removed her clothes and touched her private parts; one Baba Linnet (**PW3**) found them in the coffee plantation; the appellant attempted to run away but was apprehended by **PW3**; the complainant was taken to hospital for a medical examination which was carried out by **PW6** and a P3Form was completed; The appellant was arrested and subsequently charged in court; he was tried and convicted at the Resident Magistrates Court on the alternate charge and was sentenced to ten (10) years imprisonment.

4. Being aggrieved by both conviction and sentence, the appellant filed a petition of appeal and raised the following grounds of appeal as summarized hereunder;

(i) The evidence adduced was contradictory, inconsistent and unreliable;

(ii) The evidence of the minor was uncorroborated;

(iii) The offence of committing an Indecent Act with a Child was not proved beyond reasonable doubt;

(iv) The trial court failed to consider his mitigation; that the jail term of 10 years was harsh; and prayed for a reduction in sentence;

5. At the hearing of the appeal Mr Theuri appeared for the appellant whereas Mrs Gicheha appeared for the State; hereunder are the parties respective rival submissions;

**APPELLANTS SUBMISSIONS**

6. It was the Appellant's case;

(i) That the alternate charge was not proved beyond reasonable doubt; the record reads **"the minor demonstrates where accused touched"**; that it was not enough to have said that the minor demonstrated; the trial court ought to have indicated which part of the body of the minor the appellant is said to have touched; under cross-examination the minor stated that she had her clothes on during the ordeal; therefore if she had not taken off her clothes it would not have been possible for the appellant to touch her private parts; the onus was on the prosecution to prove that the appellant had unlawful and intentional contact with the child's genital organs; this key ingredient was not proved;

(ii) The minor's evidence was contradictory; she first stated that the appellant removed her clothes and then he touched her but under cross-examination she retracted and stated that no one removed her clothes; had the trial magistrate evaluated the minor's evidence and sought independent credible evidence to corroborate her evidence the trial court would have come to a different conclusion;

(iii) **PW3** was untruthful in his evidence he said that he stumbled upon the appellant trying to undress the minor; yet the minor had told the court that no-one had removed her clothes; he also gave different versions as to where he met the child and the appellant; one version was that the appellant fled into the coffee plantation and he gave chase the other version was that the incident occurred at the roadside; his evidence was also not consistent as to where he was found by **PW2** and **PW4**; the different versions cast doubt as to the truthfulness of **PW3** and the trial court should have approached it with caution and it should not have been relied upon as the conviction was against the weight of the evidence adduced;

(iv) The evidence of **PW2**, **PW4** and **PW5** was hearsay as they merely relied on what they were told by **PW3**; **PW4** who was the Assistant Chief had asked the appellant what had transpired but the appellant had been unable to speak because the members of public were baying for his blood; the evidence of **PW5** who was the Investigating Officer was that he re-arrested the appellant from the Assistant Chief; his evidence was a repetition of what he had been told and he did not adduce any evidence as to how he conducted the investigations;

(v) The only evidence tendered on the offence was that of the minor which evidence is challenged; the other evidence was full of speculation as to what happened on that date; speculation cannot provide a basis for inferring guilt; caselaw relied on **Micheal Mugo Musyoka-vs-R Nyeri CA No.89 of 2013 (unreported)**; the court held that before a court of law can convict a person of an offence it ought to be satisfied that the evidence overwhelming points to his guilt;

(vi) In this instant case there are lots of doubts as to what happened on that date; and the doubts must be resolved in favour of appellant and Counsel urged the court to allow the appeal and that the conviction be quashed;

### **RESPONDENTS SUBMISSIONS**

7. In response the following submissions were made;

(i) An indecent act is defined in Section 11 of the Sexual Offences Act as an act when any part of the body of a person comes into contact with the genital organs of another but does not include an act that causes penetration;

(ii) Did the appellant have any contact using any part of his body with the genital organs of **PW1**; the minor stated that the appellant touched her private parts using his right hand and she also demonstrated to the trial court what she meant; the question is answered that the appellant used his hand to touch the minor's private parts; the offence was proved beyond reasonable doubt;

(iii) On the contradictions as to whether the clothes were removed or not the Act is silent on the state of undress; as for the evidence of **PW3** was that the appellant had taken the minor to a coffee plantation; that he saw the appellant squatting and the minor was standing and that when he saw **PW3** he started running and that he gave chase; that the running took place in the coffee plantation when he caught up with the appellant upon questioning him the appellant stated that he was taking the minor to school; this claim was refuted by **PW2** the mother of the minor who stated that she had not instructed anyone to take her child to school;

(iv) The question was what was the appellant doing with a child aged 3 years in a coffee plantation; the only conclusion was that the appellant had evil intentions and had **PW3** not interrupted he could have done more harm to the minor;

(v) The appellant never denied that he was at the scene where the offence took place; that it was not a case of mistaken identity; that in his defence the appellant tried to shift the case onto **PW3** that it was in fact **PW3** who was found trying to defile the child; but all evidence pointed to the appellant being identified as the perpetrator;

(vi) Counsel urged the court to uphold the conviction and sentence of the lower court and that the appeal be dismissed;

### **ISSUES FOR DETERMINATION**

8. After taking into consideration the submissions made by both Counsels the following are the issues that this court has framed for determination;

(i) Whether the prosecution proved the key ingredients of the alternate charge to the desired threshold;

(ii) Whether the evidence adduced by the prosecution was contradictory, inconsistent and unreliable; whether the conviction was unsafe;

### **ANALYSIS**

8. This being the first appellate court it behoves me to re-evaluate the evidence on record and to reach an independent conclusion. Refer to the case of **Okeno vs R (1972) EA 32**.

***Whether the prosecution proved the key ingredients of the alternate charge;***

9. An indecent act is defined at Section 11 of the Sexual Offences Act as;

***“ an act when any part of the body of a person comes into contact with the genital organs of another but does not include an act that causes penetration”***

10. Did the appellant have any contact using any part of his body with the genital organs of **PW1**; the minor stated that the appellant touched her using his right hand and she also demonstrated to the trial court what she meant; the question is answered that the appellant used his hand to touch the minor’s private parts; the record reads ***“the minor demonstrates where accused touched”***; it is this courts considered opinion that it was not enough for the trial court to have said that the minor demonstrated; it ought to have gone further and indicated on the record exactly which part of her body the minor had demonstrated to it, that the appellant is said to have touched;

11. The minor also stated that she had her clothes on during the ordeal; to effectuate the intention he would have had to either partially undress the minor or remove her underpants so as to attain his objective; these actions or steps taken would have gone to demonstrate the appellants intention and or objective; if any item of clothing had not been taken off would it have been possible for the appellant to have touched her private parts; this evidence on the state of dress raises doubts as to how the appellant could have effectuated the offence;

12. The above coupled with the absence of a narrative on the court record by the trial court on **PW1s** evidence as to the part of the body that was touched raises more doubts in the prosecution’s case.

13. The onus was on the prosecution to prove that the appellant had unlawful and intentional contact with the child’s genital organs; this court is satisfied that the prosecution failed to prove this key ingredient of touching to the desired threshold;

14. This ground of appeal is found to have merit; and it is hereby allowed;

**Whether the prosecution witnesses evidence was contradictory/ inconsistent;**

15. **PW3** who was at the scene of crime stated in his evidence that he was heading to mill his coffee and came across the appellant holding the complainant; he then went on to say that the appellant ran and he gave chase; the exact words he used in his testimony are as follows;

***“As I was nearing the scene, I saw a person pick the child and come away with her while holding her. I got close to the man. He then dropped the child and fled alone. I gave chase but left the child behind. The person fled to the coffee plantation as I gave chase.....”***

16. From the above extract it can be deduced that **PW3** met the appellant on the road and then gave chase into the coffee plantation; the evidence of **PW2** was that **PW3** told her that ***“ he found Joseph in the coffee plantation as he tried to undress M”***; the evidence of **PW4** the chair of the Nyumba Kumi initiative likewise was that **PW3** told him that ***“he found Joseph in the coffee farm”***; the Investigating Officer (**PW5**) in cross-examination confirmed that he visited the scene of crime and states ***“I did go to the scene”*** but did not expound further in his evidence on the details of the crime scene as whether it was the coffee plantation as indicated by **PW3** or whether it was by the roadside;

17. The other inconsistency that arises in the prosecution evidence relates to whether the minor was undressed; the minor states that she was not undressed by the appellant yet **PW3** went on to tell **PW2** as she said in her testimony that he had found the appellant trying to undress the minor;

18. Therefore the only evidence tendered on the offence was that of the minor which evidence is challenged; the evidence of **PW3** is found to be mired with inconsistencies and raises doubt as to the credibility of this witness as to what actually transpired on that material date; the other evidence of **PW2** and **PW4** was hearsay as they relied on what **PW3** told them;

19. Before a court of law can convict a person of an offence it must be satisfied that there is overwhelming evidence that points to his guilt; refer to the case of **Micheal Mugo Musyoka-vs-R Nyeri CA No.89 of 2013 (unreported)**; in this instant case there are lots of doubts as to what happened on that date; had the trial court reconciled the contradictions and inconsistencies in the evidence of **PW1, PW3** and **PW2** it would have found the evidence doubtful and incapable of supporting the appellants conviction; it is trite law that the doubt must be resolved in favour of appellant;

20. For those reasons this court is satisfied that there were material contradictions and inconsistencies in the evidence of **PW1** and **PW3** that raises sufficient doubt in the prosecutions’ case; and the conviction is found to be unsafe;

21. This ground of appeal has merit and is hereby allowed.

**FINDINGS**

10. For those reasons this court makes the following findings;

(i) There were material contradictions and inconsistencies found in the evidence of **PW1** and **PW3** that cast doubt to the prosecutions’ case; the conviction is found to be unsafe;

(ii) This court finds that the prosecution failed to prove its case on the alternate charge to the required and desired threshold.

**DETERMINATION**

11. The appeal is found to have merit and it is hereby allowed;

12. The conviction is hereby quashed and the sentence set aside; the appellant be set at liberty forthwith unless otherwise lawfully held;

Orders accordingly.

**Dated, Signed and Delivered at Nyeri this 8<sup>th</sup> day of November, 2018**

**HON. A. MSHILA**

**JUDGE.**