REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL APPEAL NO. 45 OF 2016

BETWEEN

C O E..APPELLANT

AND

REPUBLIC...RESPONDENT

(Being appeal from original conviction and sentence of CM's Court in Homa Bay Criminal Case No.12 of 2015 dated 23rd March, 2016 – Hon. S. Ngungi, PM)

JUDGMENT

1. **C O E** (the appellant) was convicted on a charge of committing an Indecent **Act** with a child contrary to **Section 11(1)** of the **Sexual Offences Act No.3 of 2006**.

2. The particulars of the charge stated that on 28th day of July 2015 at [Particulars Withheld] village in Homa Bay, he intentionally touched the breasts and vagina of **BAT**, a child aged 15 years.

3. The appellant denied the charge, and after trial in which 8 witnesses testified on behalf of the prosecution, and the appellant was the only defence witness, he was sentenced to a prison term of 20 years.

4. **BAT** (PW1) does not go to school, but she recalled that one night while at home the appellant (whom she knew before) inserted his male organ into her vagina after removing his clothes and her pants, then laying her onto the ground. When she protested that he was hurting her, he said he was only inserting his organ into hers, and she should wait.

5. The incident took place in a shamba belonging to **BAT'**s parent and after the appellant had accomplished his act, he ran away.

6. It was her testimony that she was wearing a green blouse and a skirt which she identified in court. She also identified a white torn stained panty.

7. **M A T** (PW2) is the mother of **BAT**, and she testified that on 28/07/2015 she left her three children at her home in [Particulars Withheld] village at about 8.00 p.m.to go to the posho mill. **BAT** had been instructed to light the jiko. However when she returned, she did not find BAT at home. Her younger son named **M** said a visitor had come and taken BAT away to buy her sweets at the nearby shop.

8. PW2 got suspicion and begun calling out **BAT** by her nickname A – she answered but her voice came

from the opposite direction and not the shops. Since **BAT** was epileptic her mother feared that she may have had a fit, so she sent **M** to check on her. **M** left and returned to report that he had found the visitor lying on top of **BAT** in the shamba.

9. PW2 went to the shamba (which was a maize plantation) and as she approached, she saw the appellant stand up, take his trousers and run away while **BAT** lay on the ground. As he ran away PW2 asked him why he had done such a thing to her. PW2 noticed that **BAT** had soil on her back and the girl explained to her how the appellant had lured her with a promise of going to buy her sweets but diverted into the shamba. **BAT** informed her mother that her private parts were hurting.

10. PW2 reported the incident to her brother-in-law **D O** and a search was mounted for the appellant. The search team (which included PW2) went to the appellant's house and found some of his dirty clothes (a red T-shirt and a grey trouser) at his door step, and PW2 took these away and identified them as the ones she'd seen him wearing.

11. **BAT** was taken to hospital and according to PW2 there was some watery fluid in her private parts and some foul smell. PW2 told the court that **BAT** was 15 years but she did not have her birth certificate or notification of birth as they got burnt – she however was categorical that BAT was born on 11/4/2005.

12. **P O** (PW6) is **BAT**'s 7 years old brother and he confirmed that on 28/07/2015, at around 7.00 p.m. he was at their home in the company of **BAT**, as their mother had gone to the posho mill. He saw the appellant came home and take away **BAT** and infact **BAT** (who was then carrying their sibling) handed over the baby to PW6 saying the appellant was going to buy her lollipop.

13. He confirmed that upon his mother coming back and finding that **BAT** was missing she called out her name and **BAT** responded. He also confirmed that he was sent to check on **BAT** as their mother feared she may have suffered an epileptic fit and fallen on the shamba.

14. When he got to the shamba he found the appellant on top of **BAT**, so he went and informed their mother.

15. **PW3 D O O** told the trial court that on 28/7/2015 at about 8.00 p.m., PW1 reported to him that she had found the appellant on top of her daughter and that he had run away. A search was mounted but it turned out the appellant had already been arrested and was at Makongeni Chief's camp. PW3 went with the child he positively identified the appellant as the person who had defiled her. On cross examination PW3 confirmed that when he saw the girl, her clothes had soil.

16. **CHARLES KOBIBO** (PW4) a village elder in **MAKONGENI** received a phone call from BAT's father alleging that the appellant had defiled his daughter. Since PW4 knew the appellant he got assistance from fellow villagers who helped to apprehend the appellant and he was taken to the Chief's office. The child and her mother were called, and they came with clothes which they claimed the appellant had worn during the incident.

17. The Assistant Chief of **ASEGO** sub location – (**TOM MORRIS ONDIEK**) who testified as PW5 confirmed that on 29/7/2015 PW4 went in his office accompanied by 4 other people i.e. the girl's parents, the girl and the appellant who all claimed that the appellant had defiled the girl. They also had some muddy clothes which they said the appellant had been wearing.

18. **MICHEAL OCHOLLA** (PW7) a Senior Clinical Officer at Homa Bay District Hospital produced a P3 form filled and signed by Dr. Ray Kajwang who had examined BAT. The evidence presented was that BAT had suffered epilepsy since 6 months after birth, and had difficulty speaking and future mental impairment.

19. A physical examination found bruises on the right upper shoulder – about one day old, and the labia majora was tender but there was no evidence of penetration. A high vaginal swab did not find any spermatozoa but nonetheless BAT was put on past exposure prophylaxis.

20. The appellant was examined and a HIV test undertaken found he was HIV positive. On cross examination PW7 stated:-

> **"No evidence of penetration. I would not say that the injuries to the complainant were a result of an epileptic fall as she said in her testimony that a struggle ensued between her and the aggressor and that's how she sustained the injuries."**

21. **PC DAISY MUTUKU** (PW8) who received the report about the incident confirmed that she escorted both the appellant and BAT to hospital for examination. She was also given the clothes both parties had worn at the time of the incident – the same were produced in court.

22. In his sworn testimony the appellant told the trial court that on 27/07/2015 he left Migori for Homa Bay to visit his mother who is known as A. It rained heavily so he spent the night in Homa Bay. On 28/07/2015 while on his way at the stage, he met two men who stopped him and asked him his names. After he identified himself, they told him he was required at the police station and they took him there. He was locked up then charged over something he didn't even know about.

23. On cross examination he said he did not know BAT and he had never seen her – he only saw her in court when she came to testify.

24. The trial magistrate upon considering the evidence, noted that PW2 and PW6 were consistent as to how they found the appellant in the maize plantation and PW1 lying on the ground. The trial magistrate further pointed out that PW6's evidence as to how he found the appellant on top of BAT was clear and cogent – the appellant was not a stranger to him as he had earlier gone to their house and taken BAT away under the pretext that he was going to buy her sweets.

25. The trial magistrate doubted that PW1, PW2 and PW6 could have framed the appellant with evidence which she described as being **"so believable and seamless."**

26. She observed that the demeanour of the respective witnesses struck her as persons who were truthful and had not exhibited any grudge in court.

27. The appellant's defence was considered and dismissed as he had not suggested at any time during cross examination of the witnesses that he wasn't within the vicinity. The trial magistrate observed that indeed PW2 found the appellant's muddy clothings at his door step and it was significant that –

> **a) He didn't allude to the fact that PW2 did not know his house.**
>
> **b) Those were the clothes he was wearing on that day.**

28. The trial magistrate however noted that there was no evidence of penetration but from the girl's description of what took place, confirmed by the tenderness of the labia majora, it proved that the appellant's penis did come into contact with **BAT'**s vagina, hence the conviction in a charge of committing an indecent act with a child.

29. The appellant challenged these findings on grounds that he was not served with witnesses statements at plea, and the trial magistrate failed to consider that the evidence was contradictory and uncorroborated, and that no age assessment was done.

30. At the hearing of the appeal, the appellant filed written submissions in which he argued that the prosecution case was not proved to the required standard as the complainant's age was not proved.

31. He also submitted that the date of the incident was not known as the complainant was not even aware of the date and this meant that he was just framed up for reasons best known to **BAT**'s parents. It was his contention that the charge of defilement was not proved.

32. He also made additional oral submissions stating that he never got to hear what PW1 said in court, so he did not cross examine her properly. Further that the panties PW2 claimed to have recovered were found at a place other than his residence and no one said they were his property.

33. In opposing the appeal, Mr. Oluoch on behalf of the State submitted that the oral submissions by the appellant were self defeating as the appellant could not claim that he did not hear what PW1 stated then question what was said in court. Counsel pointed out that the record showed clearly that the appellant fully participated in the trial and cross examined PW1.

34. Counsel urged this court to consider the evidence of PW6 who said he went to look for BAT thus:-

> **"I went and found O on top of ....."**

and to link this with the evidence of their mother PW2 who said:-

> **"As I approached, I saw him stand up, take his trouser and run away."**

35. It was his contention that all the three witnesses had known the appellant prior to the incident and recognized him. Infact PW2 addressed him.

36. As regards the sentence, counsel submitted that although the provision is that the sentence should not be less than 10 years, and that the 20 year sentence was not illegal, the trial court ought to have paid regard to the constitutional provisions as well as **Cap 2** regarding meting the least sentence available.

37. I have reviewed and analysed the evidence presented before the trial court, and the analysis by the trial magistrate leading to the conclusion in the matter. I have also paid due regard to the submissions presented by the appellant and the State Counsel.

38. It is not clear to me what the appellant means by the statement that he did not hear what PW1 said. He never raised the same before the trial court, and infact he had been supplied with witness statements on 13/8/2015 which were to guide his mind on the nature of evidence PW1 was going to present.

39. Furthermore the appellant cross examined PW1 and I concur with Mr. Oluoch that this limb of his argument is an afterthought and is self defeating. There was a consistent flow of events by PW6, PW2 and PW1 and the flow of events that as the trial magistrate observed the chain of events linked so well that it could not have been stage managed.

40. Indeed the trial magistrate took into account the fact that there was no evidence of penetration, which is why the appellant was convicted on a charge of indecent act with a child – he had been in the prelude of committing defilement but fell short - he indeed caused his male sexual organ to get into contact with **BAT**'s genitalia having removed her underwear and his as well.

41. The Sexual Offences act defines an indecent act at **Section 2** as:-

> **"an unlawful intention act which causes –**
>
> **Any contact between any part of the body of a person the genital organs of another ... but does not include an act that causes penetration."**

42. As regards the date of the offence all the prosecution witnesses were consistent that it was 28/7/2015. PW1 indicated that she did not go to school, and even though she could not place a date as to the event, she was very categorical, and gave a graphic detailed description of what took place, and that failure alone was not prejudicial to the prosecution case.

43. As regards the girl's age, her mother explained why her birth records were not readily available – the same having been burnt. However her mother was emphatic that she was born on 11/04/2006 but the

medical officer was able to give an age estimate of 15 years going by the history given.

44. Indeed all the medical records produced constantly gave her age as 15 years. I do not know whether the appellant suggests that because a formal age assessment was not done, then what he did was legal or whether he believed she was over 18 years. He never raised such a defence in the trial court – but of greater significance is that for this offence there is no ascending order of sentence pegged to the age of the victim. I am of the view that the lach of a formal age assessment did not remove **BAT** from the minor bracket.

45. Consequently I find that the conviction was safe and it is upheld.

As regards the sentence Article 50 (2) provides:-

> **"Every accused person has the right to a fair treatment which includes the right -**
>
> **(p) to the benefit of the least severe of the prescribed punishment for an offence ..."**

46. Under **Section 11 (1)** of the **Sexual Offences Act** the least available sentence is 10 (Ten) years and the trial magistrate ought to have considered this, or given a reason why a sentence other than the least prescribed was warranted. Since no reason was given, I find it prudent to set aside the 20 years sentence and substitute it with 10 years sentence which shall run from the date of conviction and it is only to this extent that the appeal succeeds.

Delivered and dated this 24th day of March, 2017 at Homa Bay

H. A. OMONDI

JUDGE