REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 30 OF 2016

P. M. M.

VERSUS

REPUBLIC

JUDGEMENT

The appellant was charged with two counts of sexual assault contrary to section 5 (1) (a) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence for each count are as follows: -

> Count I: On diverse dates between the month of May 2015 and December 2015 at [particulars withheld] Village in Kilifi County intentionally and unlawfully used his fingers to penetrate the anus of R.K. a child aged 6 years.
>
> Count II: On diverse dates between the month of May 2015 and December 2015 at [Particulars withheld] Village in Kilifi County intentionally and unlawfully used his fingers to penetrate the vagina of S.Z.M a child aged 10 years.

The trial court convicted the appellant on each count and sentenced him to serve five years imprisonment. The sentence is running concurrently. The grounds of appeal as amended are that: -

1. The prosecution evidence was unreliable and made up.

2. There was no link of the appellant's arrest to the case.

3. The prosecution did not prove its case beyond reasonable doubt.

4. The trial court did not consider the defence evidence that was reliable.

In his submissions, the appellant states that there was a dispute between the complainants' mother and the appellant. That is the reason why the appellant was charged as each one of them wanted to keep the children. PW1 was the appellant's wife and she coached the children to implicate the appellant who is their father. The complainants were not the only female grandchildren in the homestead as per the defence evidence. There was evidence that the door used to be locked and it is not clear how the appellant could have committed the offence. The defence evidence is reliable but was not considered.

The State opposed the appeal. It is submitted that the charges were not framed. All the evidence is corroborated. The trial court considered the evidence of the defence. It is further submitted that the

prosecution proved its case beyond reasonable doubt. The minimum sentence under section 5 (2) of the Sexual Offences Act is 10 years imprisonment and the state would like the sentence to be enhanced.

This is a first appeal and the court is required to evaluate the evidence and make its own conclusion. Before the trial court PW1 P. M.M is the mother of the two complainants and an x-wife to the appellant. She testified that the appellant is the father of the complainants. They separated in 2011. He used to stay with children until January 2015 when the appellant decided to keep the children. She did not visit the children at Kilifi in 2015 until December that year. She wanted to celebrate Christmas with children. She was living in Malindi while the appellant and the children were living in Kilifi. She got information that the appellant used to touch the children inappropriately whenever drunk. They went to the children's office but the officer decided to give custody to the appellant. She informed the officer that the children were being indecently assaulted. The matter was reported to the Kilifi police station. It is her evidence that PW2 informed her that the appellant used to put his fingers on her vagina and also used to put his fingers on PW5's anus. The children were taken to hospital and examined.

PW2 S.P. testified under oath. She was nine years old and a class four pupil. She informed the court that the appellant is her father. She used to live with the appellant, her grandparents, her aunt and her sister PW5. Her evidence is that she used to sleep at her grandmother's house. They had their own bed. At times their grandmother was not there. At night, the appellant would go to their room and insert his fingers in her private parts. He warned her not to tell anyone or he would beat her up. She told her grandmother who did nothing. She used to talk to her mother on phone and she asked her to go and collect them. She also saw the appellant putting his fingers in PW5's anus. Although the door used to be locked, at times it was not locked.

PW3 DR. MOHAMED YUNIS was based at the Kilifi County hospital. He produced P3 form for the complainants and post rape care forms. The forms were filled by his colleague Dr. Busra. The report shows that PW2's hymen was not intact. The incident was reported late and there was possibility that any injuries to PW2 and PW5 could have healed. The anus of PW5 was examined and found to be intact.

PW4 CPL. CLARAH BUGO was stationed at the Kilifi police station. She investigated the case. The case was reported on 12.1.2016. The complainants' age was assessed and the medical evidence indicated that the children were sexually assaulted. She was informed by the children that the assault took place during the second term of school. That is why the charge sheet gave the date of the offence as between May 2015 to December 2015. The children were threatened by the appellant. PW5 R.M was six years old. She gave unsworn evidence due to her age. She told the court that the appellant put his fingers in her anus. He told her that he would beat her if she told anyone else about the act. They never used to lock the bedroom door but would lock the main door. The incident occurred at night. The appellant told them not to scream.

In his unsworn defence the appellant testified that he is a fisherman. He relied on the statement of PW1. He told the court that PW1 was told by a neighbor that the appellant used to sexually assault the children. He appeared before the Children Office and he was given custody of children. The charge sheet does not give the specific date of the offence. PW1 framed him. DW2 M. M is the appellant's mother. She testified that she used to live with complainants. She never heard of the complaints against the appellant. She has older grandchildren who have never complained that they were defiled. She never used to open the door whenever they were asleep. She slept with the children in the same room. DW3 K. M testified that she used to live with the children. The house has two doors. They would go to sleep at 8.00 pm and they would lock the door.

This court has to consider whether the prosecution proved its case beyond reasonable doubt. According to the appellant the case was framed by PW1 so that she could take custody of the children. It is his submissions that the case was not proved beyond reasonable doubt. The evidence of PW1 is that the children told her that their father used to sexually assault them. She had heard that issue from her aunt who was to testify but did not. PW2 testified that the appellant used to put his fingers in her vagina. The incident occurred at night. PW5 testified that her father used to put his fingers in her anus. She testified that she had not been coached to implicate her father. It is clear that the children used to live with the

appellant and the defence witnesses. It is also established that the children used to share a bed and at times DW2 would not be present.

There is the medical evidence to the effect that PW2's hymen was not intact. The medical evidence is to the effect that PW2 was sexually assaulted. With regard to PW5 the assault took place in the anus and there is no hymen. According to PW3 it took a long time for the incident to be reported and PW5 could have had her injuries healed. The defence evidence is to the effect that this is a framed up case. PW1 wanted to take custody of the children and came up with the charges.

The evidence on record is clear that the children used to stay with their appellants from January, 2015. PW1 did not visit the children until December 2015 when she went to ask for them so that she could spend Christmas with them. That is when the issue of sexual assault came about. The charge sheet indicate the appellant was arrested on 12.1.206. The evidence of the investigating officer is that the case was reported on 12.1.2016. Before that time there was no dispute between PW1 and the appellant. PW1 was not disputing the fact that the appellant was staying with the children. In view of the complaints given to her by the children and the aunt who did not testify, PW1 decided to report to the Children's Office so that she could take custody of the children. When custody was given to the appellant, PW1 revealed the issue of sexual assault. The matter was reported to the police and the appellant was arrested on the same day.

From the evidence on record it is established that PW2 and PW5 were sexually assaulted. Apart from their own evidence, there is the medical evidence which is not fabricated. At the age of nine PW2's hymen was not intact. The appellant submitted that there was no evidence to show that it was him who caused the hymen not to be intact. PW2 testified that it was her father who inserted his fingers in her vagina. There is no proof that PW2 was on her mother's side and was out to ensure that her father was sentenced to imprisonment. There is evidence of PW5 to the effect that her anus was penetrated by way of a finger. These two children had no reason to lie to the court. Had PW2 been defiled by the appellant through penetration by the penis she would have revealed that to the court. She was candid enough to tell the court that the appellant only used his fingers. The same applies to PW5. There is no evidence that the complainants were coached. The defence witnesses were out to defend the appellant and could not have confirmed the incident. I am satisfied that the children were sexually assaulted and the prosecution proved its case beyond reasonable doubt.

There is the issue of sentence. I believe the trial court considered the fact that the children will need their father's support and that is why the court imposed the five year sentence. I do not wish to disturb that sentence. In the end, I do find that the appeal lacks merit and is hereby dismissed.

Dated, signed and delivered in Malindi this 8th day of March, 2017.

S.J. CHITEMBWE

JUDGE