



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MIGORI**

**CRIMINAL APPEAL NO. 68 OF 2016**

**DANIEL NYAMOHANGA.....APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

***(Being an appeal arising from the conviction and sentence by Hon. A. P. Ndege, Acting Principal Magistrate in Kehancha Principal Magistrate's Criminal Case No. 198 of 2013 delivered on 15/11/2013)***

**JUDGMENT**

1. **P G K** must have been truly bewildered when he received a phone call from the Chief of Isebania Location about his daughter whom she had released to return to school on the opening day. The caller instead informed him that the daughter had been found inside a room in a Guest House at Sirare town with a man and that he was urgently required.
2. The day was 08/05/2013. That was the official opening day for St. [Particulars withheld] where the said daughter was in Form 3. As the father was releasing his daughter to school, little did he know what was ahead.
3. From the said events, the appellant herein, **DANIEL NYAMOHANGA**, was arrested over the allegation that he had committed an indecent act with a child; the child being the daughter of P G K. The offence was committing an indecent act with a child contrary to **Section 11(1)** of the Sexual Offences Act No. 3 of 2006. The appellant was charged and denied committing the offence.
4. The charge was however amended to comply with the parent statute and the appellant was called and pleaded to the substituted charge. The substituted charge was substantially the same as the original one save the name of the statute; the original charge having been brought under the Penal Code whereas the substituted one under the Sexual Offences Act. Having denied the substituted charge, the appellant was tried, convicted and was sentenced to 10 years' imprisonment.
5. Being dissatisfied with the conviction and sentence, the appellant preferred this appeal with the leave of this Court. At the hearing, the appellant appeared in person and made an oral scathing attack on the entire evidence that supported the conviction and sentence. He raised four main grounds. The first one was that his rights under **Article 50(2)(a)** and **25(c)** of the **Constitution** were violated as the charge sheet was defective having not specified the sub-section under which he was charged. The second ground was on the age of the victim. He submitted that the age was not correctly settled by the trial court as there was no evidence to suggest it moreso given that the Certificate of Birth he demanded at the trial was not produced and that the reliance on the evidence of the victim's father was erroneous. He also pointed out that there was no evidence that the victim was a school-going student. The third ground was that the

victim was forced to give false evidence just to fix him up. That the evidence of the Guest House operator was totally unreliable. Lastly, he contended that the Chief was never called as a witness. He urged this Court to allow the appeal accordingly.

6. The appeal was opposed.

7. As this is the Appellant's first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013)eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

8. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the offence of committing an indecent act with a child were proved and as so required in law; beyond any reasonable doubt.

9. However before doing so, I will revisit the evidence as tendered before the trial court. The prosecution called three witnesses. **P G K** testified as **PW3**. He was the father to the victim. The victim testified as **PW1** She was a girl called **E W G PW2** was one **LUCIA GATI CHACHA** who was the Guest Maid at [Particulars withheld] Guest House at Sirare town. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified before the trial court save **PW1** whom I will refer to as **'the complainant'**.

10. The prosecution's case was that in the morning of 08/05/2013 at around 10:00am, the complainant left her home at [Particulars withheld] village as she headed to [Particulars withheld] School at [Particulars withheld] where she was in Form 3. On reaching Kehancha stage where she intended to travel to Sirare to purchase some school items before going to school, she met the appellant herein whom she knew before. They talked generally and the appellant also told her that he had some work to do at Sirare. As a result, they left together using a motor cycle and safely arrived at Sirare. When they alighted, the complainant asked the appellant to assist him by holding her bag as she rushed to purchase some items from the shops. The appellant obliged.

11. As the complainant left, the appellant decided to secure a room at a nearby Guest House. He managed to get a room for Kshs. 300/= at [Particulars withheld] Guest House and paid for it. The appellant was served by **PW2** who allocated him room number 6. According to **PW2**, the appellant gave her two notes, one for Kshs. 200/= and the other one for Kshs. 100/=. Since the rooms at the said Guest House are usually left open during the day unless occupied, the appellant informed **PW2** that he was rushing to pick his luggage which he had left elsewhere and was soon returning and that he would collect the keys to his room then. The appellant left the Guest House. **PW2** also went to the rear of the Guest House where he was preparing some lunch and waited for the appellant to return and collect the keys as agreed.

12. The complainant returned to the place she had left the appellant with her bag, but did not find him. She just waited for him. When the appellant returned, he did not have the bag belonging to the complainant and on enquiry the appellant informed the complainant that he had kept her bag at a certain shop and asked her to follow him and collect it. The complainant did so. The appellant led the complainant into a corridor which looked like that of a Guest House but thought it was a shop. Suddenly, the appellant forced the complainant into one of the rooms and further forced her to stay therein. Having no option, the complainant stayed. The appellant then started touching the breasts of the complainant.

13. The return of the appellant into the room with the complainant was not witnessed by **PW2** for she was still at the rear of the Guest House. However, it appears that the entry of the appellant and the complainant into the Guest House attracted some attention of the members of public moreso given that the complainant was in school uniform. Two men hurriedly approached **PW2** and asked her if any of the rooms in the Guest House were occupied. They were people well known to **PW2**. One was called James while **PW2** could not recall the name of the other man. **PW2** answered in the affirmative and the two men

asked her to accompany them into the rooms. She obliged.

14. When PW2 passed by the window of the room number 6, she saw the appellant seated on the bed. Reaching the door to that room, PW2 attempted to open it but it was forcefully closed from inside. The two men joined PW2 in forcing the door open until it gave way. Upon entry into the room, PW2 was surprised to see the appellant and the complainant who was in school uniform. Both were standing. They were both ordered to sit down and they did so on the bed. One of the two men called the Chief who hurriedly found his way to the [Particulars withheld] Guest House. The Chief then called PW3 on getting his number from the complainant. The Chief called the police as well who on arrival arrested the appellant from the Guest House and escorted him to the Isebania Police Station. The complainant and PW2 also went with the police for further interrogation and recording of statements. It was when they were at the police station that they were joined by PW3.

15. The complainant was taken to the Nyayo District Hospital where she was examined. The appellant was charged.

16. At the close of the prosecution's case the appellant was placed on his defence. He opted to remain silent and the trial court rendered its judgment where it found the appellant guilty as charged and was convicted. He was sentenced to 10 years in prison.

17. **Section 11(1)** of the Sexual Offences Act states that:

***'11(1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term not less than ten years.'***

**Section 2(1)** of the said Act defines an **'indecent act'** as follows:

***'Indecent act' means an unlawful intentional act which causes: -***

***(a) Any contact between any part of the body of a person with the genital organ, breast 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.***

18. The main ingredients of the offence of committing an indecent act with a child are: -

**(a) Proof that the victim is a child in law;**

**(b) Proof that there was a contact between any part of the body of the accused person with the genital organ, breast or buttocks of the child victim (but that act must not be an act that causes penetration) and that the act must be intentional; or**

**(c) Proof of any intentional form of exposure or display of any pornographic material to a child;**

**(d) There should be no legal justification in the act complained of.**

19. Before addressing the above ingredients, I will first consider if the charge was defective as alleged. The defectivity is alleged to be the failure to state the sub-section of **Section 11** of the Sexual Offences Act. I have looked at the said Section 11. Subsection 1 creates the offence and prescribes the sentence on conviction. Subsections 2, 3 and 5 provide for a defence to the charge. Subsection 4 is on sentencing of minor offenders. There is therefore only one offence created under the entire Section 11 of the Sexual Offences Act. The failure to indicate the subsection 1 of Section 11 in the Charge Sheet was hence an irregularity that did not go to the root of the charge as to occasion any miscarriage of justice to the appellant. The same is curable under **Section 382** of the **Criminal Procedure Code**, Chapter 75 of the

Laws of Kenya. The appellant understood the charge, pleaded to it, took part in the entire trial by vigilantly cross-examining witnesses and opposing applications for adjournment and did not raise any complaint during the trial.

20. A consideration of a scenario like the foregone was made by the Court of Appeal at Nairobi in the case of **Nyamai Musyoki vs Republic (2014) eKLR**. In that case the Court considered the effect of a charge under the Sexual Offences Act which had been brought under Section 8(1)(3) instead of Section 8(1) as read with Section 8(3). The Court held thus: -

*‘In this case as was rightly pointed out by the Learned Judge, the*

*Appellant was charged under Section 8(1)(3) of the Sexual Offences Act. This was evidently a misdirection of the section creating the offence and it is apparent to us that the police intended to charge the appellant under Section 8(1) as read with Section 8(3) of the Sexual Offences Act. The prevailing question however is whether this prejudiced him in any way. It is our finding that this was a minor technical defect and it is clear from the record that all other procedures were followed to the letter and the appellant was accorded a fair hearing and he understood the charge that was facing him. His full participation in the trial process vindicated that position. If a defective charge is followed by a series of other procedural or substantive mistakes and which in particular affect the rights of the accused person, or the defect goes to the root of the charge distorting it in a way that the accused cannot understand the charge, then the Court ought to be reluctant to apply Section 382 CPC to cure the defect. In this case, we agree with the Learned Judge that the defect did not prejudice the appellant in any manner and the invocation of Section 382 CPC was proper in the circumstances.’*

21. I say no more.

22. Back to the ingredients, the appellant strenuously contended that the age of the complainant was not properly settled as a Certificate of Birth was not produced and as such there was no evidence that the complainant was a minor in law. It is true the Certificate of Birth for the complainant which was marked for identification as ‘MFI 2’ was not produced as an exhibit. Therefore, the evidence on the age of the complainant was that of the complainant herself and PW3 who both testified that the complainant was 16 years old. PW3 gave the date of birth of the complainant as 07/10/1996.

23. Proof of the age of a victim in sexual offences is very crucial as that has all the bearing in sentencing. If the age of a victim is not properly settled then a court may find itself at a cross road in passing a lawful sentence. Ideally, age ought to be proved by way of documents including, but not limited to, a Certificate of Birth, a Birth Notification, medical documents, official religious documents, official school documents, among others. Having said so, it should not be lost that there are instances where none of the perceived documents may be available and in such a case a court must revert to the oral admissible evidence on record.

24. In this case, the oral evidence is that of the complainant and PW3. There is no dispute that PW3 is the father of the complainant and that they stay at K[Particulars withheld] village. PW3 gave the date of birth as 07/10/1996. That evidence was not challenged at all and it is admissible evidence in law. By accepting the evidence of PW3 on the birth of the complainant, it therefore confirms that the complainant was **16 years 7 months old** at the date of the alleged offence.

25. The aspect of age was well dealt with by the trial court in the judgment. I hereby affirm the finding that the complainant was still a minor in law.

26. As to the proof that there was any contact between any part of the body of the appellant with the genital organ, breast or buttocks of the child victim, (but that act must not be an act that causes penetration), I have gone back to the evidence and noted that the complainant at one point stated as follows: -

**“...He forced me to stay with him inside the room. He then started to touch my breasts. Only the breasts.....**

**.....The accused who touched my breast is accused in the dock...”**

27. The trial court observed the demeanors of the witnesses as they testified and it was satisfied that they were all truthful. I have noted that the complainant was cross-examined at length and remained firm and categorical; her testimony was not shaken. The appellant was arrested inside the Guest House with the complainant. I find that the evidence of the prosecution is quite cogent and goes to prove that indeed the appellant touched the breasts of the complainant.

28. **But was the act of the appellant touching the breasts of the complainant intentional?** The intention ought to be a result of all the events considered. The appellant met the complainant at Kehancha. He knew too well that she was a student as she was in school uniform. He offered and travelled with her to Sirare town. As the complainant went to buy school items, the appellant quickly organized for and secured a room in a Guest House. He did not even reveal to PW2 that he intended to spend some time with a lady; if not a girl; in the room. He equally did not notify PW2 of his return into the room.

29. From the evidence, the complainant did not consent to follow the appellant into the Guest House. The appellant tricked her into believing that they were going to pick her bag from a shop. When she realized that indeed the appellant was tricking her into a room and not a shop as alleged, the complainant refused to enter inside the room. The appellant forced her inside and even forced her further to stay therein. I must however state that the position in law would not have been different even if the complainant had voluntarily gone into the room given that she was then a minor.

30. There was also the reaction of the appellant when PW2 wanted to access the room. He resisted until overcame by the three people. One wonders why he did so if not with the intention to conceal a wrong. There is also the evidence that the appellant wanted to bribe the Chief with Kshs. 200/= but the Chief declined.

31. When all the foregoing events are taken together, it is clear that the appellant intended to commit the act complained of; among many others; once he secured the innocent complainant into a room. The appellant therefore intended to commit the act.

32. I will also deal with the aspect of legal justification. There may be very limited instances where one may intentionally commit such acts as the one complained of without committing an offence. Even in such cases such acts must be sanctioned by the Constitution and/or the law. I find no such legal justification in this case.

33. Having dealt with all the ingredients of the offence, I will now address the twin issues on the failure of the Chief to testify and if the appellant was framed up. The prosecution has a wide discretion in deciding the number and type of witnesses to testify in a case. That is so expressly provided for in **Section 143** of the **Evidence Act**, Chapter 160 of the Laws of Kenya which states that:

***"143. No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."***

34. However, if the prosecution fails to avail crucial witnesses without any plausible justification then the court may presume that had such witnesses testified their testimonies would have been unfavorable to the prosecution. (***See Bukanya & Others versus Uganda (1972) E.A. 594, Kingi versus Republic (1972) E.A. 280 and Nguku versus Republic (1985) KLR 412***). In this case I cannot find that the Chief who was not called would be deemed to have had any adverse effect on the prosecution's case. To the contrary he would have strengthened the case further. I also note that the Chief was called in the presence of the complainant and PW2 hence his evidence would not have introduced any new issues save corroborating the evidence of the complainant and PW2. The witnesses called managed to prove the ingredients of the offence and as so required in law.

35. From the evidence, the contention that the appellant was framed does not have any room. The witnesses were forthright and were cross-examined accordingly. Their evidence was believable and truthful. Nothing closer to the appellant's suggestion arose. The argument is not founded in fact or law and is for rejection.

36. This Court therefore finds that the appellant was properly found guilty and convicted of the offence of committing an indecent act with a child.

37. On sentence, the appellant was sentenced to the minimum prescribed sentence under **Section 11(1)** of the Sexual Offences Act. Infact the appellant should consider himself very lucky having not been charged with other offences which would easily flow from his said unlawful actions.

38. As I come to come to the end of this judgment, I remain deeply grateful to **Hon. A. P. Ndege**, Principal Magistrate for his effort in availing the trial court's typed proceedings as I sincerely apologize to the appellant for the delay caused in the hearing of this appeal due to the non-availability of the proceedings and the confusion caused by some appeal files at Kisii High Court bearing similar name as the appellant herein which this Court could not ignore.

38. The decision of the trial court is hereby affirmed and the appeal is accordingly dismissed.

**DELIVERED, DATED and SIGNED** at **MIGORI** this 6<sup>th</sup> day of June 2017.

**A. C. MRIMA**

**JUDGE**