



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO. 49 OF 2013

JOAKIM FUNDI MUGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant has appealed against his conviction and sentence of ten years imprisonment in respect of the offence of committing an indecent act contrary to section 11 (1) of the Sexual Offences Act (**Cap ...**) Laws of Kenya, imposed upon him by the court of the Ag Principal Magistrate at Runyenjes on 5th September 2013.

2. His advocate has raised four grounds in his petition of appeal against both the conviction and sentence. In ground 1, he has stated that the prosecution did not prove their case beyond reasonable doubt. In ground 2, he has stated that the trial court failed to give the benefit of doubt to the appellant. In ground 3, he has stated that there was absolutely no evidence to support the charge of committing an indecent act. And finally in ground 4, he has stated that the trial court relied on contradictory evidence to convict the appellant.

3. This is a first appeal. As a first appeal court, I am required according to *Peters v Sundays Post Ltd (1958) EA 424* to re-assess the evidence upon which the conviction and sentence are based. After doing so, I have to make my own independent findings based on that evidence while deferring to the findings of the trial court on issues of credibility. The reason being that the trial court was better placed because it had the advantage of hearing and seeing the witnesses.

4. The evidence of the complainant (PW 1, name withheld as she was a minor victim of a sexual offence) was that she was sent by her grandmother, C W N (PW 2) to go to the shop of the appellant and buy milk. Upon arrival she found the appellant who pulled her into his shop and took her into a room where according to PW 1 the appellant inserted “something” into her private parts. Thereafter, the complainant dressed up and the appellant then gave her Kshs 45/- and she went home. She never disclosed this to her grandmother. However, she made the disclosure after her grandmother discovered the Kshs 45/- in her pocket at night. Her grandmother took her to hospital and she was examined.

5. The evidence of her grandmother is that the complainant delayed in returning home. As a result she was forced to go and look for her. When she reached the gate she met the complainant who was in company of farm workers. According to her, the complainant never disclosed what had transpired in the shop of the appellant. The grandmother discovered that she had Kshs 45/- in her pocket when she was sorting out her clothes in preparation to wash them. She then asked her the origin of that money. In response the complainant told her that it is the appellant who had had sexual intercourse with her and then gave her the Kshs 45/-. It is the further evidence of her grandmother that she saw blood stains on the pant

of the complainant. A report was made to the police and the appellant was arrested and charged with this offence.

6. The evidence of the Sergeant Josphat Sakwa (PW 3) is that he arrested the appellant on 19th May 2010 and escorted him to Runyenjes Police Station. There is also evidence of Dr Ann Mburu (PW 4) who examined the complainant a day after the offence had been committed. This doctor put in evidence the medical report of the complainant which had been prepared by a Clinical Officer by the name Mulwa.

7. The accused was put on his defence. His defence was that of an alibi. According to the appellant he was not at the scene of crime on the material date. The appellant also stated in his defence that the grandmother of the complainant owed him a debt amounting to Kshs 6,000/-. He further stated that the complainant's grandmother had a grudge against him. The appellant called four defence witnesses namely, Purity Murigi Nyaga (DW 2) who was his wife, Juliet Wawira Njiru (DW 3), Emily Njeri Ngai (DW 4) and Simon Ndwiga Nguru (DW 5). All these witnesses gave evidence to the effect that the appellant was not at the scene of crime.

8. The trial court assessed in great detail the evidence of both the prosecution and the defence and came to the conclusion that the case against the appellant had been proved beyond reasonable doubt.

9. On my own I have reassessed the evidence and I have come to the conclusion that the offence of indecent assault was proved beyond reasonable doubt against the appellant.

10. The appellants grounds of appeal numbers 1, 2 and 3 are in general terms and they only relate to matters of law. In the light of the evidence produced in the trial court there is no merit in grounds those grounds. In ground number 4 which is in relation to the alleged contradictory evidence I find that the discrepancies were not material and they do not affect the conviction recorded against the appellant. In total I find there is no merit in the grounds of appeal which I hereby reject.

11. The trial judgement showed that the appellant was acquitted on the main charge of defilement but was convicted on the alternative charge of committing indecent assault. The trial court should not have made a finding in respect of the main charge. It should have left open its findings in respect of count I namely defilement as stated by the Court of Appeal in *Kantilal Jivraj v R (1961) EA 6*. The reason being that in Kenya a trial court sits both as a jury and a court of law. As a jury it finds an accused guilty or not guilty of the offence charged. As a court of law it then proceeds to formally convict or acquit the accused person. However this did not occasion a failure of justice as the appellant was acquitted of the main charge.

12. I have taken into account that the appellant was sentenced to the minimum sentence of 10 years imprisonment and in my view it was merited.

13. The upshot is that the appellant's appeal is dismissed in its entirety

JUDGEMENT DATED, SIGNED AND DELIVERED in open court at **EMBU** this **10th** day of **FEBRUARY 2016**.

In the presence of Mr. Mogusu for the Appellant and Ms Mbae for the state

Court clerk Mr Njue

J.M. BWONWONGA

JUDGE

10.02.16