REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 5 OF 2015

SAMUEL MANZI MUTHUI..... APPELLANT

V E R S U S

REPUBLIC..... RESPONDENT

(From original conviction and sentence in Criminal Case No. 20 of 2014 of the PM Court at Kyuso – E.M. Mutunga).

JUDGMENT

The appellant was charged in the subordinate court at Kyuso with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on the 16th January 2014 at Kyuso Township in Kyuso District within Kitui County intentionally touched the buttocks of MA a child aged 12 years with his hands. He denied the offence. After a full trial he was convicted as charged and sentenced to serve 10 years imprisonment. He was dissatisfied with the decision of the trial court and has now come to this court on appeal, on the following grounds as follows:-

1. That the trial magistrate erred in admitting prosecution evidence which was totally contradictory thus violating the provisions of section 163 c of the Evidence Act Cap 80 of the Laws of Kenya.
2. The learned magistrate erred in convicting and sentencing him without considering that the key prosecution witnesses were from one family of the complainant her two brothers and their mother.
3. The learned trial magistrate erred in convicting and sentencing him very severely without considering that the case had no valid exhibits which connected him to the crime.
4. The learned magistrate erred both in law and fact in convicting and sentencing him without considering that the case originated from a grudge between the appellant and mother of the complainant who was his long time partner with whom they had parted.
5. The learned trial magistrate erred in law and facts in convicting and sentencing him without noting that some crucial witnesses were never bonded to testify as required under Section 150 of the Criminal Procedure Code.

6. The learned magistrate erred by convicting and sentencing him very severely without considering that he was a first offender and should have been shown leniency.
7. The learned trial magistrate erred in law and fact in convicting and sentencing him without considering the burden the appellant had in his family of 6 children and their mother and that he was their daily bread winner.

8. The learned trial magistrate erred in fact and law in concluding the matter without considering his defence.

During the hearing of the appeal, the appellant made oral submissions. He emphasized that the evidence of the prosecution was from members of the same family. He stated that the evidence of PWI that he went to the home and found her washing clothes and disturbed her was pure lies. He stated also that PW2 lied in court as he said that the incident occurred on 16th January 2014. He stated that it was lies when PW2 said he came from school and found him sitting down and persuading his sister to go to a loading.

He said that he did not go there. He stated that though PW2 said in examination in chief that the appellant pulled his sister, during the cross examination he gave another version that the appellant was sitting under a tree. In addition, though PW2 said that the appellant promised to give his sister money and also buy her rice, neither the money nor the rice was produced in court.

He stated that the evidence of PW2 that he called two police officers who arrested him and also that the appellant escaped was false. He emphasized that PW3 said that he came from school with PW2 but did not find PWI at home, which was a contradiction.

The appellant submitted further that PW4 said that the date in question was 17th and that they went home at 9.00 PM, when she was told that the appellant was disturbing PWI. He stated that the incident was said to have occurred on 16th January and as such the evidence of PW4 was lies.

The appellant also stated that PW5 a Police Officer, falsely stated that he saw him with PW1 100 metres away. According to the appellant PW5 contradicted the evidence of PWI and PW2. The appellant submitted that the evidence of PW5 and PW6 that he ran away, was lies and was contradictory. According to the appellant, the Investigating Officer also merely stated what he was told, and the medical evidence on age was lies.

He submitted that his alibi defence was not considered by the magistrate, and that he was away on 15th to 17th January. He contended that he was a lover of the mother of PWI and that they had separated because she stole from him, which caused her to threaten him.

Learned Prosecuting Counsel Mr. Orwa opposed the appeal. With regard to contradictions, counsel submitted that the evidence of PWI was corroborated by PW2, PW3 and PW5 all of whom were eye witnesses to the incident. Counsel emphasized that there was sufficient light at the scene and that PW2 knew the appellant well. In addition PW2, identified the clothing that the appellant wore.

On witnesses coming from the same family, counsel submitted that no law was violated. In any case it was not true that all crucial witnesses came from the same family.

On ground 3 on exhibits, counsel submitted that the appellant faced a charge of indecent act and a age assessment report was produced to confirm that PWI was 12 years old. Counsel submitted that there was no need to produce a P3 form to indicate injuries suffered or other observations of a physical nature.

On production of rice and money, counsel submitted that such items were used as an inducement and were not recovered by the police. They could not thus be produced in court.

On the alleged existing grudge, counsel submitted that the appellant had not produced any evidence to establish the existence of a grudge. He did not cross examine the prosecution witnesses on this aspect. In counsel's view, there was no reason for the prosecution witnesses to frame the appellant.

On the issue of the mother of the complainant being a previous lover of the appellant counsel submitted that there was no evidence that a report had been made to the police about the relationship of the appellant and the mother of the complainant, and the theft.

With regard to crucial witnesses not being called to testify, counsel submitted that the appellant did not name those crucial witnesses. Counsel concluded by stating that the prosecution had proved its case against the appellant beyond any reasonable doubt as required under Section 143 of the Evidence Act as

this was a case in which more than one person was an eye witnesses.

Counsel submitted that the defence of the appellant was considered and that the alibi was found to be untrue.

With regard to sentence, counsel submitted that the mitigation of the appellant was considered by the trial court before sentencing.

In response to the Prosecuting Counsel's submissions, the appellant submitted that PWI, PW2, PW3 and PW5 did not corroborate each other. According to him, PW5 said he came to the scene alone and did not reach where the appellant was. The appellant emphasized that the case was a frame up. He said that he did not call witnesses in his defence, because he was in cells and was not able to get witnesses or send for them. He submitted also that in his opinion the medical personnel did not say the truth because he did not give the exact age of the complainant. He stated that in his mitigation he emphasized that he wanted to take care of his sister.

The summary of the evidence is as follows:-

During the trial the prosecution called 9 witnesses. PWI was the complainant a girl aged about 12 years who testified on oath. It was her evidence that she attended ***[particulars withheld]*** Primary school in class two and that on 16th January 2014 while washing clothes at home at 6.30 Pm Sammy the appellant approached and asked her to go to a lodging and promised he would pay her Kshs 200/=.

When she refused his request he started caressing her and, in the process, was seen by M P. According to her, he touched her on the shoulders and back and when M found him holding the complainant he called the police but Sammy refused to leave her alone. She also stated that Sammy had promised to buy her rice. According to her when the police arrived they found Sammy holding her.

She stated further that she knew Sammy before since she used to see him at Tseikuru market. She stated that Sammy held her under a tree, and that when the police arrived, Sammy the appellant claimed to the father of the complainant and then fled before being taken to the police station.

In cross examination, she stated that the appellant blocked her mouth and as such she could not scream. She stated that the appellant wanted to take her to a nearby bar with a lodging.

In re-examination, she stated that when she told the appellant that she would inform her mother about his conduct, the appellant said he would kill the whole family.

PW2 was a minor P M Paul aged 15 years in Std 6 at ***[particulars withheld]*** Primary school. He was sworn without being examined on whether he was intelligent and whether he knew the importance of saying the truth.

It was his evidence that on 16th January 2014 at around 6.00 Pm, he came home from school and found Sammy at their homestead with the complainant seated outside the house. Sammy was by then persuading the complainant to accept Kshs 200/= and pulled the complainant to a nearby tree while asking for sexual intercourse. He saw Sammy pulling the complainant's skirt while firmly holding her. They thus decided to call the police who came and found Sammy still holding the complainant and behaving as if he was drunk. He said that he knew Sammy before as he had seen him at Tseikuru and there was enough light which enabled him identify, and even noted Sammy was wearing a black Tshirt. According to him, two policemen came and found Sammy and Sammy thereafter ran away.

In cross examination, he maintained that he saw Sammy under a tree with the complainant and that Sammy had lifted the complainant's skirt. He maintained that Sammy wanted to give the complainant Kshs 200/-.

PW3 was R N M a pupil of ***[particulars withheld]*** Primary School aged 10 years. It was his

evidence on oath that on 16th January 2014 at 6.00 Pm he came from school with M PW2 and found the complainant not in the house. When they moved outside the house, they found Sammy holding the complainant and persuading her to accept being bought rice. Sammy then pulled the complainant to a nearby tree and promised to give her Kshs 200/= so that they go to the lodging for sexual intercourse. They (PW2 and PW3) then called the police and when they came they asked Sammy what he was doing with a child and Sammy responded the child was his daughter. Thereafter Sammy escaped but was later arrested. It was his evidence that he saw Sammy removing the skirt of the complainant and holding her hips.

In cross examination, he maintained that he saw Sammy the appellant seated under a tree and pulling the complainant's skirt.

In re-examination, he stated that he was not related to the complainant and that he had seen the appellant before.

PW 4 was M M a business lady from Kyuso market. It was her evidence that on 17th January 2014 she came from Tseikuru market at 9.00 Pm and her son (PW2) told her that on coming from school he found her daughter (PW1) being caressed by Sammy. When he enquired why the appellant Sammy was caressing the complainant Sammy threatened him.

It was her evidence that PW2 reported the incident to the police who arrested Sammy. When she talked to Sammy, he said that he was drunk and that is why he did what he did to the girl. She also stated that the complainant told her that Sammy had tried to remove her panties and asked her to go to a lodging. She said that the complainant was aged 12 years and that an age assessment report had been prepared on 20th January 2014.

In cross examination, she stated that she had known the appellant for one year, and denied sharing her house with him. She also denied stealing from the appellant. She further denied that the appellant brought food for the children.

PW5 was Administration Police Constable Wycliff Makonge Nyaberi of Kyuso. It was his evidence that on 16th January 2014 at 8.00 Pm, as he was guarding IEBC offices at Kyuso, two boys told him that a man had taken their sister and was forcefully trying to undress her.

He proceeded to the scene and found the appellant with a girl and called his colleagues Geoffrey and George Wairimu. They then interrogated the appellant who thereafter managed to escape into the nearby bush.

The next day, they received information from members of the public that the appellant had been arrested. According to him, the incident occurred behind Avillas bar. He said that there was enough light coming from the security light of Avillas bar.

In cross examination, he stated that there was enough light at the scene to identify the appellant and that they interrogated him when he was about 100 metres away before he escaped from the scene.

PW6 was Administration Police Constable Geoffrey Kangemi of Kyuso. It was his evidence that on 16th January 2014 he was near Avillas bar with George Wairimu when he was called by PW5. They proceeded together and found the appellant standing near a minor. They tried to interrogated the appellant but he escaped. They then brought the minor girl to Kyuso Police Station and the next day the appellant was arrested and brought to Kyuso Police Station.

In cross examination, he maintained that the appellant escaped from the scene and that before then they found him arguing with the minor girl complainant, but he could not understand what the argument was about because the language used was Kikamba.

PW7 was Administration Police Constable George Wairimu of Kyuso. It was his evidence that on

16th January 2014 he was called while on guarding duties at IEBC offices at Kyuso. They went to a scene of incident but Sammy ran into the bush, though they found him with a girl. In cross examination he stated that there was enough light which could enable one recognize another.

PW8 was Police Corporal Jackline Makumbe of Kyuso Police station. It was her evidence that on 16th January 2014 at 2040 hours, she was instructed with another police officer called Mercy Shilesi to investigate a case of a minor who was brought to the police station by AP Police. The Investigating Officer interrogated the minor and got the story. Statements were then recorded. According to her the appellant was the complainant's lover and both of them knew each other well.

In cross examination, she stated that the complainant was washing clothes when the appellant promised to give her Kshs 200/- and rice in exchange of sexual intercourse.

PW9 was Francis Saku a Clinical Officer from Kyuso District Hospital. He produced an age assessment report dated 20th January 2014. He stated that he conducted age examination which showed that the complainant was aged between 11 and 13 years. He produced the age assessment report as an exhibit.

When put on his defence, the appellant elected to make an unsworn statement. He stated that on 15th January 2014 he left Kyuso at 4.00 Pm, went to sell cows at Dagoreti where they arrived at 4.00 am on 16th January 2014. He later left Dagoretti for Kyuso after loading some goods on the vehicle, they reached Kyuso township on 17th January 2014 at 10.00 am.

At 4.00 Pm, he came out of his house and was arrested by police and taken to Kyuso police station where he stayed for 2 days before being charged. He denied knowledge of the charges facing him.

He stated that the complainant's mother had a grudge against him because he was her lover but the relationship had broken up. He stated that on 24th October 2013 the complainants mother sent her daughter to his house so that he could buy food for them. He stated that the complainant's mother had threatened that she would ensure that he got out of Kyuso town because he had abandoned her.

On the above evidence for the prosecution and the defence, the court found that the prosecution had proved its case against the appellant beyond reasonable doubt. The court thus convicted him and sentenced him to serve 10 years imprisonment.

This is a first appeal. As a first appellate court I am required to evaluate the evidence on record afresh and come to my own conclusions taking in mind that I did not see witnesses testify and give due allowance for that fact. See the case of ***Okeno –vs- Republic (1972) EA 32.***

I have evaluated the evidence on record.

Two witnesses, that is PW2 and PW3 both minors, stated that they saw the appellant caressing the complainant and also persuading her to accept Kshs 200/= and to go into a lodging for sex. This two witnesses reported the incident to two Administration Police Officers PW5 and PW6, who came to the scene and found the appellant still arguing with the complainant and caressing her.

The evidence on record is that there was sufficient light from Avillas bar. It was electric security light. The two minor children together with the complainant knew the appellant well before. He does not deny that they knew him before. Infact his evidence is that he was a lover of the mother of the complainant.

In my view having evaluated all the evidence on record, I find that there was no possibility of mistaken identity regarding the appellant. In my view he was positively identified by PWI, PW2, PW3 and the two Administration Police Officers who came to the scene. His action of trying to undress or caress the complainant against her will was certainly indecent. I find no other description which can be given to that conduct.

The appellant said in his defence that the complainant's mother had a grudge against him because of a love relationship gone sour. Even assuming that the appellant and the mother of the complainant were lovers who had parted ways, the circumstances of this case do not show that the complainant's mother instigated the report to the police. She was not present at home when the incident occurred. She did not see whatever was happening. It was the two children PW2 and PW3 who witnessed the incident and reported the same to independent witnesses the two Administration Police Officers PW5 and PW6 who also went to the scene and saw the appellant, still caressing and arguing with the complainant. It cannot thus be said that the complainant's mother instigated the arraignment in court of the appellant.

The appellant has complained that he was kept for two days before ultimately being charged in court. There is no record of a complaint of such a nature made before the trial court as the proceedings do not indicate any such complaint. Even if that were true, the remedy would be a claim in the civil court for payment of damages. It does not affect the conviction herein.

Though the appellant claims that there were contradictions in the prosecution evidence, I find no material contradiction.

The appellant raised the defence of an alibi, that he was not in Kyuso when the incident is said to have taken place. I am alive to the fact that an accused person has no burden to prove a defence of alibi. It is for the prosecution to disprove a defence of alibi. See the case of ***Sekitoleko –vs- Uganda (1967)EA 531,*** and ***Leonard Aniseth –vs- Republic (1963) EA 206.***

In the present case the defence of alibi was raised for the first time after the prosecution had closed its case. It was also raised in an unsworn defence statement in which the prosecution was not entitled to cross examine the appellant.

In my view the defence of alibi was an afterthought. It was an attempt to divert attention from the real issues. I find that with the evidence on record, the prosecution established beyond reasonable doubt that the appellant was at the scene of incidence and that he was the culprit.

I find that the appeal of the appellant against both convictions and sentence has no merits. The sentences allowed by Parliament in sexual offences are severe and the trial court has usually no discretion. The sentence of 10 years imprisonment is the lawful sentence provided by the statute. I dismiss the appeal and uphold both the conviction and sentence. Right of appeal explained.

Dated and delivered at Garissa this 11th day of May 2016.

GEORGE DULU

JUDGE