REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 22 OF 2015

(From original conviction and sentence in Criminal Case No. 114 of 2013 of the PM Magistrate's court at Kyuso – B.M Mararo - PM)

DANIEL KIMANZI MUVEA ..... APPELLANT

V E R S U S

REPUBLIC ..... RESPONDENT

JUDGMENT

The appellant Daniel Kimanzi Muvea was charged in the subordinate court at Kyuso with attempted defilement contrary to Section 9 (1) and (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 20th June 2013 in Mumoni District within Kitui County he intentionally attempted to cause his penis to penetrate the vagina of M. M a child age 10 years. In the alternative, he was charged with committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act. The particulars of the offence were that on the same day and place intentionally touched the vagina of M. M a child aged 10 years with his penis. He denied both charges. After a full trial he was convicted of the alternative count of committing an indecent act. He was sentenced to serve 10 years imprisonment.

Dissatisfied with the decision of the trial court the appellant through counsel Mulinga Mbaluka and Company has appealed to this court on 9 grounds as follows:-

1. The learned trial magistrate erred in fact and law by failing to acknowledge that the appellant did not commit the offence of attempted defilement contrary to Section 9(1) and (2) of the Sexual Offences Act No. 3 of 2006.
2. The learned trial magistrate erred in facts and law by failing to acknowledge that the appellant did not commit the offence of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.
3. The learned trial magistrate erred in fact and law by failing to appreciate the appellant’s defence.
4. The sentence meted on the appellant is harsh and excessive.
5. The learned trial magistrate erred in fact and law when he failed to appreciate the evidence of the defence.
6. The learned trial magistrate misdirected himself in both fact and law when he failed to make a finding that the prosecution evidence was contradictory and could not have sustained the charge against the appellant.
7. The learned trial magistrate erred in fact and law when he failed to record the medical evidence which was very clear.
8. The decision of the learned trial magistrate was against the weight of the evidence.
9. The learned trial magistrate erred in law and fact when he considered extraneous matter not in

evidence to sentence the appellant.

In addition to the above grounds of appeal, the advocate for the appellant filed written submissions which I have perused.

At the hearing of the appeal, Mr. Nyasani learned counsel who held brief for Mr. Mbaluka for the appellant, relied on the written submissions dated 27th November 2015. Counsel added orally that there was no corroboration of the prosecution evidence in the trial court. Counsel stated that the medical evidence did not support the oral evidence as the entries in the P3 form showed that there was no indication of defilement or attempted penetration. Counsel emphasized that there were inconsistencies in the flow of the prosecution evidence and as such, there was no basis for the conviction. Counsel urged the court to allow the appeal, quash the conviction, and set aside the sentence.

Learned Prosecuting Counsel Mr. Orwa, opposed the appeal. Counsel submitted that PW3, PW4, PW5 and PW6 clearly linked the appellant to the offence in their evidence because they saw him pull the complainant into the bush. On the contention that PW7 the Clinical Officer did not prove defilement, counsel argued that the charge was for attempt and as such it was not necessary to prove penetration. Counsel also argued that medical examination was conducted three days later, and as such it was not possible to detect any visible marks on the body of the complainant.

Counsel also submitted that the medical evidence was not challenged even if the medical practitioner who filled and signed the P3 form did not personally testify in court. Counsel also submitted that there was no requirement that evidence of minor victims of sexual offences and evidence of women should be corroborated in order to sustain a conviction. On this contention counsel relied on provision of 124 of the Evidence Act. (cap.80)

With respect to age of the complainant, counsel argued that proof of the specific age of a victim was not mandatory in a case of attempted defilement. In counsel's view, it was sufficient for the prosecution to demonstrate that the victim was below 18 years, and in this case it was clearly established that she was aged about 10 years.

With regard to holding the appellant in custody for a period of more than 24 hours before being charged in court, counsel submitted that the remedy for such violation of the Constitution lies in an award of damages if it is proved. It does not render the criminal proceedings annulity.

Counsel emphasized that the appellant was actually represented by an advocate during the trial in the subordinate court.

In brief the prosecution called 8 witnesses. PWI was the complainant aged about 10 years. She was walking home from school in the afternoon together with PW2 K N aged 9 years, and PW3 M M aged 9 years as well as PW4 M N aged 13 years. All were sisters and brothers. According to this witnesses, before they reached home they met the appellant who asked her to accompany him. She then left her school bag with the other children, and accompanied the appellant saying that she was going for a call of nature.

The other children waited for her for sometime but she didn't show up. They thus proceeded to the farm where they met their father PW5 P N K and informed him that their sister had followed the appellant into the bush.

P N K then proceeded to look for the complainant (PW I) in the bush and in the process saw the appellant and the complainant. According to him the appellant had already removed his shirt and opened his trouser's zip. He saw the appellant lying on top of the complainant who had no pant. He then chased the appellant who ran away and started throwing stones at him. He called the Assistant Chief and people chased the appellant and arrested him. He discovered that the complainant had been given biscuits and Kshs 60/- in coins by the appellant.

The matter was then reported to the police. The complainant was taken for medical treatment at Kyuso hospital and a P3 form was filled. Her genital organs were found to be intact with no signs of sexual or attempted sexual assault, though she had a bacterial infection. Her age was assessed as between 10 and 11 years. The appellant was thus arrested and charged with the offence.

In his defence the appellant gave a lengthy sworn statement. He stated that on the 20th January 2013 at 1.00 Pm he was with his mother Tabitha coming home from Kiambere when he met people who manhandled and beat him up and snatched his Kshs 4,500/-. Then he met the Assistant Chief. He stated that there existed a land dispute between him and N, which was a family dispute and according to him that is the reason why he was implicated in this offence. He stated that the Assistant Chief was an interested party in the land dispute.

This is a first appeal. A a first appellate court, I am duty bound to reevaluate all the evidence on record and come to my own conclusions and inferences, taking into mind that I did not have the opportunity to see witnesses testify to determine their demeanor – see the case of ***Okeno -vs- Republic (1972) EA 32***.

I have reevaluated all the evidence on record. The appellant has raised many issues on appeal.

The major issue is whether the evidence of the prosecution was sufficient to sustain his conviction. He maintained that there was a land dispute between him and the family of the complainant. He also stated that there were inconsistences in the prosecution evidence. He further stated that the medical evidence did not support the allegation of the indecent act for which he was convicted, or attempted defilement which was the main charge.

On proof of the charge I have to start with the age of the complainant, the complainant is said to have been about 10 years of age. The medical evidence in the P3 form says that she was between 10 and 11 years of age. The complainant herself and her father PW5 say that she was 10 years of age at that time. The learned trial magistrate saw the complainant in court. The appellant saw the complainant in court. Defence counsel Mr. Mbaluka also saw the complainant in court.

No one raised an issue regarding the age or the apparent age of the complainant. In my view it was sufficiently proved by the prosecution that the complainant was 10 years of age, which meant that she was a minor of below 18 years of age.

The main issue is whether there was an indecent act committed on the complainant by the appellant.

This is because the court found that the appellant committed such an act. The incident occurred during broad day light. Three children PW2, PW3 and PW4, as well as the complainant PW1 were consistent that the appellant called the complainant (PWI) when she was on her way from school, and proceeded with her into the bush. In my view these children had no reason to lie about that incident.

The children waited for the complainant for a while and she didn't show up. They thus proceeded on to the farm where they met their father PW5 and informed him about the absence of the complainant. The father PW5 proceeded to the bush and stated that he saw both the appellant and the complainant there in the bush, the appellant having removed his shirt and opened his zip and was lying on the complainant, whose pant had already been removed. PW5 called the Assistant Chief on the phone and the public were mobilized who arrested the appellant in the bush.

Though the medical evidence did not show any signs of a struggle, the story or evidence given by PW5 was consistent with the lack of any signs of physical struggle. It does not appear that the complainant was resisting the sexual attempt by the appellant after she was given Kshs 60/- and biscuits. It is apparent that the appellant was on his mission to have sexual intercourse with the complainant after having persuaded her with biscuits and Kshs 60/=, but was disrupted by the appearance of PW5, and that was when he ran away.

In my view the fact that the appellant was found on top of the complainant having removed his shirt and opened his trouser zip, and also her underpants, the complainant being a child with no capacity to consent to sexual intercourse, in itself amounts to an indecent act on a child. PW5 was an eye witness to the indecency. I am mindful of the need for caution on disputed identification expressed by the Court of Appeal in the case of ***Nzaro –vs- Republic (1991)KLR 70***. However, in my view there was no possibility of mistaken identity herein. The fact that the appellant was arrested in the nearby bush shortly afterwards also supports his guilt. In my view the trial court was correct in finding that the appellant was found with the child committing an indecent act. The medical evidence was neutral and did not dissolve the fact.

The appellant in his sworn defence, gave a long story. He stated that he was from Kiambere with his mother when people assaulted him for no apparent reason and snatched his Kshs 4,500/- and then later he was charged for no apparent reason.

The magistrate considered the defence and found it to be unbelievable. It is not thus true that the magistrate did not consider the appellant's defence.

Having evaluated the case for the prosecution and defence of the appellant, I concur with the learned trial magistrate that the defence of the appellant was unbelievable. It appears to be an afterthought meant to divert attention from his acts on that day. It is not believable that while someone is walking home from Kiambere with his mother during the day, he can just be beaten by the public, robbed of his Kshs 4,500/= and then charged with an offence he knew nothing about.

In my view the prosecution proved their case against the appellant beyond reasonable doubt on the alternative count of indecent act. The appeal against conviction is thus dismissed.

With regard to sentence, the sentences imposed by Parliament in sexual offences in this country are very severe. The sentence of 10 years imprisonment the minimum is within the parameters provided by the statute. It is a lawful sentence and I will not interfere with it.

Consequently I dismiss the appeal and uphold both conviction and sentence. The appellant may appeal to the court of appeal if he is dissatisfied with this judgment.

Dated and delivered at Garissa on 2nd day of June 2016.

GEORGE DULU

JUDGE