REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 13 OF 2015

DOUGLAS KAMWAKA MAINA.....…….APPELLANT

VERSUS

REPUBLIC…….....….……RESPONDENT

(Appeal against Judgement conviction and sentence imposed in Criminal Case Number 57 of 2015, R vs Douglas Kamwaka Maina at Mukuruweini, delivered by W. Kagendo, C.M. on 10.4.2015).

JUDGEMENT

The appellant **Douglas Kamwaka Maina** was convicted of the offence of committing an indecent act with a child contrary to Section **11 (1)** of the Sexual Offences Act[1]and sentenced to **10 years imprisonment.** The learned magistrate dismissed the first count of sexual assault contrary to Section **5 (1) (a) (i) (2)** of the Sexual Offences Act[2] for lack of evidence. I note that charge of indecent assault was framed as an independent (i.e. count) as opposed to being framed as an alternative count even though the two counts were premised on the same set of facts. I will address this issue later.

The appeal is against both conviction and sentence. The appellant also challenges the decision by the learned magistrate refusing to admit him to bail pending appeal. In my view, this is not proper because a determination of the appeal either way renders the issue of bail irrelevant.

This appeal raises three issues, namely:-

a. *Whether the prosecution proved its case to the required standard.*
b. *Whether the appellants' defence was considered.*
c. *Whether it was proper to frame two counts based on the same facts.*

This being a first appeal this court has a duty to make a complete and comprehensive appreciation of all vital features of the case, and to scrutinize the evidence on record with care and caution and also to see that justice is appropriately administered. It is also a duty of this court to weigh the materials and to consider the evidence objectively and dispassionately[3] and arrive at its own conclusions.

The learned magistrate correctly found that there was no evidence in support of count one relating to sexual assault, but convicted the appellant on count two with the offence of committing an indecent act with a child.

I have evaluated the evidence on record and also considered the rival submissions made by the parties. I have also considered the relevant law and authorities. Section **11 (1)** of the Sexual Offences Act[4] provides as follows:-

"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 of not less than ten years"

The Act defines *"indecent act"* as act which causes:-

a. *Any contact between the genital organ of a person, his or her breasts and buttocks with that of another person; or*

b. *Exposure or display of any pornographic material to any person against his or her will, but does not include any act which causes penetration.*

Further guidance on the meaning of an indecent act may be found in *R. vs Stringer*, where **Adams J** in the Supreme Court of New South Wales, Court of Criminal Appeal set out the following test of *indecency:-*

"The test of indecency has been variously stated as whether the behaviour was unbecoming or offensive to common propriety……..or to modesty…or would offend the ordinary modesty of the average person…"

Arguably, one of the most common offences of indecency is that of indecent assault, with the offence exhibiting an element of sexual connotation. The very intentional doing of the indecent act is sufficient. But if the assault alleged is one which objectively does not unequivocally offer a sexual connotation, then in order to be an indecent assault it must be accompanied by some intention on the part of the assailant to obtain sexual gratification.

In my view, for an act to be indecent, there must be circumstances of indecency. In *R.vs Court**[5]*** it was stated that there seems to be a number of fairly specific rules and then an overall test of indecency. The specific rules divide allegedly indecent acts into three kinds, *first*, where the acts are inherently indecent, like touching the victims genitals, anal areas or a females breasts or undressing the woman either in private or in public. In such cases it does not matter whether the defendant has an indecent motive.[6] The *second* category is where the act is such that an indecent motive is obvious to reasonable persons. The *third* category is conduct or act that may not be indecent but an indecent motive will make it so.[7]

Apparently superimposed on those rules is a general test that the act must also be indecent according to right minded or respectable members of the community.[8]

I find useful guidance in Australian jurisprudence where in addition to basic indecent assault, courts have singled out offences of aggravated indecent assault characterized by factors such as age of the victim or physical or mental condition of the victim or certain forms of violence all of which aggravate the offence. [9]

The prosecution is required to proof that there was an indecent act which was unlawful and intentional. [10] Unlawful means the act was not justified or excused. From the evidence adduced, no evidence was tendered to show that the appellant touched the minors private part or did any of the indecent acts specified in the above cited section. The conclusion arrived at by the magistrate at page **8** of her judgement is not supported by the evidence tendered nor was there a reasonable basis for the magistrate to dismiss the defence offered by the appellant that the minor passed stool, then he wiped her with a newspaper. The medical examination also confirmed that the hymen was intact and there was no laceration noted or abnormality and that if there was an injury, the scars would have been visible.

A criminal trial is a judicial examination of the issues in the case and its purpose is to arrive at a judgment on an issue as to a fact or relevant facts which may lead to the discovery of the facts in issue and obtain proof of such facts at which the prosecution and the accused have arrived by their pleadings; the controlling question being the guilt or innocence of the accused. Since the object is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not about

over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty. The proof of charge which has to be beyond reasonable doubt must depend upon judicial evaluation of the totality of the evidence, oral and circumstantial, and not by an isolated scrutiny.[11]

I have reviewed and analysed the prosecution evidence and the defence offered by the appellant. I am not persuaded that the prosecution proved the offence of indecent assault at all. Accordingly, I find that the conviction was not supported by evidence and cannot be allowed to stand.

I now address the issue of charging the appellant with two separate counts premised on the same facts and based on the same evidence. It is clear that both counts emanate from the same set facts and circumstances. This raises the question why was count two not framed as an alternative count as opposed to a distinct count by itself.

The above scenario raises the question whether Parliament indented an accused person to be punished twice for the same conduct based on the same set of facts and supported by the same evidence. This brings into sharp focus *'the same evidence rule'* enunciated in the case of *Blockburger vs United States**[12]*** where it was held that the test to be applied is whether there are two statutory offences or only one and whether each requires prove of a fact which the other does not. The rationale is that no one should be punished twice for the same offence.

From the charge sheet the appellant faced count one as outlined earlier in this judgement and second count based on the same facts. This exposed the appellant to double jeopardy and the proper cause of action for the prosecution was to frame the second count as an alternative count of committing an indecent act. Discussing a similar situation the court in *Republic v Moses Gachovi Njiru**[13]*** held that count 2 ought to have been an alternative count as it arose from the same facts. A similar position was reiterated **Omolo, Shah & O'kubasu JJA** in *David Ngugi Mwaniki v Republic**[14]***

I am not persuaded that the said error is capable of being cured under Section **382** of the Criminal Procedure Code[15] because in my view the appellant was exposed to double jeopardy by being tried for two counts emanating from the same facts. To me, this is a clear case of double jeopardy and the conviction cannot be allowed to stand. The omission was a serious mistake that is highly prejudicial to the accused person and vitiates the entire conviction and sentence. The double jeopardy rule protects an accused person against **(a)** retrial after an acquittal, **(b)** retrial after a conviction, **(c)** retrial after certain mistrials and **(d)** multiple punishments. This case falls under the last part.

The paramount consideration of the court is to ensure that miscarriage of justice is avoided. A miscarriage of justice which may arise from the acquittal of the guilty is no less than from the conviction of an innocent person or conviction of a person who has been subjected to double jeopardy. The court has to balance each situation depending on the facts at hand. I find that the court erred in trying the appellant on both counts and treating them as independent counts as opposed to treating count two as an alternative count.

As stated above, the above scenario occasioned a miscarriage of justice. A miscarriage of justice was discussed in the Indian case of *Zahira Habibullah Sheikh & another vs State of Gujarat & Others*[16] where the Supreme Court of India stated:-

> *"It has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. There can be no analytical all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted…… Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, the condemnation should be rendered only after the trial in which the hearing is a real one, not a sham or mere farce and pretence….The fair trial for a criminal offence consists not only in technical observance of the frame, and forms of law, but also in*

recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice"

In view of my foregoing conclusions and guided by the above cited authorities, I find that **(a)** the prosecution did not prove its case to the required standard, and **(b)** that the learned magistrate erred in failing to consider the defence offered by the appellant which in my view was plausible and further **(c)** the appellant was subjected to double jeopardy by being tried on two separate counts arising from the same set of facts and circumstances and that count two ought to have been framed as an alternative count. Consequently I find that the conviction and sentence imposed upon the appellant cannot be allowed to stand .

Accordingly, I hereby set aside the conviction and sentence and order that the appellant be released forthwith unless otherwise lawfully held.

Right of Appeal **14** days.

Signed, delivered and dated at Nyeri this 6th day of June 2016

John M. Mativo

Judge

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[1] No. **3** of 2006

[2]Ibid

[3] K. Anbazhagan v. State of Karnataka and Others, Criminal Appeal No. 637 of 2015

[4] Act No 3 of 2006

[5] {1989} AC 28

[6] Ibid

[7] Ibid

[8] R vs Harkin {1989} 38 a Crim R 296

[9] Australian Criminal Code ss 324, 319

[10]See J Blackwod and K Warner, Tasmanian Criminal Law: Text and Cases (University of Tasmania, 2006) Vol 2, 700, citing PutvesvsInglis {1915} 34 NZLR 1051

[11] Ibid

[12] 284 U.S. 229, 304 {1932}

[13] {2010} eKLR

[14] [2001] eKLR

[15] Cap 75, Laws of Kenya

[16] AIR 2006 SC 1367