REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 70"B" OF 2013

RASHID RUGUZE ROBA.....……...…..……APPELLANT

VERSUS

REPUBLIC……..……..……RESPONDENT

(Appeal against Judgement, Conviction and Sentence in Criminal Case Number 33 of 2011, R vs. Rashid Ruguve Rofa at Nyeri, delivered by C. Wekesa, R.M. on 10 . 9. 12).

JUDGEMENT

The appellant herein seeks to quash the conviction and sentence imposed by the Learned Resident Magistrate in Criminal case number **33** of **2011,** *R vs Rashid Rugive Rofa* at Nyeri, delivered on 10. 9. 2012 whereby the appellant was convicted of an alternative count of indecent act with a child contrary to Section **11 (10)** of the Sexual Offences Act[1] and dismissed the main count of attempted defilement for lack of evidence.

The particulars of the offence in the alternative count were that on the 11th day of August 2011 at [particulars withheld] area in Nyeri District within central province intentionally and unlawfully committed an indecent act by causing his penis to touch the vagina of **G M,** a child aged **11** years.

This being a first appeal, this court has a duty to weigh conflicting evidence and draw its own conclusions.[2] It is the function of a first appellate court to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, the court should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses**.**[3] (Also see *Okeno v. R*[4])

PW1 P N K stated that on the material day they were many in their house and his young daughter was seated between him and the appellant. The girl started pushing towards him and as the appellant rose to leave, he touched his young daughter on the head. After the appellant left he called his daughter and asked her and she confessed that the appellant was touching her private parts. He young daughter also made a similar confession. Subsequently, he reported to the police and the appellant was arrested.

PW2 G M, was aged 12 years at the time of giving evidence. The court was satisfied that she understood the meaning of oath and consequences of lying and allowed her to give sworn evidence. Her evidence was that on 11.8.2011 the appellant took her to his house, removed her clothes and lied on her for about 2 minutes. She also stated that on 11.9.11 the appellant started holding her legs and her father saw it. However, she only disclosed the incidence that he lied on her at the police station.

PW3 M W also a minor, upon voir dire examination the court was satisfied that she appreciated the nature of an oath and allowed her to give sworn evidence. She stated how the appellant touched her thighs on the material day. **PW4 Geoffrey Njoroge Mrefu**, arrested the appellant while **PW5,** the Doctor confirmed that there was no evidence of defilement. **PW6** received the complaint at the police station and accompanied the minor to the police station.

The trial magistrate was satisfied that a *prima facie* case had been established and put the accused on his defence. The appellant elected to give sworn evidence. The appellant did not address himself to the allegations levelled against him. In particular, he did not deny being in the house at the material time when he is alleged to have touched the minors, but he explained that he had differed with **PW1** over a certain woman and **PW1** warned him. In cross-examination he denied that he knew the **PW1's** children.

The learned magistrate concluded that the charge of attempted defilement was not proved but found that the alternative charge of indecent act with a child was proved and convicted the appellant as charged and sentenced him to **15** years imprisonment.

Aggrieved by the above verdict, the appellant appealed to this court seeking to overturn the said sentence. In his amended petition of appeal, the appellant raised four grounds, which in my view can be conveniently reduced into one, ***(a)*** *whether the prosecution proved its case to the required standard.*

I have carefully considered the submissions made by the appellant and the learned prosecution counsel. I have also reviewed the evidence on record and the relevant law. Section **11 (1)** of the Sexual Offences Act[5] 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.*

In *R. vs Stringer*, **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…"*

In my view, for an act to be indecent, there must be circumstances of indecency**. In** *R.vs Court***[6]**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.[7]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.[8]

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[9] though a reasonable belief that there was consent is a good defence.

Whether or not the act involves penetration, an assault committed in indecent circumstances may amount

to the offence of an indecent act. 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. As stated above, the very intention of doing an indecent act is sufficient. From the evidence adduced, I find that the same is manifestly weak to support the charge of indecent assault and that the offence was not proved to the required standard.

The South African case of *Ricky Ganda vs The State*[11]provides useful guidance. In the said case it was held:-

> *".....The evidence must be considered in its totality. In order to convict there must be no reasonable doubt that the evidence implicating him is true……..the correct approach is to consider the alibi in light of the totality of the evidence in the case and the courts impression of the witnesses….it is acceptable in totality in evaluating the evidence to consider the inherent probabilities….*
>
> *The proper approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weigh so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt"*

Having considered the circumstances of this case, the prosecution evidence and the defence offered by the appellant, I am persuaded that the conviction was not justifiable. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge.[12] In my view, that moral certainty is missing in this case, at least from the evidence on record.

The upshot is that this appeal is allowed, I hereby quash the conviction and set aside the sentence and order that that appellant be set at liberty immediately unless otherwise lawfully held.

Right of appeal 14 days

Signed, Delivered and Dated at **Nyeri** this **7th** day of **June** 2016

John M. Mativo

Judge

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[1] Act number **3** of 2006

[2]Shantilal M. Ruwala V. R (1957) E.A. 570

[3]see Peters V.Sunday Post (1958) E.A. 424

[4] {1972) E.A, 32at page 36

[5] Act No 3 of 2006

[6] {1989} AC 28

[7] Ibid

[8] Ibid

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

[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] {2012}ZAFSHC 59, Free State High Court, Bloemfontein

[12]Duhaime, Lloyd, Legal Definition of Balance of Probabilities, Duhaime's Criminal Law Dictionary