REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 139 OF 2015

WILFRED MAINA MWANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence in the

Chief Magistrate's Court at Makadara Cr. Case No. 3462 of 2012

delivered by Hon. L.C Kosgei, RM on 28th August, 2015.)

JUDGMENT

BACKGROUND

The Appellant was charged with attempted defilement contrary to Section 9(1) (2) of the Sexual Offences Act No 3 of 2006. The particulars of the charge were that on 1st July, 2012 the Appellant in Industrial Area within Nairobi Area Province, intentionally attempted to cause his penis to penetrate the vagina of A.K a child aged 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 No.3 of 2006. The particulars were that on 1st July 2012 in Industrial Area within Nairobi Area Province, the Appellant intentionally and unlawfully committed an indecent act with A.K a child aged 10 years by touching her private parts namely vagina.

He was arraigned in court and on conclusion of the trial he was convicted of committing the alternative offence. He was sentenced to 10 years imprisonment. He was dissatisfied with the court's decision and decided to exercise his constitutionally mandated right of appeal. He filed Amended Supplementary Grounds of Appeal in which he set out the following grounds of appeal:

I. ***That the trial magistrate erred in relying on fabricated prosecution evidence which was contradictory and insufficient to convict him.***

II. ***That the learned trial magistrate erred when she relied on circumstantial evidence and thus failed to observe that no offence had been committed .***

III. ***That the learned trial magistrate erred by failing to observe that proper investigations were never conducted to warrant charging and subsequently convicting him.***

IV. ***That the learned trial magistrate erred in failing to consider his defence.***

SUBMISSIONS

The Appellant filed written submissions while the Respondent, represented by learned State Counsel Ms. Kimiri, chose to make oral submissions. The Appellant submitted that the evidence presented in the lower court was a fabrication of facts and contradictory and thus it could not be relied upon to prove his guilt beyond a reasonable doubt. He further submitted that the trial magistrate had erred in relying on circumstantial evidence to support a conviction and in so doing failed to observe that no offence was ever committed by the Appellant. The circumstantial evidence that the Appellant relied on was with regards to PW1 and PW2 frequenting his house which was misconstrued and used as evidence of his commission of the crime. He submitted that no investigations were carried out in the case and consequently the evidence of the investigating officer mirrored on that of the complainant which did not show what investigations were carried out. He concluded by submitting that the trial magistrate had erred in not considering his defence in which he broke down what had transpired on the day in question and also had witnesses who evidenced his activities on the day in question. He therefore prayed that this court allows his appeal, quashes the conviction and sets aside the sentence.

Ms. Kimiri, for the Respondent opposed the appeal. She submitted that the ingredients of the offence had been proved. These were age of the complainant, identification of the Appellant and indecent act. She further submitted that under Section 124 of the Evidence Act the court could convict in sexual offences on the evidence of the minor victim alone without corroboration. She submitted that a *voire dire* examination on the minor had been carried out before taking her sworn evidence. She concluded by submitting that the Appellant was sentenced to 10 years imprisonment which conformed to the law. She therefore prayed for the appeal to be dismissed.

EVIDENCE

The prosecution's case was majorly premised on the evidence of PW1, the complainant and her mother, PW2. It was alleged that the Appellant attempted to defile PW1 after she returned to his house from the shop where he had sent her.

PW1, A.K, after a *voire dire* examination gave a sworn testimony. She recalled that on 1st July, 2012 she was alone at home as her mother was away at church. The Appellant, who was their neighbour called her and informed her he wanted to send her to buy vegetables. When she turned to leave after setting down the vegetables she realized that the door was locked. The Appellant took a knife and informed her he would kill her if she screamed. He then got hold of her, lifted her and put her on the bed. He then told her he would put a finger in her vagina and that if it goes in he will lie on her. She resisted. He tried to take off her skirt but she kept pulling it up and when the Appellant saw she would not allow him to put his finger in her vagina he lay on top of her after taking off his trouser and underwear. She still had her panties on and 'white stuff' came from his penis and he gave her a t-shirt to wipe herself. He also wiped himself with the t- shirt before telling her that he would kill the complainant's mother if she told her. He also gave her 20 shillings.

On the following week on Sunday her mother was unwell and she asked her not to go to church but instead make her porridge. The Appellant came and called her mother and asked her to let him send the complainant to the shop to buy him milk. Her mother obliged but told her to return as soon as she was done. She went to the Appellant's house who gave her money to go purchase the milk. She did so and when she returned and took the milk into his house he put a t shirt in her mouth and pushed her onto the bed. The Appellant then removed his trouser and underpants but while he was struggling with the complainant's trouser her mother came in. She was shocked and asked the Appellant what he was doing to her child. She testified that the Appellant had removed her trousers to her knees and had inserted his fingers into her vagina which was painful. The mother reported the matter to the chief and she was taken to hospital in Mathare where she was examined.

PW2, J K M the mother to PW1 in corroborating the evidence of PW1 confirmed that the Appellant

requested her to send PW1 to his house so that he could send her to the shop. When her daughter took long she thought she could have lost the money and this caused the delay. She decided to check at the Appellant's house. She entered without knocking and she found the Appellant sitting on the bed and trousers on his knees with his private parts exposed. He had inserted his left hand in the complainant's private parts. Next to them on the table was a knife. She asked the Appellant whether he had raped her daughter but the Appellant dismissed her.

She took the child to hospital where she disclosed that it was not the first time the Appellant had done that to her. She produced a health clinic card issued to her after treatment.

PW 3, Dr. JOSEPH MAUNDU based at Nairobi Police Surgery examined PW1 on 28th September 2012 on allegations of defilement by a person known to her on 1st July 2012. On examination he found no physical injuries and that her external genitalia was normal. Her hymen was intact and no discharge was noted. He filled a P3 form to the effect and produced it in court.

PW4, No. 75227 CPL MARGARET MAITHYA, the investigating officer met the child and her mother and the minor informed her that the perpetrator was a neighbor. She took the child to the doctor who confirmed that the child was not injured. She therefore prepared a file to charge the accused with the offence of attempted defilement. She concluded her testimony by producing a health clinic card that showed that the complainant was born on 23rd January, 2002.

PW5, BARBARA SALAMA KERE is the Clinical Officer who presented the treatment card on behalf of Irene Gori who treated PW1. On general examination her vital signs were normal. On physical examination no injuries were evident but her hymen was hyperanic(appeared redder than usual. Tests on blood and urine were negative.

In his defence, the Appellant gave a sworn statement. He recalled that on the morning of 1st July 2012 he woke up at around 7:30 am and as he was getting ready for the day a lady neighbour, PW2, entered the house. She informed him she was sick and he told her he was going to work. PW2 then left for her house. After about 5 minutes the neighbour's daughter,PW1, came to his house but at around 7:40 am he asked her to leave but as she was living they met the mother at the door on her way back. The neighbour then started insisting that he had tried to defile her daughter. Unperturbed he left and went to work. On the following Monday and Tuesday he went to work as usual. On Tuesday evening at around 9:30 pm he heard a knock on his door and upon opening the door he was arrested and taken to the Chief's camp at Landmawe. He spent the night there before being transferred to Industrial Area Police Station. He was charged on the following day.

DW2, PAUL MUHURI KAMAU, testified that he had known the Appellant since 2005 since they lived in the same area. He recalled that on 1st July 2012 at about 7:50 am he met the Appellant while he was purchasing milk. He asked him why he had not gone home since he was not used to seeing him on Sundays. The Appellant informed him he had not traveled home as he had to work. On Monday they both went to work but after three days at around 9.00 pm, due to the nature of their mabati housing, he heard people yelling at the Appellant asking him to go with them. He later learnt that the Appellant was arrested for defiling a child and charged.

DW3, JULIUS MWANGI, he testified that he too lived in Kayaba. He recalled that they met with the Appellant on 1st July 2012 at around 5.00 pm and he asked him why he had not travelled home and he informed him that it was due to the fact that he had to work. On Sunday and Monday evening they met to watch news. He did not meet him on Tuesday evening but received a call from the Appellant's brother on Wednesday informing him that the Appellant had been arrested for defiling his neighbour's daughter.

DETERMINATION

After analyzing the evidence on record I find the sole issue for determination to be whether the prosecution proved their beyond a reasonable doubt. My evaluation of the same point to material

contradictions with regard to the dates and the amount of times the Appellant allegedly perpetrated the offence against the complainant. The offence charged was committed on the 1st of July 2012. The evidence of the complainant, A.K, was that on 1st July 2012 the Appellant tried to assault her, ejaculated on her and thereafter threatened to kill her mother if she told her what had transpired. This all occurred while her mother was away at church. The evidence of PW2, the complainant's mother, was that on 1st July 2012 she went out to check on the clothes and ran into the Appellant who informed her he wanted to send her daughter to the shop. A few things transpired in between but she finally sent her daughter over to the Appellant's to run his errand. She then noticed that her daughter had taken an eternity to return and decided to go and on a whim that her daughter may have lost the Appellant's money she went to find out what was taking so long. The Appellant's house door was not locked and she went in without knocking. He found the Appellant half nude, fondling her daughter's private parts and a knife next to the table and the series of events leading to the Appellant's conviction begun.

However, the evidence of PW4, the investigating officer was that the Appellant had perpetrated the offence on 1st July 2012 and that the complainant informed her that it had never happened again. Whereas the contradiction regarding the times PW1 may have been defiled may not be material as to render the trial a nullity, it is important to note that PW5 testified that PW1 told her that the Appellant had formed a habit of defiling her every time he sent her to the shop. Unfortunately on examining PW1 there was no evidence of defilement. It is then safe to conclude that PW1 was not a truthful witness. In as much as under Section 124 of the Evidence Act a court may convict on uncorroborated evidence of a minor witness if it believes the minor, the same must be evaluated against other evidence the prosecution chooses to tender. I am doubtful in my mind in the circumstances that PW1 gave a true account of what may have transpired between herself and the Appellant.

Besides, there is also marked contradiction in the prosecution evidence on how the offence was discovered. PW2 testified that she went to the Appellant's house on a whim that her child had lost his money and thus ambushed him. The evidence of the investigating officer (PW4) and that of the PW5, Barbara Salama Kere, was that PW2 heard the complainant scream and went to rescue her. It then raises doubt whether PW2 did tell PW4 a true account of what transpired and if she did why PW4 opted to give a different account of events. PW5 was the Clinical Officer who examined PW1. She too testified that PW1 told her that her mother (PW2) heard her scream while in the Appellant’s house and found the latter about to defile her.

It must be borne in mind that the burden of proof in a criminal case always lies with prosecution to prove their case beyond a reasonable doubt. If a doubt is cast in the evidence, the same must be resolved in favour of the accused. See **Miller v. Minister of Pensions [1947] 2 All ER 372**where it was held:

> ***“...[F]or that purpose the evidence must reach the same degree of cogency as is required in a criminal case before an accused person is found guilty. That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence “of course it is possible, but not in the least probable,” the case is proved beyond reasonable doubt, but nothing short of that will suffice.”***

In the instant case, it is my view that the inconsistencies in the evidence do make the commission of the offence less probable and the Appellant's assertion of innocence more congent. They are inconsistencies that cannot be wished away. As a result, this appeal must succeed. I allow the same. I quash the conviction, set aside the sentence and order that the Appellant be and is hereby forthwith set free. It is so ordered.

DATED AND DELIVERED THIS 14TH DAY OF SEPTEMBER 2016

G.W. NGENYE-MACHARIA

JUDGE

In the presence of;

1. Appellant present in person

2. M/s Nyauncho for the Respondent.