



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**CRIMINAL APPEAL NO. 6 OF 2012**

**C W K.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Appeal from original conviction and sentence in Karatina Senior Resident Magistrates' Court Criminal Case No. 606 of 2008 (Hon. L Mbugua), delivered on 7<sup>th</sup> July, 2011)*

**JUDGMENT**

The appellant was charged with the offence of defilement of a child contrary to **section 8(1) (2)** of the **Sexual Offences Act, No. 3 of 2006**. The particulars were that on the 10<sup>th</sup> day of October, 2008 in Nyeri North District, the appellant did an act of penetration to M N M, a child under the age of 16 years. He faced the alternative charge of indecent act with a child contrary to **section 11(1)** of the **Sexual Offences Act, No. 3 of 2006**. The particulars here were that on the 10<sup>th</sup> day of October, 2008 in Nyeri North District, the appellant unlawfully and intentionally assaulted M N M, a child under the age of 16 years, by touching her private parts, namely, vagina.

The trial court found the appellant guilty of the alternative count of indecent act with a child and convicted him accordingly; he was sentenced to 10 years imprisonment. He appealed to this court against both the conviction and sentence on the following three grounds:-

1. The learned magistrate erred in law by holding that the alternative charge of indecent act with a child contrary to section 11(1) of the Sexual Offences Act had been proved.
2. The learned magistrate erred in law and in fact by relying on the evidence that was contradictory and did not establish the commission of any offence by the appellant.
3. The learned magistrate erred by disregarding medical evidence tendered on the appellant's behalf before sentencing him.

The record shows that the complainant was a minor aged 4. She testified and gave unsworn testimony after the learned magistrate opined that she could not understand the meaning of an oath. She testified that while her mother was away the appellant removed her pants and inserted his fingers in her private parts. She informed her mother of this assault when she returned home.

The complainant's mother, **T W M (PW2)** gave evidence that on 10<sup>th</sup> October, 2008 at around 6.00 pm she left her two children, who included the complainant with their grandmother. While she was away, her brother **C M (PW3)**, found the appellant with the complainant; according to her testimony, he had

removed the complainant's pants and "he was on her". The appellant ran away, apparently after C M caught him, and **T W M (PW2)** saw him zipping his trouser. The appellant was a person known to her because they were neighbours.

The complainant's mother did check complainant out but she immediately took her to hospital; she was accompanied by the appellant's wife. Later they went together to the police to report. The appellant is said to have disappeared for two weeks and he was only arrested when he came for a mention of a case in court.

**C M M (PW3)** stated that he was a form four student at [particulars withheld] Secondary School. On the material date at around 6.00 pm he had gone to visit his sister when he found the appellant with the complainant. The appellant is said to have been found seated on a seat and the complainant was between his legs. According to his evidence, the appellant was fondling the complainant. The complainant was dressed but he could not tell whether she had her pants on. When he enquired from the complainant where her mother was, the appellant discouraged him from waiting for her because she had gone far away. The complainant told him that the appellant was lying and that her mother was nearby. This witness asked the complainant and her brother to accompany him to where their mother was. He left with the complainant's brother but the appellant remained with the complainant. The witness did not find the complainant's mother where he went to look for her but he met her when he was going back to her home. Just before he spotted her, he saw the appellant going to the road while zipping his trouser. The appellant came to where they were and asked them to forgive him because he had not done anything. This witness together with her sister hired a motor-cycle and took the complainant to hospital at Karatina as the appellant went to his home.

Police Constable **Wilfred Masita (PW4)** testified that the appellant was arrested at Karatina Law Courts; he had been at large after the incident. According to the police, the complainant's inner wear was indicated in the P3 form as having dry semen and blood. He agreed, however, that there was no finding of defilement.

The doctor who examined the complainant and filled her P3 form was Dr Qureshi. He did not, however, testify as Dr. Wilson Gichuki Kariithi testified on his behalf; he presented the findings and the medical opinion on the complainant's state after her medical examination. According to these findings, the complainant was in a fair condition and her garments were not soiled. There were injuries that were estimated to be a day old and the extent of those injuries was classified as harm. No tears were seen on the external genitalia but the hymen was lacerated. There was neither discharge nor bleeding. The vaginal swab results were not available. The complainant was given what was described as routine drugs.

After the close of the prosecution case and after submissions by counsel for the appellant, the court acquitted the appellant of the main count because of lack of evidence but found that he had a case to answer on the alternative charge. The appellant's counsel informed the court that the appellant is retarded and therefore he could not communicate; for this reason he opted to have his client remain silent and leave it to the court to make its decision.

**Section 11 (1)** of the **Sexual Offences Act** does not only define the offence for which the appellant was convicted but it also prescribes the minimum sentence that that was meted out against him; it says as follows:-

***11.(1) 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.***

Two important elements which must be proved for one to be liable for this offence are first, the nature of the act and second kind of person with whom the act has been committed. As to the nature of the act, it has been described as an "indecent act"; this kind of act has been defined in **section 2** of the **Sexual Offences Act**. It says as follows:

***“indecent act” means any unlawful intentional act which causes-***

***(a) any contact between the genital organs of a person, his or her breasts and buttocks with that of another person;***

***(b) exposure or display of any pornographic material to any person against his or her will, but does not include an act which causes penetration;***

As far as the person with whom the act is committed is concerned, age is the determining factor; it has to be a child. The treatment card which the doctor produced coupled with the evidence of the complainant's mother showed that the complainant was a minor and she testified as such. There was therefore no doubt whether the victim of the alleged assault was an adult or a child. The only aspect of the offence that was not easily settled was the act of indecent assault. The question that therefore concerns this court as it certainly concerned the lower court is whether there was sufficient evidence to prove that an indecent act was committed, by the appellant and with the complainant. The answer to this question can only be found in the evidence at the trial.

The trial court obviously had the advantage of seeing and hearing the witnesses as they testified and therefore it is assumed that it appreciated the evidence better than this Court which is only restricted to the record before it. But even so, this court is not bound by findings of fact of the lower court if after the evaluation of the evidence on record, it is inclined to reach a different conclusion.

According to the complainant, the appellant removed her pant and inserted his fingers in her vagina. Her uncle, **C M M (PW3)** is said to have found the appellant fondling her. She is said to have been between the appellant's legs but it is not clear from the evidence whether she was standing or she was seated together with the appellant.

If it is indeed true that **C M M (PW3)** found the appellant fondling the complainant, was he not concerned as to raise any sort of alarm, if for some reason he could not stop him? He testified that he was a form four student meaning that he was old enough to tell that whatever the appellant was up to was not right; couldn't he have rescued the complainant or even attempted to free her from the appellant instead of simply walking away to look for his sister? Is it possible that he could just leave his niece being sexually assaulted? These questions raise doubt in my mind whether **C M M (PW3)** ever saw the appellant committing the offence for which he was convicted.

I also note that though the complainant testified that the appellant had removed her pant, **C M M** testified that he was not sure whether his niece had her pant on or not. More importantly, however, is the contradiction between what **C M M** himself testified he saw and what the complainant's mother related as having been told by the same Charles Muthee Maina. According to the complainant's mother, **M** told her that the appellant had removed the complainant's pant and that “he was on her”. But as has been noted **M** testified that he could not tell whether the appellant had removed the complainant's pant or not and that the appellant was seated on a seat; he did not say that he saw the appellant “on the complainant.”

It is also important to note that though the complainant's mother testified that she left children, including the complainant, under the care of their grandmother, this person did not feature anywhere amongst the prosecution witnesses. If this grandmother was in charge of the children when one of them is alleged to have been assaulted, she would have shed some light on whether these allegations were true; under the circumstances, the responsibility to protect the children from any form of harm, including the alleged assault, lay squarely on her. Much as the state has the discretion to call whichever witness it chooses, this particular one was crucial and her evidence would probably have cleared some of the lingering doubts.

Turning to the medical evidence, it was apparent from the evidence of Dr. Wilson Gichuki Kariithi (**PW5**) that Dr. Quresh who completed the P3 form did not examine the complainant; all he did was to rely on the treatment card which the complainant was issued with when she went for treatment on 10<sup>th</sup> October, 2008. In fact looking at the P3 form, he literally lifted the information in the treatment card word for word but in the process omitted or distorted some information. For instance the card said: external

genitalia- “no laceration, bruises or semen/blood deposits” but in the P3 form, the doctor indicated that there were whitish dried deposits, semen and no blood. There is no indication of laceration of the hymen in the treatment card but in his testimony the medical expert testified that the hymen was lacerated.

These inconsistencies in the prosecution witnesses’ testimony, in my humble view, were sufficient to cast enough doubt that an indecent act had been committed on the complainant and that the appellant was its perpetrator; the appellant ought to have benefited from these doubts.

Although it would not make any difference to my conclusions, one other thing I have noted and which I am compelled to mention here is that besides having been recorded as having entered a plea of not guilty, the appellant never said anything else during his trial. He did not cross-examine the first three prosecution witnesses; it is only when an advocate appeared on his behalf that he cross-examined the remaining two prosecution witnesses. The reason for being passive became apparent when he was called upon to defend himself; it emerged that the appellant was mentally retarded and had spent a considerable part of his life at Karatina Special School for the Mentally Handicapped. The records presented to court by his counsel showed that he had been admitted in that institution between 1984 and 2006.

The trial court may not have observed the mental disposition of the appellant until an advocate appeared for him and therefore cannot be faulted for having presided over the prosecution of a person that could not follow the proceedings; however, for purposes of determination of this appeal, I would say that considering the mental status of the appellant, he may not have followed the proceedings during his trial and therefore his right to a fair trial as guaranteed under **article 50(2)** of the Constitution was severely undermined; perhaps he may not have been subjected to the trial if his mental status had been ascertained from the very onset.

For all these reasons I am satisfied that the appellant’s appeal is merited and I hereby allow it; his conviction is quashed and sentence set aside. The appellant is set at liberty unless he is lawfully held.

**Signed, dated and delivered in open court this 7<sup>th</sup> October, 2016**

**Ngaah Jairus**

**JUDGE**