REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

CRIMINAL APPEAL NUMBER 23 OF 2015

(From original conviction and sentence in criminal case number 1519 of 2014 of the Principal Magistrate's Court at Kapenguria)

EVANS MWAURA……..……. APPELLANT

VERSUS

REPUBLIC ……. RESPONDENT

JUDGEMENT

The Appellant herein, one **EVANS MWAURA** was charged with the offence of **Sexual Assault, contrary to section 5(1) (b) as read with section 5(2) of the sexual offences Act No. 3 of 2006.**

The particulars of this offence are that on the 6th day of November 2014 at Kacheliba stage within Makutano Township in West Pokot County, the Appellant unlawfully caused his finger to penetrate the vagina of J W, a girl aged 4 years.

The Appellant in the alternative faced a charge of **indecent Act Contrary to section 11(1) of the Sexual Offences Act No. 3 of the Sexual Offences Act.** For this offence the particulars are that on the 6th day of November 2014 at Kacheliba stage in Makutano Township in West Pokot County, the Appellant unlawfully and intentionally caused his fingers to touch the vagina of J W.

The prosecution called five witnesses and their case is briefly that PW-2 (M W) is the mother to the complainant in this case, who is PW-1. PW-3 (G N) is a sister to PW-2. PW-4 is the clinical officer while PW-5 is the investigating officer.

PW-1 by the time of commission of the alleged offence was aged 4 years and was schooling at *particulars withheld* in what she termed as room 3. She alleged in her unsworn testimony that she had seen the appellant before at the hotel of PW-3 (Mama Jimi). She however did not know his name. She alleged that the appellant put his "dik dik" in her. She was in a skirt and he removed it. He didn't remove his clothes. They were only the two of them at the back of the hotel of Mama Jimi. She cried. The appellant told her to go with Jimi to buy chips. He laid her on the ground. He wanted to put his finger inside hers. Then he put it in her private part (pointed at her private part). She then stated that he put it in the part she uses to urinate.

Her mother (PW-2) says it was on 6/11/2014. She was at work where she sells milk. She met PW-1 at 7 pm. She told PW-1 to stay in the house as she goes to fetch water. The minor told her that she won't tell

her what Mwaura did to her and instructed her not to tell the mother, unless the mother was willing to go with herto fetch the water. The mother told her to join her so that she tells her. Its then she disclosed that uncle took her at the back of the hotel. She was laid on flowers. He removed her clothes. Uncle promised to buy her sweet and chips. He wanted to put his "dick dick" in her but she told him she would feel pain. He did not then put his "dick dick" but used his finger into her private parts. PW-2 went and asked PW-3 about it. PW-3 said Mwaura went with J around 1:00 p.m. PW-2 went and reported at Kapenguria Police Station. They were referred to the hospital.

PW-4 examined PW-1 on 8/11/2014. He indicates that she was 4 years old. On examination the hymen was intact. She had no S.T.I. He indicated that there was attempted defilement. The age assessment indicated she was 4 years 7 months old.

PW-5 the investigating officer issued the P-3 form and caused the appellant to be arrested and charged. The appellant when he was placed on his defence gave a brief unsworn testimony and called no witness. He stated that he was working at a bakery and a hotel in Makutano. On 8/11/2014 he went to the hotel. He asked for money from Grace who is his boss. He was told to wait till 4 p.m. At 4 p.m police went and arrested him. He was taken to Kapenguria police station and charged. He denied the offence in court.

The trial magistrate in his judgment delivered on 24/4/2015 found him guilty of the alternative count and he was accordingly convicted and sentenced to 10 years imprisonment.

Dissatisfied with both the conviction and the sentence he appealed to this court. His grounds of appeal are generally that the case was not well investigated, the evidence was not properly evaluated by the trial Magistrate and was in want of corroboration.

The state opposed the appeal on both conviction and sentence on the grounds that the facts disclosed the offence in the alternative charge and the appellant was properly convicted and sentenced.

This being a court of first instance on appeal, I am legally bound to evaluate the entire evidence afresh and if deserved even come to an independent different finding.

I wish to start by saying that the complainant who was aged 4 years 7 months then was a child of tender years. As the law demands of such child a **Voir Dire** should be conducted and recorded in the right manner as the law dictates. The questions put by the court to the child should have been recorded as they were put, and the answers given by the child recorded as given. What is on record as voir Dire is only a few answers given by the minor. They are very brief and as follows:-

> *" I am J W. I am in room 3 at Makutano Central. I don't know my age. I will tell the truth."*

The court the made a finding that :-

> *"The minor is of tender age 4 years as per charge sheet. Let her give unsworn statement as she can't understand what an oath is."*

It's clear that the trial magistrate did not ask enough and relevant questions; and the answers given were not adequate to justify his finding. The said finding is also not explicit on the two crucial findings:-

> ***1. Whether the child is intelligent enough to offer evidence.***
>
> ***2. Whether the child understands the meaning and nature of oath.***

The court's finding is in want of the decision on the first consideration.

Voir Dire procedure as I have indicated was guided by the holding in the case of Johnson Mwiruri -Vs- Republic (1983) KLR 447. It was reiterated in the CMR of Kivevelo Mboloi -Vs- Republic, Criminal Appeal No. 34 of 2013.

PW-1 gave unsworn testimony and she was the only eye witness in the case. I have carefully evaluated her evidence. I do find existence of danger in relying on it to arrive at a conviction. She stated that the appellant put his "dik dik" in her (He put his dik dik in me). She was not called to explain what she called "dik dik" if "dik dik" meant appellant's genital organ, then the offence committed was defilement. She went ahead to say he removed her skirt and he did not remove his clothes. She never stated whether she was in a pant and if she was, what happened to it. If appellant did not remove his clothes, she then needed to explain what "dik dik" is and where it was put. Further on, in her evidence, she said, "he laid me on the ground. He wanted to put his finger inside mine." My understanding of this statement is that he wanted to put his finger in her finger. However she explained that he put it in her (pointed at her private parts). Still further she explained that he put it in the part she uses to urinate. If these latter statements made it clear on where the appellant put his finger; she needed to explain how, given that she did not state whether she had her pant on or not.

PW-2 did not well corroborate her evidence. She was allegedly told that Mwaura laid her on flowers. It should be noted here that the girl said she had not known his name and never referred to him anywhere in her evidence as Mwaura. The witness further discloses that she referred to the appellant as uncle. The complainant did not as well refer to him as such in her evidence. What she reported to PW-2 is that the appellant wanted to put his "dick dick" in her but she told him she will feel pain. If that was the case, the offence committed given the appellant's intention was attempted defilement. When PW-2 stated that the minor said he used his finger into her private part it makes it unclear whether he penetrated her using the finger or with the help of a finger penetrated her with another object or organ. When PW-2 asked PW-3 (her sister) about it, she told her the appellant went with the complainant at 1:00 p.m. However PW -3 in her evidence does not disclose such. She said in her evidence that the appellant went to the hotel at 10:00 a.m on 6/11/2014 and then returned at lunch hour. She never disclosed that the appellant met the minor and left with her.

The statement by the complainant that the appellant told her to go with Jimi to buy chips, suggests that he gave her some money. We were however not told of what happened of such money if at all it was given.

The clinical officer's evidence does not corroborate the complainant's evidence. He found no evidence which can be connected to the offence. Her hymen was intact and she had no S.T.I. No other odd observation was made which suggests her genitalia was intact. It's out of this evidence that the court concluded there was no penetration and that the evidence revealed an offence of indecent Act. If the girl's evidence is that she was penetrated with a finger, the medical finding, as well as the court's, contradicts it.

This case was poorly investigated. It's clear that the investigating officer did not visit the alleged scene of crime. If she did would have informed us about it's layout, and whether there were flowers in which the girl told her mother was laid on. We would have been told whether such a scene appeared disturbed, and probably have photographs taken of the place. There should have been effort to recover the girl's clothes to see whether they were soiled and if such stains present matched what was at the scene. The same should have been done upon accused's arrest to try and place him at the scene or otherwise.

Doctors and clinical officers are mostly expected to form an opinion given their clinical finding and not merely on history indicated on P-3 form or P.R.C form. When PW-4 indicated that there was attempted defilement of which is not supported at all by his clinical finding, he does not assist the court at all in its effort to arrive at a decision based on facts and the law. It's simply flowing to the direction of the tide.

PW-1 is a minor. She gave unsworn testimony. She was not consistent and firm in her evidence. She was not also clear on what actually happened to her. The evidence is not corroborated by any other evidence. The trial magistrate erred in finding that it was corroborated by the evidence of PW-2 who was not an eye witness. If she had weighed PW-1's evidence correctly, she would have found the glaring gaps and the ambiguities of which are vividly pronounced. There is no doubt of the existing danger in relying on such evidence to arrive at a conviction.

The offence of which the appellant was convicted of, was not proved by the prosecution beyond reasonable doubt. The existing doubts as required of law are resolved in his favour. As he urged this court

in his submissions the appeal is allowed, conviction quashed and sentence set aside. He's accordingly set at liberty unless otherwise lawfully held.

Judgment read and delivered in the open court this 3rd day of November, 2016 in the presence of:-

Mr. Mark Nabuyumbu for the state

The Appellant - Present

S. M. GITHINJI

JUDGE