



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 218 OF 2015

J M N.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the Principal Magistrate's Court at Eldama Ravine

Hon. M. Kasera - Principal Magistrate delivered on the 14th October, 2015

in PMCR Case No. 25 of 2015)

JUDGMENT

The Appellant **J M N alias M** has filed this appeal challenging his conviction and sentence by the learned Principal Magistrate sitting at the Eldama Ravine Law Courts. The appellant was arraigned before the trial court on 12/1/2015 facing a charge of **SEXUAL ASSAULT CONTRARY TO SECTION 5(1) (a) (1) as read with SECTION 5(2) OF THE SEXUAL OFFENCES ACT, 2006.**

The particulars of the charge were that

“On the night of 10th day of January 2015 and 11th day of January 2015 within Baringo County, unlawfully penetrated his finger into the genital organ (vagina) of T W a child aged 12 years”.

The appellant entered a plea of ‘**Not Guilty**’ to the charge. His trial commenced on 12/3/2015 at which trial the prosecution called a total of six (6) witnesses in support of their case.

The complainant **T W** was a minor aged 12 years old. She told the court that on the night of 10th/11th January 2015 she was asleep in the family home in [particulars withheld] Village. The child told the court she shared a bed with her sister ‘**M M**’ whilst her aunt **M W PW3** slept on a separate bed in the same room. At about midnight the complainant felt pain in her private parts. She felt a finger being inserted into her vagina. The complainant shouted and called out to her father who was sleeping in a separate room.

The appellant who was in the room visiting the child’s aunty asked for forgiveness. The aunt (**PW3**) threatened to take the appellant to her brother. The appellant then took off but was chased and brought back.

The complainant was taken to hospital where she was examined and found to have bruises on the outer genitals. The appellant was then taken to court and charged.

At the close of the prosecution case the appellant was found to have a case to answer and was placed onto his defence. He gave a sworn defence in which he admitted having been in the room at the material time but denies having molested the complainant.

On 14/10/2015 the learned trial magistrate delivered her judgment in which she convicted the appellant of the offence of Sexual Assault and sentenced him to serve ten (10) years imprisonment. Being aggrieved by both his conviction and sentence the appellant filed this appeal.

The appellant who was not represented by counsel at the hearing of his appeal opted to rely upon his written submissions which had been duly filed. **MS OUNDO** learned Senior Assistant Director of Public Prosecutions, made oral submissions in opposition to the appeal.

Section 5 of the Sexual Offences Act provides

“Any person who unlawfully penetrates the genital organs of another person with:-

a. Any part of the body of another person or that person or

b.”

In this case the complainant told the court that she awoke to find that a finger had been placed into her vagina. She grabbed hold of the hand which was fingering her and it was a **‘Masculine hand’**. The only person who slept in that room were the complainant, her sister and her aunt. All were female. The male was an intruder. Although the incident occurred at night when the complainant raised the alarm the appellant spoke up asking for forgiveness. **PW1** stated that she knew the appellant as he was her aunty’s lover.

The complainant gave a clear account of what happened to her on that night. She stated under cross-examination at page 7 line 10

“I held your hand when your finger was in my private part. Our hands are smaller than yours so it was not my sister’s hand. My aunties hand is soft. The hand I held was tough (masculine) and it was yours.....”

PW3 M W was the complainant’s aunt. She confirms that on the night in question she was sharing a bedroom with her two nieces. **PW3** states that the appellant who was her lover came and knocked on the door. She let him in and they moved to her bed (It appears the appellant used to visit her regularly at night). Suddenly the complainant shouted saying that somebody had touched her. Thus the evidence of **PW3** corroborates that of the complainant in that it places the appellant at the scene in the bed room.

In his defence the appellant himself admits that he had in fact gone to the bedroom on the night in question in order to reconcile with **PW3** with whom he had had a quarrel. Thus there can be no doubts regarding the presence of the appellant in the complainant’s bedroom that night.

The complainant told the court that a finger was inserted into her vagina. **PW2** the child’s father confirms that he awoke to hear his daughter calling out to him. She later told him that a finger had been inserted into her vagina.

The complainant was taken for a medical examination. **PW5 DR. PHILIP KAMAU** a doctor at Eldama Ravine Hospital confirms that he examined the child. He noted that she had a bruise on her private parts which was evidence of some interference. **PW5** filled and signed her P3 form which he produced in court as an exhibit **P. Exb 2**. He also produced the age assessment report confirming that the complainant was twelve (12) years old. **P. Exb 3**. The evidence of the doctor corroborates the testimony of the complainant

that a finger was inserted into her private parts.

Similarly **PW3** who was sleeping in the same room with the complainant confirms that the complainant said she had been touched. It is pertinent that appellant immediately asked for forgiveness – why was he seeking forgiveness if he had done nothing wrong? I doubt that any of the other women in the room would have inserted a finger into the child’s vagina. The only likely culprit was the appellant.

The fact that the appellant ran away after the incident is also indicative of a guilty mind. I therefore find that it was the appellant who in error (mistaking the sleeping child for his lover) or otherwise inserted his finger into her vagina.

Section 5(a) refers to **‘penetration’** of a person’s sexual organs.

In order to establish the commission of this offence the prosecution must adduce evidence to prove that there has been an act of **‘penetration’** into the genital organ of the victim. The term **‘penetration’** is defined in Section 2(1) of the Sexual Offences Act as:-

“the partial or complete insertion of the genital organs of a person into the genital organs of another person”

Thus the definition of the word **‘penetration’** makes a specific reference to the complete or partial insertion of a **‘Sexual Organ’**.

A finger cannot be described as a sexual organ. Thus I do agree with Ms Oundo that a conviction under Section 5 was erroneous. The correct offence ought to have been ‘Indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act. I therefore quash the appellant conviction and instead impose a conviction under Section 11(1) of the Act.

Section 11(1) provides for a sentence of **‘not less than ten years’** upon conviction. As such the ten (10) year sentence imposed upon the appellant by the trial court remains lawful and is hereby confirmed. This appeal therefore fails.

Dated in Nakuru this 7th day of November, 2016.

Appellant in person.

Maureen A. Odero

Judge