



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CRIMINAL APPEAL NO. 150 OF 2014

PHARIS KIHARA WANYATI APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an appeal from the original Conviction and Sentence of the Principal Magistrate's Court at Mavoko by Hon. L.A. Mumassaba (RM)) in Sexual Offence Case No. 7 of 2014 dated 6th August, 2014)

JUDGMENT OF THE COURT

1. The appellant, **Pharis Kihara Wanyati** was convicted of the offence of Sexual Assault contrary to **Section 5(1) (a) (ii) 2** of the **Sexual Offences Act**, and was sentenced to ten (10) years imprisonment.
2. The applicant, being dissatisfied with the said conviction and sentence has filed this appeal urging the following grounds;
 - a. That the learned trial magistrate erred in law and fact when he failed to consider the evidence that connects the accused person to the alleged offence.
 - b. That the learned trial magistrate erred in law and fact when he held that the appellant was guilty of the alleged crime.
 - c. That the learned trial magistrate erred in law and fact when he failed to consider the fact the accused was unable to defend himself.
 - d. That the learned trial magistrate erred in law and in fact when he failed to give the appellant adequate time to prepare for trial.
 - e. That the judgment and sentence as drawn is full of omissions and is bad in law.
 - f. That the trial magistrate failed to consider that the proceedings as taken lacked merit and could not sustain a conviction.
 - g. That the learned magistrate erred in law and in fact in failing to find that the prosecution evidence lacked corroboration and was full of contradictions.

h. That the appellant herein appeals against both judgment and sentence herein.

3. The brief facts of the case were as follows. The particulars of the charge are that the accused person on the **17th day of March, 2014** at [particulars withheld] area in Athi River District within Machakos County, intentionally and unlawfully caused his finger to penetrate into the female genital organ (vagina) of **NNM** a child aged 7 years. The accused person is also facing an Alternative Charge of committing an indecent act with a child contrary to **Section 11(1) of the Sexual Offences Act No. 3 of 2006 Laws of Kenya**.

4. The particulars of the charge are that the accused person on the **17th day of March, 2014**, at [particulars withheld] area in Athi River District within Machakos County, intentionally and unlawfully caused his finger to penetrate into the female genital organ (vagina) of **NNM** a child aged 7 years. The accused person pleaded not guilty in both the main and the alternative charge and the matter proceeded for full hearing. The Prosecution's case is that on **17th March, 2014** in the afternoon, PW2 left PW1 with the accused person who was their neighbor. She was going to pick PW1's brother from school. PW1 used to play with the accused person's children and the accused person assured PW2 that his children were almost returning from school. PW1 then got into the accused person's house and started watching television. It was her evidence that the accused person shortly after switching on the television for her to watch started touching her. He lied to her that he was confirming whether she had healed as she had been bitten by a dog the previous day on her thigh. It was her evidence that he touched her vagina using his finger and that he had removed her clothes. She managed to push the accused person away from her, wore her clothes and went outside. She later returned to the accused person's house to pick their house keys and sat outside their gate to wait for her mother, PW2. It was her further evidence that the accused person touched her vagina with his fingers and his nails were long and that she bled. She was then taken to hospital and then to the police station. PW1 knew the accused person as they were neighbours and she was at times left by her mother at the accused persons place to play with his children. She further testified that on the material day that accused person allegedly assaulted her sexually, his children were not at home.

5. The main issue in this appeal, which is to be determined, is whether or not the appellant committed the alleged offence, and this issue turns on ground number 7 of the Petition of Appeal, that is, whether the evidence of the complainant was corroborated. This is basically so in light of the fact that the appellant was known to the complainant, and had a day earlier allegedly administered first aid to the young complainant following a dog bite during which the complainant was injured in her private part. The appellant's defence appears to be that he touched the complainant's private part unintentionally, while the intention was always to find out if the dog bite wound had healed, or was healing.

6. Parties made oral submissions. The appellant's counsel **Mr. Simiyu** submitted that the whenever a doubt arises on a criminal matter the benefit of doubt must be given to the accused. In this matter there were lots of doubts. There was no direct evidence connecting the appellant with the offence committed. The minor N was bitten by a dog on her thigh on 16th March, 2014. The appellant was the nearest neighbour who was called to perform first aid on the minor. On the following day the minor was left with the appellant, and the appellant checked the injury of the minor and therein the allegation that he poked his hand in the minor's vagina, leading to bleeding. There was no evidence of bleeding shown to the court. Further, there was a controversy on the age of the child, which varied from 7 to 8 to 9 years depending on who gave evidence. Mr. Simiyu submitted the magistrate had a preconceived idea and had in her mind already convicted the appellant. The magistrate had indeed confirmed that the minor had a dog bite but did not disclose how close the said wound was to the vagina. P3 Form was produced by an officer who did not examine the minor. The P3 Form also does not disclose the distance between the wound and the vagina. The appellant only went to help but things turned against him. It was submitted that the appellant did not intentionally assault the girl [minor]. He was only using his hand to check the wound. There was no intention to injure the minor. It was not the first time the minor had been left alone with the appellant, and nothing had happened before. The defence urged the court to allow the appeal.

7. The prosecution submitted that the case was proved beyond any reasonable doubt, and that conviction and sentence should be upheld.

8. From the facts of the case and submissions of the parties, what emerges, and the issue for determination, is whether or not the appellant intentionally and with *mens rea* touched the vagina of the complainant. It is not in doubt that the appellant was known to the complainant and to her family. It is also not disputed that the appellant had the previous day administered first aid on the complainant, a minor, following a dog bite in her private parts. In administering the said first aid, and examining the extent of her injury, the appellant must have closely looked at the complainant's private part, the vagina. A day after that, the complainant was left with the appellant, who sought to find out whether the wound had healed or was healing. It is then alleged that he sexually assaulted the complainant.

9. At this stage it is the duty of this court to review and to re-evaluate the evidence and to reach its own finding based on that re-evaluation. The complainant, whose age varied between 7 and 9 years depending on who gave evidence, understood the need to tell truth and this was confirmed by the court which conducted a *voire dire* exercise. She testified that the appellant took her inside the house, and undressed her so that he could confirm whether or not the dog bite wound had healed. The appellant then inserted his finger into the vagina causing her to bleed. This testimony was corroborated by the mother who stated that she noted blood stains on the complainant's vagina. The doctor also corroborated the evidence of the minor.

10. I have carefully considered the evidence. The issue here is not the act itself, or the *actus reus*. The act is confirmed by all the witnesses, including the appellant. The appellant's defence is that, while it is true he touched the vagina of the complainant, there was no intention to do that. He was examining the dog bite area, which was close to the vagina, and in the process his finger strayed to the vagina. The issue to be determined by this court is whether the appellant's testimony raised a doubt about him having the *mens rea* to commit the offence. The cardinal rule running throughout the criminal jurisprudence is that the prosecution must prove the commission of an offence beyond any reasonable doubt, and that where there is a doubt, the same must be given to the benefit of the accused person.

11. Now, in this matter, the appellant was a day before the alleged offence a good Samaritan who administered first aid on the complainant. A day after that, the complainant was left under his care, and he sought to establish whether or not the wound was healing. The wound itself was said to be near the private part of the complainant. In the process of examining the wound the complainant testified that the appellant sexually assaulted her. The appellant on his part states that he did not sexually assault the complainant, but that his long fingers may have touched the complainant's vagina. Obviously, there is a doubt as to whether the appellant intentionally sought to sexually assault the complainant. The only person who can clarify this issue is actually the complainant herself, who at 7 years, would not really understand the intention of the appellant. A child of 7 years will only state what happened as it did, but would not really know the intention of the appellant. Such a complainant would testify about what other people may have told her to say. This court does not know whether or not the appellant committed the said offence. He may as well have done that. However, being that the appellant had previously administered first aid on the complainant, it is not farfetched to think that he would be interested to find out whether or not the wound had healed. This, however, he ought to have done in the presence of the parents of the complainant, instead of doing it alone with the minor in circumstances which reveal he could have had ulterior motive. However, that does not deny the appellant the right to any doubt in these proceedings being given to his favour.

12. It is the finding of this court that the prosecution did not prove the guilt of the appellant beyond any reasonable doubt, and that indeed doubts abound whether or not the appellant committed the offence, and whether the *actus reus* met the *mens rea*.

13. For these reasons the appeal succeeds, the conviction and sentence is hereby quashed and set aside. The appellant is set free unless otherwise lawfully held.

THAT is the judgment of the court.

DATED, SIGNED AND DELIVERED THIS 15TH DAY OF NOVEMBER, 2016

E.K.O. OGOLA

JUDGE

In the presence of;

Mr. Machogu for State

Appellant present

Court Assistant – Mr. Munyao