REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 154 OF 2015

PETER MWAO KAMIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original Conviction and Sentence of the Chief Magistrate's Court at Machakos by Hon. C.K. Kisiangani (RM)) in Criminal Case No. 244 of 2015 dated 27th October, 2015)

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JUDGMENT OF THE COURT

1. The appellant was charged in the trial court with two (2) counts of offences. The first count was committing an Indecent Act with a child contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. It was alleged that on the 9th day of January, 2015 within Machakos County intentionally and unlawfully touched the breasts of JW a girl aged fourteen (14) years with his hands against her will. In count two (2) the appellant was charged with abducting with intent to confine contrary to **Section 259** of the **Penal Code**. The particulars were that on the 9th day of January, 2015 within Machakos County abducted with intent to cause JW to be secretly and wrongfully confined. After the trial the trial court convicted the appellant and sentenced him to serve ten (10) years and one (1) year respectively for the two counts. Aggrieved by the decision of the trial court the appellant lodged this appeal on 9th November, 2015 raising the following grounds for appeal.

a. The trial court erred in law by convicting the appellant when the case against him had not been proved beyond reasonable doubt.

b. The trial court erred in law and fact by convicting the Appellant in the absence of evidence to prove that the complainant was a minor.

c. The trial court erred in law and fact by conducting the trial in a manner which violated the appellant's constitutional rights to a fair trial. In particular the language used during plea taking and the entire trial is not indicated.

d. The trial court erred in law and fact by failing to find and hold that the prosecution's evidence was full of doubts which doubts ought to have been resolved in favour of the Appellant.

e. The trial court erred in law and fact by failing to find and hold that the prosecution evidence did not support the charges facing the appellant. The patent inconsistencies thereof created doubts

which ought to have been resolved in favour of the Appellant.

2. To prove their case the prosecution called a total of five (5) witnesses, whose total evidence can be summarized as follows. On 9th February, 2015 at around 1pm the complainant herein JWM went to salon to make her hair. That is where she met the accused, who snatched her phone, hat and spectacles and refused to give them back. He then told her to go to his house and he left the salon. The complainant decided to follow the accused to his house so as to get her things since she was reporting to school the following day and needed her spectacles. When she found the accused, he still refused to give back her things and instead pulled her into his house and locked her inside and left. The accused returned to his house at around 6.30p.m then went out again locking his door from outside. He came back again and put on loud music. Since it was now late and the accused had warned her that there were no vehicles at the time and that the area was insecure, the complainant decided to stay until the following day. The accused then touched her breasts while her clothes were on. Later at 10.00pm the police officers and her father came looking for her.

3. The accused was put on his defence and gave sworn evidence denying the offences. He did not call any witnesses.

4. With the leave of the court parties filed submissions to the appeal. The appellant's case is that the prosecution failed to prove their case beyond reasonable doubt. The Appellant's case is that for count one to stand the age of the child had to be proved beyond reasonable doubt. **Mr. Ngolya** for the appellant submitted that no iota of evidence was adduced to prove that the complainant (PW1) was a child in respect of whom the Sexual Offences Act would apply. The age of a victim of an alleged Sexual Assault under the Sexual Offences Act is a critical component. Without watertight evidence and in the absence of authoritative documents such as Notification of Birth of a child or a Certificate of Birth, a court of law cannot estimate or approximate an alleged victim's age. Counsel submitted that no evidence was led to prove the child's age and on this ground alone this appeal must succeed.

5. **Mr. Ngolya** also submitted that with regard to count two (2) the prosecution did not prove commission of offence of abduction with intent to confine. Counsel submitted that PW1 did not allude to any act on the part of the appellant constituting abduction. No promise whatsoever was made to her by the appellant. The items she alleged the appellant took from her were never produced in court as exhibits. The appellant's case is that it was the complainant who voluntarily went to his house and started watching Television. The complainant refused to leave the appellant's house and the appellant did not interfere with her in any way.

6. On their part the prosecution opposed the appeal. **Mr. Cliff Machogu** for the State submitted that age of a victim of Sexual Assault under the Sexual Offences Act is a critical component, and must be proved by credible evidence. This, counsel submitted, was proved by the victim's own testimony that she was fourteen (14) years. It was also corroborated by the victim's father (PW2) and that of PW5- the investigating officer.

7. **Mr. Machogu** also submitted that the second count of abduction with intent to confine under **Section 259** of the **Penal Code** was also proved. The state urged the court to dismiss the appeal.

8. I have carefully considered the appeal and submissions of the parties. I have also carefully reviewed and re-evaluated the evidence given at the trial. I have considered the submissions of the parties and the grounds of appeal. I agree with Mr. Machogu that the issues for determination in this appeal are:

(i) Whether the age of the complainant was proved beyond reasonable doubt in the first count.

(ii) Whether the prosecution's evidence discloses the offence of abduction with intent to confine for count two.

(iii) Whether the evidence of the victim that the appellant touched her breast was beyond reasonable doubt.

9. On the first issue of age, the complainant testified that she was fourteen (14) years old, and in form one at [particulars withheld]. This issue of age was corroborated by the testimony of her father (PW2). There was no documentary evidence produced to confirm age. However, that should not be a hindrance to establishing age beyond any reasonable doubt. The use of a Birth Notification Certificate or a Birth Certificate indeed makes the process much easier. But in my view any believable testimony in the absence of any documentary evidence is sufficient to prove age as required under the Sexual Offences Act. If that were not correct, then a vast majority of offences which are being committed against children under the age of eighteen (18) years would never be proved. So, then, whose evidence, in the absence of a Birth Certificate, can be taken as conclusive? In my view, the victim's evidence is the starting point, but that of the parent is paramount since they were the people who gave birth to the victim. Where this fact is corroborated by other witnesses is an added advantage. I have looked at the trial record. The victim stated that she was fourteen (14) years old and in form 1. The defence never challenged this testimony in cross-examination. A court of law is comprised of reasonable people, and where the issue of age would be material, it would be clear on the record. In this case there was no such dispute on age. It is the finding of this court that the victim's testimony that she was fourteen (14) years old was corroborated by the evidence of PW2 her father, and other facts including that she was in form 1. It is also the finding of this court that the trial magistrate acceptance of the victim's age of fourteen (14) years was based on her testimony and circumstantial evidence was proper.

10. On issue number two, as to whether the evidence upon which the appellant was convicted was proved beyond reasonable doubt, this court thinks that the issue is very important. Although the victim denied it, it still comes across that both the victim and the appellant had known each other for a short while. The appellant testified that the victim was his girlfriend, but the victim testified that she had only seen him at a bus stage. However, for some reason, the victim ends up in the appellant's saloon. Whether by prior arrangement or by coincidence, it is not easy to tell. But the victim then says that the appellant snatched her phone, hat and spectacles and ran away with them to his home, compelling the victim to proceed to the appellant's home for those items, and then she was allegedly abducted and detained. It is noteworthy that the alleged phone, hat and spectacles which were allegedly taken from the victims were not produced in court as exhibit. It is also clear that apart from the allegations by the victim that she was locked in the appellant's house, the rest of her stay in the appellant's house appears to have been comfortable. She was given food, she was never molested, and the appellant did not seek to have sex with her. In her testimony, the accused only touched her breasts while she had her clothes on. At this stage it is clear that the appellant is not that very bad guy the Sexual Offences Act points out. The evidence of the victim must be weighed against the possibility of a child who may not be telling his parents and the police the entire story. For an appellant who purportedly met the victim for the first time and snatched her phone and other items, forcing the victim to follow him into his house at 6pm, it is surprising that by 10.00pm the only thing he had done was to touch the victims breast with her clothes on. I am not saying that this act did not take place, but I am saying that there are serious elements of doubt on the testimony of the victim. In criminal jurisprudence, this kind of doubt changes the entire cause of criminal proceedings to the benefit of the accused person. I am not satisfied that the appellant touched the breasts of the victim. In fact I am not satisfied with general testimony of the victim. This means that any doubt must be given to the benefit of the accused person. It is the finding of this court that the conviction of the appellant on count one was done on evidence which was not proved beyond reasonable doubt and the same must be vacated.

11. As for issue number three, that is, whether the accused person abducted the victim, I refer to aspects of the appellant evidence at page 22 of the proceedings: He stated in regard to the complainant as follows:

> ***"It's true the complainant was found in my house. I had known her for three months. I knew she stayed in [particulars withheld]. I did not know her family. I knew that she had completed primary school. She told me that she was going [particulars withheld] Girls. The complainant asked about where I stay. The boy directed her to my house which was not far from the salon. The complainant came at around 6.00pm going to 7.00pm. I allowed her into my house since she had come to greet me. I had not invited her. I was going to my brother in hospital. I did not chase the complainant. She told me at around 7.00p.m that she was not going home. I did not take any steps to ensure that she goes. I agreed that she stays overnight. The police came and I***

opened the door for them. The police came looking for the complainant. I did not leave or lock the complainant in the house. We had supper. I bought it. At the time I left the complainant in the house. I did not bring any speakers but I have them in the house. When I went to buy food I did not lock the door. I knew the complainant for three months. She was my girl friend. We met in church the first time. We used to meet during weekends in town. I am able to look at things and observe. I had gone to their church to perform with their pastor. I met her then at our market. That is when she gave me her phone number. I went to her church once."

12. I have considered both the testimony of the victim and that of the appellant in relation to alleged abduction. The act of abduction with intention to confine under **Section 259** of the **Penal Code** has not been proved in this matter. Under **Section 256** of the **Code**.

"Any person who by force compels, or by any deceitful means induces, any person to go from any place is said to abduct that person."

13. According to the evidence PW1 testified that the appellant took her phone, spectacles and hat which compelled her to go to the appellant's house. However, the testimony of the victim is not convincing for the reason that once she entered the house she stayed there. She was not molested and was safe. More importantly, the alleged phone, hat and spectacles were never produced as evidence. The allegation by the victim that she was abducted was not proved, leave alone a proof beyond any reasonable doubt. It is the finding of this court that the conviction and sentencing of the accused person on count two was unsafe and the same cannot stand.

14. In the upshot, the judgment of this court is that both the conviction and sentence of the appellant on counts one and two was unsafe and against the law, based on evidence which fell short of the standard required by law and are hereby vacated and set aside.

15. The judgment of the court is that the appeal herein has merit and is successful. The said conviction and sentence are set aside and the appellant set free unless otherwise lawfully held.

THAT is the judgment of the court.

DATED, SIGNED AND DELIVERED THIS 2ND DAY OF NOVEMBER, 2016

E.K.O. OGOLA

JUDGE

In the presence of;

Mr. Machogu for State

Mr. Mutie & Mwema for accused

Court Assistant – Mr. Munyao