REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO 118 OF 2012

Appeal from the original conviction and sentence by the Principal Magistrate (B. M. Mararo, PM) in Criminal Case No. 203 of 2012 at Kyuso Principal Magistrate's Court

JOEL MWANGANGI MWENDWA…….....APPELLANT

VERSUS

REPUBLIC……RESPONDENT

JUDGEMENT

Introduction

Joel Mwangangi Mwendwa, the appellant, was convicted and sentenced to serve ten years imprisonment for the offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars of the charge are that on the 4th October 2011 at around 7.30PM at Kyuso District in Kitui County intentionally touched the vagina of R.M.N a child aged 14 years.

The appellant had been charged with defilement contrary to section 8(1) (3) of the Sexual Offences Act an offence allegedly committed against the same complainant on the same date and time as in the alternative count. After a full trial the trial magistrate found the alternative charge proved, convicted and sentenced the appellant.

He is aggrieved by the conviction and sentence and has appealed to this court.

Petition of appeal

Through his counsel, the appellant has raised the following grounds of appeal:

i. The learned trial magistrate erred in law and fact in finding the appellant guilty against the weight of the evidence tendered.
ii. The learned trial magistrate erred in law and fact in convicting the appellant on contradicting and uncorroborated evidence.
iii. The trial magistrate erred in law and fact in overlooking the grudge which resulted in the appellant's being implicated in the case.
iv. The learned trial magistrate erred in law and fact in not finding that the whole evidence was tailor-made and couched to defeat justice.
v. The learned trial magistrate erred in law and fact in relying on facts which did not form part of the entire proceedings.

vi. The learned trial magistrate erred in law and fact in failing to consider the accused's mitigation in handing out the sentence.

Appellant's submissions

In support of the grounds of appeal, the appellant has submitted that the age of the complainant has not been proved beyond reasonable doubt because there was no birth certificate or a certificate of age assessment by a medical practitioner; that the appellant was convicted on evidence of a single identifying witness who is a minor and therefore this evidence requires corroboration unless for reasons to be recorded in the proceedings; that there is no such reason recorded in the proceedings and therefore the trial magistrate ought not to have convicted based on this evidence. He further submitted that crucial witnesses were left out.

The appellant relied on a list of authorities attached to the submissions. Counsel for the appellant did not point out what issues he was raising and which authority was relevant for a particular issue.

Respondent's submissions

The Respondent, through learned state counsel, opposed the appeal and submitted that prove of age of the complainant is immaterial in a charge of committing an indecent act with a child under section 11(1) of the Sexual Offences Act; that though the prosecution omitted to call crucial witnesses the evidence of PW1 was corroborated by that of PW2 and PW3 who were the first to get to the scene; that **Criminal Appeal No 148 of 2007, Abdul Aziz Mohamed v. Republic** and **Criminal Appeal No. 72 of 2012 Daniel Muli Mulyungi v. Republic** are not relevant to this case.

The respondent asked the court to dismiss the appeal for lack of merit and uphold the conviction.

The prosecution case

The prosecution presented evidence that on 4th October 2011 at 7.00pm PW1 and another girl Ngoki Kiinga were given a lift by the appellant using his motor cycle. The two had attended a choir practice presided over by the appellant at a local church in Kyuso town. The appellant dropped Ngoki on the way and proceeded with PW1 allegedly to see PW1's grandmother. He did not take her home but deviated to the police station near the OCPD office. The appellant stopped the motorcycle and took PW1 by her hand and led her behind the building. He laid her down and removed her biker and pants. He removed his jacket and placed it on her face and began defiling her. They were found by PC Samson Omisati, PW2, a police officer at Kyuso Police Station.

PW2 flashed a torch at the duo. The appellant stood up quickly and fled into the bushes. PW2 called PC Barnabus Kigen, PW3. PW3 pushed the motorcycle to the police station. PW1 was taken to the police station where she spent the night. In the morning she was taken to hospital for treatment. The appellant was arrested and was later and charged with this offence.

The defence case

The appellant testified under oath. He gave a long story of what happened that day. He admitted giving a lift to the two girls. He told the court that PW1 asked for his phone to call someone and that after they dropped Ngoki. While riding towards PW1's home PW1 told him about a police officer who was after her and was befriending her grandmother in order to get to her. She told him that the man wanted to marry her. He said that his phone rang and a man asked to speak to PW1. After she finished talking to the man, the appellant said he wanted to meet him. PW1 told him to take her to the OCPD offices. He parked the motorcycle and asked her to call the man. She called the man who came after one minute. The man was in civilian clothes. He flashed a torch at them and told them to sit down. The man grabbed and pushed the appellant. The appellant ran from the place. The following day he was told he had intended to defile PW1 which he denied. He was arrested and charged.

The appellant denied defiling PW1 and told the court that even if this had been his intention, he would not have done it at the police station. The appellant called Grace Nzambi Mutua, DW2, as his witness. This witness was however did not give any useful evidence towards the appellant's defence.

Determination

I remind myself of the duty placed on this court while sitting on first appeal to examine and evaluate all the evidence tendered in the lower court afresh with a view to arriving at its own independent conclusion. In determining this appeal this court will critically examine and evaluate all the evidence in order to determine whether it proves beyond reasonable doubt that the appellant committed this offence.

Francis Saku Mwendwa, PW4, the Clinical Officer told the court that he examined PW1 on 5th October 2011. He told the court on cross examination that he could not say if there was penetration within 24 hours as alleged; that the hymen had been broken prior to this date (4th October 2011) and that there was nothing to sex had taken place 24 hours prior to the examination of PW1. In other words the medical evidence did not support defilement. This is the reason why the lower court found the main charge of defilement not proved. Is there evidence to support the alternative charge?

I have critically examined the evidence of PW1 and PW2 and something keeps bothering me. It is strange that anyone would choose a police station to commit an offence of this nature or any other offence. The time was 7.00pm and definitely the likelihood that there were police officers at the station is very high. In addition to this, PW1 was led by her hand, according to her evidence, and put down, her underwear removed and she did not call for help or scream. Her evidence is that the appellant removed her underwear and covered her face with his jacket. She did not say whether he removed his clothes. There is no mention of what may have happened to the biker and under pant. Were they collected by the police or by PW1?

PW2 on his part did not mention the biker or under pants. If PW2's evidence were to be believed this court is wondering if he had adequate time to identify the appellant given that he told the court that after he flashed the torch at PW1 and the appellant and told them to sit down, the appellant fled into the bushes. the question is how he came to know it was the appellant? His evidence is silent on this issue. He also told the court that he found the appellant's jacket under PW1's head. This contradicts evidence of PW1 that the jacket was covering her face.

Further, PW2 said he gave the appellant and PW1 five minutes before he confronted them. This is not logical for a police officer. In my view one does not give another time to commit a crime. Five minutes is enough to commit a serious crime and the duty of PW2 as a police officer is prevention of commission of a crime among other duties.

I have considered the evidence in detail. I have also considered submissions by counsel. The trial court convicted on the alternative charge under section 11 (1) of the Sexual Offences Act. Under this section, the age of the victim of the sexual offence is not a factor. On the issue of a single identifying witness, it is not true that PW1 was the only witness who identified the appellant. If this court were to belief that this offence was committed it would have considered the evidence of PW2 who said he witnessed first-hand the offence taking place. However this court finds the evidence doubtful due to contradictions on key facts. The underwear of PW1 is not mentioned at all. PW1 said the appellant removed his jacket and covered her face while PW2 said he found the jacket under PW1's head. Further the prosecution left out key witnesses. Ngoki, the girl who is alleged to have asked for a lift from the appellant together with PW1 was not called to testify to the events before she was allegedly dropped off.

There is one more issue I want to clarify before concluding this matter. The trial magistrate, after stating what each witness said in his/her evidence had this to say in his judgement:

> **"I have considered all the materials placed before me and beginning with the accused's defence I note that the accused refused to reveal the name of the police officer who was allegedly having an affair with the complainant despite knowing him. In regards to the**

allegations of a set up why would the complainant set up the accused (sic) while according to the accused he was her counselor and she was revealing her problems to him. in regards to the conduct of the accused after the confrontation with the policeman, I find his conduct to be strange even. Why did he not go to the police station immediately and waited till the next afternoon and even had time to attend an interview. Did he not consider his safety to be of prima facie importance so as to treat it with such casualness? …… I find the accused's defence as not being sufficient to shake the prosecution's evidence which I find consistent and corroborated".

What the trial magistrate did was to shift the burden of proof to the appellant. An accused person never assumes the onus of proving a case. He has no obligations to proof his innocence either. He could actually remain silent and this would not be taken against him.

While I find grounds three and six lack merit because the trial magistrate considered the appellant's defence and mitigation before sentencing, I find the appeal has merit.

The conviction, in my view, is against the weight of the evidence. The evidence of PW1 and PW2 is contradictory thereby creating doubts in my mind concerning the evidence of PW1, PW2 and that of PW3. Where doubts exist in a criminal trial, the benefit of such doubt goes to the appellant and this case is no exception. The appellant gets the benefit of doubt.

The appeal is hereby allowed. Consequently, I will, which I hereby do, proceed to quash the conviction and set aside the sentence. The appellant shall be set at liberty forthwith unless for any other reason he is held in custody. I make orders accordingly.

Dated, signed and delivered this 11th day of March 2014.

S.N.MUTUKU

JUDGE