



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 120 OF 2011

SIMON KARUKI NJIRU.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTION

(Being an Appeal from the Conviction and Sentence by L.K. MUTAI Principal Magistrate Embu in Criminal Case No. 2223 of 2010 on 22nd July, 2011)

J U D G M E N T

1. **SIMON KARIUKI NJIRU** the appellant was charged and convicted of the offence of **committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006**. The particulars as stated in the charge sheet were as follows:-

On the 9th day of December 2010 at about 4.00 p.m. in Embu District within Embu County intentionally touched the vagina of NMM a mentally retarded child aged 10 years with your hands.

2. After conviction the appellant was sentenced to serve (10) years imprisonment. He was aggrieved by the judgment and filed this appeal against both conviction and sentence raising the following grounds of appeal:-

1. ***He pleaded not guilty.***
2. ***The learned trial Magistrate erred in law and facts by convicting him on evidence which was inconsistent and uncorroborated.***
3. ***The learned trial Magistrate failed to consider that complainant and him were not taken before a doctor for test.***
4. ***His constitutional rights were violated when he was kept in police custody for over 24 hours and no explanation was offered during the trial.***

3. The prosecution had called a total of five (5) witnesses. PW1 (MNM) was said to be mentally retarded. She had on 9/12/2010 gone to the kiosk of PW4 and sat outside when the appellant came there. He sat next to her and touched her breast and even passed his hand through her skirt and touched her vagina.
4. She was with PW2 and PW4 though she says the former did not see the appellant's action. A report was made to PW1's father (PW4) who led police to arrest the appellant. The appellant elected to remain silent when placed on his defence. He called no witness.
5. When the appeal came for hearing the appellant presented the Court with written submissions. In his submissions he mainly dwelt on the contradictions and inconsistencies in the evidence of the witnesses.

6. The State through Mr. Miiri the Learned State Counsel opposed the appeal saying the charge of indecent assault had been proved. He however admitted that the Prosecution had not produced any certificate to confirm PW1's mental status.
7. This being a 1st appeal this Court has a duty to re-evaluate and reconsider the evidence on record and arrive at its own conclusion. I am alive to the fact that I did not see or hear the witnesses. The Court of Appeal in the case of **SOKI VS REPUBLIC [2004] 2 KLR 21** stated thus

“It is the duty of a first appellate Court to remember that parties are entitled to demand of it a decision on both questions of fact and of law, and the Court is required to weigh conflicting evidence and draw its own inference and conclusions bearing in mind always that it has neither seen or heard the witnesses and make due allowance for this”.

8. I have considered the submissions by the appellant and the State. I have equally considered the evidence on record and the grounds raised by the appellant.
9. The witnesses who claimed to be eye witnesses to the acts complained of are PW1, PW2 and PW3. Ground No. 2 of the appeal states that the Learned Trial Magistrate relied on inconsistent and uncorroborated evidence to convict the appellant. I believe once I tackle this ground the other grounds will have been sorted out.
10. PW1 was said to be a child with a mental challenge. After conducting a *voire dire* exam for PW1 this is what the learned Trial Magistrate stated at page 10 line 8 – 11:-

“On examining the minor I am satisfied that she is not possessed of sufficient knowledge to understand the meaning of oath to therefore give unsworn evidence. I am also satisfied that the minor can communicate well with ease”.

11. In a case where a complainant or witness has a mental challenge, it is always mandatory to have an assessment done and a certificate produced in Court to confirm that. This was not done in this case and so it remains an allegation.

12. When PW1 testified she said she was with Mama K (PW4) and her brother SM at the kiosk but the latter did not witness the indecent assault.

13. The complainant's brother who came to testify in Court was VG (PW2) and not SM. PW1 and PW4 did not anywhere mention VG (PW2) as having been with them at the scene. All that PW4 says is that she later informed PW2 to collect PW1 who declined to leave the scene. PW2 says at page 13 lines 1 – 2

“I called the complainant who followed me. I alerted my father later at home”.

15. The question that then begs an answer is whether PW2 was at the scene and witnessed what he told the Court.

16. PW4 testified that PW1 and the appellant had been at the kiosk from 10 a.m. - 4 p.m though PW1 kept on going home and returning. She was telling the Court that she did nothing even though she was seated next the appellant and PW1 and saw him touch PW1's breasts. All this while she did nothing to stop the appellant from touching PW1's breasts.

17. This is unlike the conduct of a person of PW4's age. PW2 said he reported this incident to his father later on at home. However his father (PW3) said he received information on this from his son Wilson. PW2 is not Wilson. The above observation shows that there were a lot of inconsistencies in the evidence of PW1, PW2 and PW4.

18. The appellant elected to remain silent and say nothing in his defence. This placed on the trial Court a duty to ensure that the Prosecution evidence was watertight.

19. PW3 (J M) said the appellant told him he had only dusted PW1's dress and did not touch her breasts. In the face of the inconsistencies in the evidence of PW1, PW2 and PW4, who would know exactly what

happened?

20. The burden of proof lies on the prosecution. From the inconsistencies I would give the benefit of doubt to the appellant. He may or may not have done what is alleged. The result is that the appeal is allowed and the conviction quashed. The sentence is set aside.

21. The appellant to be released unless otherwise held under a separate warrant.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 2ND DAY OF MAY, 2014.

H.I. ONG'UDI

J U D G E

In the presence of:-

Ms. Mbae for State

Appellant

Mutero/Kirong CC