No. 372/14

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 184 OF 2012

S M M……...…APPELLANT

VERSUS

REPUBLIC ……...……RESPONDENT

(Being an appeal from the original conviction and sentence in Makueni Principal Magistrate's Court Criminal Case No. 450 of 2010 by Hon. J. Karanja , PM on 6/2/2012)

J U D G M E N T

1. The appellant was charged with the offence of incest by male contrary to **Section 20(1)** of the **Sexual Offences Act** No. 3 of 2006.
2. Particulars thereof being that on the **15th** day of **September, 2010** at **Ngoosini sub-location** in **Makueni District** within **Eastern Province,** he unlawfully caused penetration of his male genital organs to **A M** who is his daughter a girl aged **6 years.**
3. In the alternative the appellant was charged with Indecent Assault of a girl contrary to **Section 11(1)** of the **Sexual Offences Act No. 3** of **2006.** Particulars of the offence being that on the 15th day of **September, 2010** at **Ngoosini sub-location** in **Makueni District** within **Eastern Province,** he unlawfully indecently assaulted **A M** by touching her private parts.
4. He was tried, convicted and sentenced to serve **ten (10) years** imprisonment on the alternative charge.
5. Being aggrieved by the conviction and sentence he now appeals on grounds that:-

i. The charge was defective as there was no indication as to what part of the complainant's body he penetrated with his male organ.
ii. Conviction on the alternative charge was a misdirection on the part of the trial magistrate.
iii. The conviction based on evidence adduced by PW2 was erroneous since she had been coached by her mother.

6. The complainant in this case was a daughter of the appellant. PW2, **J M M** her mother had a disagreement with the appellant which resulted into her being away from home on the **15th September, 2010.** She however, went back home on the **16th September, 2010** in the morning to prepare her children for school. The child went to school. She returned home at 4.00pm. As she played, PW2 noticed some blood stains on her pant. She sought to know what happened to her but she did not answer. Thereafter she beat her up seeking to get an explanation and she allegedly told her that she had been made impure by the appellant. She reported the matter to the authorities. The appellant was arrested and charged.

7. In his defence the appellant denying having committed the offence stated that as a watchman he was on duty on the fateful day. He had supper and went to work. He returned home to find his wife having left with their children with all household items. He blamed the chief, Collins Mutisya for causing the problem and stated that he found him engaged in coitus with PW2 his wife. He quarrelled with his wife as a result. The chief offered him 500 which he declined to take. He then agreed to accompany him to the police station. On arrival, it was alleged by the chief that he had defiled his daughter.
8. At the hearing of the appeal, the appellant relied upon his written submissions. He sought this courts intervention in the matter by quashing the conviction and setting aside the sentence imposed.
9. In response thereto the learned State counsel, **Mrs Abuga** submitted that the prosecution did show that the minor was defiled by her father, the appellant. She called upon the court to disregard the allegation that the appellant was framed up by his wife after having sex with PW3. In regard to the sentence meted out she argued that it was proper being the minimum sentence provided by the law.
10. This being the first appeal, I am duty bound to re-evaluate evidence adduced at trial and come to my own conclusions bearing in mind that I neither saw nor heard witness who testified (***see Okeno versus Republic [1972] E.A. 32).***
11. The complainant, a child whose age is estimated as **6 years** old was examined by a clinical officer, **PW5, Onesmus Katua.** She had blood stained pants. There were clots of blood protruding from the vagina and blood was also oozing from her vagina. On cross-examination he said that no spermatozoa were seen. Her hymen was not torn. He also examined the appellant on the same day and found nothing to indicate he had committed an act of rape per the allegations that resulted into him being taken to hospital. It was on that basis that the learned trial magistrate made a finding that the evidence did not support the main charge. He however, reached a finding that the complainant did tell the truth there having been no actual penetration, there was an attempt on the girl and the culprit was the appellant.
12. When the act allegedly happened PW2 was away from home having disagreed with the appellant. The only evidence as to what transpired is therefore for the child. PW2 was silent on the age of the complainant. PW5, the Clinical Officer estimated her age as **six (6) years**. In his defence the appellant also estimated her age as **six (6) years.** At the hearing the trial court stated:-

> ***"The court's observation is that the child is of very tender years and cannot be sworn."***

13. In her testimony she stated thus:-

> ***"My father caught me. He put his thing which is in his trousers… here… He did it at night. My mother was at Wavinya's place. I kept quiet. Yes, I felt pain. I did not cry…"***

14. On cross-examination she said:-

> ***"My mother told me to come and talk in court. She told me what to come and talk in court. She told me to say that my father caught me…***
>
> ***My mother told me to come and say what you had done".***

15. It is trite law that in sexual offences there is no need for corroboration in material particular of evidence adduced by the complainant ***(see Section 124 of the Evidence Act***) but in some instances the court may be required to act cautiously in believing and reaching a finding that the evidence adduced is believable(***see Chilla versus Republic [1967] E.A. 722).***
16. This is a case where the court simply stated that it had observed that the child could not be sworn as she was of ***'very tender years'.*** The basis upon which the court formed the opinion was not stated. No preliminary examination of the child was carried out. To receive evidence of a child of tender years, a proper procedure must be carried out. This was stated in the case of ***Johnson***

Muiruri versus Republic [1983] KLR 445 as follows:-

> ***"When in any proceeding before court, a child of tender years is called as a witness; the court is required to form an opinion, on voire dire examination. Whether the child understands the nature of an oath in which event his sworn evidence may be received. If the court is so satisfied his unsworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him.(see Section 19, Oaths and Statutory Declarations Act, Cap 15; the Evidence Act, Section 124 cap 80). It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided, and not be forced to make assertions. (Also see Samuel Wahuini Ngugi versus Republic – Criminal Appeal No. 218/2007)".***

17. From the foregoing, it is apparent that there was a miscarriage of justice on the part of the trial court as the proper procedure was not followed. This court can therefore not tell if the child was seized of any intelligence that would make her understand the duty of telling the truth and hence divorce the truth from what her mother had told her to state in court.
18. Secondly, the learned trial magistrate failed to delve in evidence adduced that PW2 removed the child's pants and clothes in the morning of the **16th September, 2010** and dressed her in school uniform. She said that she did not bathe her. The child went to school and returned home at 4.00pm. As she played she noticed her pants had blood. If the child sustained an injury that resulted into her having blood on the pants on the night of **15th September, 2010** per the prosecution's case, then the pant she wore in the morning of **16th September, 2010** would definitely be stained by blood. This having not been the case, the question posed is whether the child could have been injured in her private parts in the course of the day prior to **4.00pm?** In the circumstances, it would be doubtful if the harm suffered was occasioned by the appellant.
19. Lastly, the appellant was convicted of the offence of indecent assault of a girl contrary to **Section 11(1)** of the **Sexual Offences Act.** The offence envisaged could have been committing an indecent act with a child as provided by **Section 11(1)** of the **Sexual Offences Act, 2006 Laws** of **Kenya.** However, for such an offence to be proved the prosecution would have been required to prove that the appellant intentionally did an act that caused some contact of the body of the complainant with his genital organ. The particulars of the offence however, state that he assaulted the complainant by touching her private parts. The alleged private parts are not disclosed and what he used to assault her is not stated.
20. Similarly, he cannot be said to have assaulted her sexually as envisaged by **Section 5** of the said Act as penetration was not proved.
21. From the foregoing, a re-evaluation of the evidence adduced shows that the appeal has merit. I do allow it, quash the conviction and set aside the sentence imposed. The appellant shall be released forthwith unless otherwise lawfully held.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **9TH** day of **SEPTEMBER 2014.**

L.N. MUTENDE

JUDGE