



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 92 of 2010

PAUL MACHARIA KIRAMU.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 2906 of 2008 in the Chief Magistrate's Court at Thika – Mrs. L.W. Gicheha (SRM) on 5th February 2010)

JUDGMENT

1. The appellant **Paul Macharia Kiramu** was charged with the offence of attempted defilement of a girl contrary to **Section 9(1)** of the **Sexual Offences Act No. 3 of 2006**. In the alternative he was charged with indecent act contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**.
2. The brief particulars were that on 17th July 2008 at [place withheld] village in Murang'a South District within Central Province 4A in Nairobi he attempted to commit an act which could have caused penetration of his male genital organ with the female organ of H. W. W. (name concealed on account of her being a minor) a child under the age of 18 years. Further in the alternative count it was alleged that he committed an indecent act with H. W. M. a child under the age of 18 years.
3. The learned trial magistrate found that the prosecution failed to prove their case against the appellant on the main count of attempted defilement of a Girl contrary to **Section 9(1)** of the **Sexual Offences Act No. 3 of 2006** and acquitted him. She however found that the prosecution had proved the alternative charge of indecent assault, and convicted him accordingly. She sentenced him to 10 years imprisonment.
4. Being dissatisfied, the appellant lodged an appeal against both conviction and sentence. His six grounds of appeal may be summarised as follows:
 - a) *The prosecution's evidence against him was contradictory, inconsistent, uncorroborated and insufficient to sustain a conviction.*
 - b) *There were no ingredients to constitute the charge as is required.*
 - c) *His defence was rejected without due consideration.*
5. Miss Nyaicho the learned State Counsel opposed the appeal stating that the prosecution had proved their case to the required standard since the child was familiar with her assailant.

6. I scrutinized and reassessed the evidence as is my duty as the court of 1st appeal. In so doing I was cognisant of the fact that I neither saw nor heard the witness as they testified.
7. The record shows that **PW3**, an 8 year old minor, gave her testimony under oath following Voire dire examination. The learned trial magistrate found her intelligent enough to understand the duty to tell the truth.
8. The prosecution case rested on facts that on 17th July 2008 **PW1**, the mother to the complainant, was at home when she was approached by a lady friend and asked to come and hear what her child was saying. She found the child crying by the roadside surrounded by many people. The school uniform in which she was dressed was wet. The Appellant who was known to her and the child was nearby and said nothing when they inquired from him what had transpired. They took the child to Githumu Police Station, where she explained to the OCS what had occurred.
9. **PW2**, Sebanus Mutuku Mbatha a business vendor at Makongeni market and a community policing official testified that on the said date, he was at the market place when some elders came and alleged that a young man called Baba Wairimu from Makomano had attempted to defile a child. A report had been made at Githumu police station. They accompanied **PW2** to the place where the young man worked and arrested him.
10. **PW3** P.C Kyalo, an officer based at Githumu Police station testified that he received the report of attempted defilement on 17th July 2008 from **PW1** and **PW4** at about 3 p.m, and that by then the Appellant had already been arrested.
11. The trial court heard that **PW4** was an 8 year old standard 3 pupil at [name withheld] Primary school. She had come from school on 17th July 2009 at 1 pm accompanied by Manasses **PW5** her fellow classmate, when they met the Appellant who was a close neighbour. The Appellant asked **PW3** to go to his house and fetch him a spade as **PW5** went home. He then surreptitiously followed **PW4** to his house where he lured her into his mother's bedroom. He told her to remove her pants and lift up her dress so that he could remove fleas from her. He covered her face and urinated on her and touched her private parts.
12. The Appellant released her to go when he was done with her. **PW4** went home and told her mother **PW1** what had transpired before they both went to the police to report the incident. Along the way she also informed a woman known as Wairimu, of her ordeal at the Appellants hands before she reached home. The appellant was subsequently arrested with the help of the **PW4's** Father.
13. The appellant denied the offence in his unsworn testimony, and told the court that he was digging a trench on 17th July 2008 when he was confronted by **PW4's** father who was carrying a panga and threatening to cut him. Some elders intervened and stopped him. The following day the appellant was accosted by another group of people who beat him up without cause before arresting and taking him to Githumu police station where they accused him of defiling **PW4**. He denied committing the offence.
14. The learned trial magistrate convicted the appellant on the alternative count of indecent assault for reasons that the complainant was a minor who might never learn to trust again. The trial magistrate made the following observations in her assessment of the evidence:

“I have considered the evidence before me. It is not in dispute that the complainant in this case is a minor. However, there is no evidence that there was an attempt to penetrate. According to the complainant, the appellant urinated on her private parts and this was corroborated by her mother PW1 that the child's dress was wet. There is no evidence showing an attempt to penetrate the complainant genitalia. I find that the proper offence is Indecent Act with a child contrary to section 11(1) of the sexual offences act.”
15. **PW1** testified that she was informed of her daughter's (**PW4**) plight by her friend, and that she

found her (PW4) crying by the road side with many people surrounding her. PW4 confirmed what had transpired before they both went to the police to report the incident. The evidence of PW1 that she was first informed of the incident by a female friend whose name she did not supply corroborates the minor's evidence that she first reported the incident to a woman called Wairimu.

16. There is no reason from the evidence on record to believe that the evidence was stage managed to frame the appellant. The appellant stated in his sworn defence that the minor asked for a drink of water from him but ended up pouring it upon herself when a dog came barking and chasing after her. If that were so there is no reason from the record for the minor to have turned such an ordinary and simple thing as pouring water on herself, into a twisted tale such as the appellant fondling her private parts and urinating on them.

17. Further her evidence was lent credence in material parts by PW5, another minor who was with her on the fateful day. He confirmed that they were coming from school on the 17th July 2008 when they met the appellant. That the appellant threw his keys at the complainant and asked her to go to his house and get a spade for him. When the complainant caught up with PW5 at "Mungai's place" she was crying but would not tell him what was wrong.

18. After a careful analysis of the evidence on record, I am satisfied that it is the complainant who was giving the true version of the events as they unfolded and not the appellant. She was too young to hatch such a devious story and to maintain it on cross examination. Both she and PW5 the other minor, knew the appellant before and identified him by name. As stated earlier there is no evidence of pre-existing ill will between the appellant and the complainant's family to lead me to the conclusion that they devised this elaborate scheme to frame him.

19. The appellant was convicted under **Section 11(1)(a)** of the **Sexual Offences Act** which provides that:

"Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years."

"indecent act" as defined in **Section 2(1)** of the **Sexual Offences Act** means:

"Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration."

According to the testimony of PW4, the appellant removed her bikers under the pretext of checking whether she had fleas. In her own words she described what followed as below:

"He urinated on me with his private parts. When he urinated on me he had put it in my private parts. We were just the two of us. When he removed my biker he was touching my private parts. I was standing when he put his penis on my private parts."

20. In my humble view this is as explicit a description of indecent act with a child as they get. The absence of medical evidence does not disable the prosecution's case because there is no legal requirement therefor. Under the proviso to **Section 124** of the **Evidence Act** the court can convict a person for an offence of a sexual nature on the evidence of the complainant alone, provided reasons are given for believing the complainant's evidence.

21. After a careful analysis of the evidence I find no contradictions or inconsistencies as stated by the appellant in his grounds of appeal, nor can I hold that it is insufficient to sustain a conviction. I find that the charge was properly framed and that his defence flies in the face of the complainant's evidence and the state in which PW1 found her in.

22. For these reasons there is no merit in the appellant's six grounds of appeal. The conviction for the

offence of indecent act with a child was well-founded, and is therefore upheld together with the sentence following there from.

Appeal dismissed.

SIGNED DATED and **DELIVERED** in open court this **2nd** day of **May 2013**.

L. A. ACHODE
JUDGE