REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL NO. 107 OF 2012

RAPHAEL MUSYOKA MULI…….....
…….APPELLANT

VERSUS

REPUBLIC……...
…….RESPONDENT

(Being an appeal from the conviction and sentence of the Senior Resident Magistrate at Mwingi (H.M.Nyaberi) in Criminal Case Number 977 of 2010)

JUDGEMENT

The Appellant (Raphael Musyoka Muli) was in the main count charged with defilement contrary to Section 8(1) as read with sub-section 4 of the Sexual Offences Act No. 3 of 2006. The particulars of the offence stated that on 10th of October, 2010 at [particulars withheld] Location in Mwingi District the Appellant intentionally did an act which caused penetration with his penis into the female genital organ of R.M. a child aged 16 years.

In the alternative the Appellant was charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The particulars of the alternative charge will be reproduced later in this judgement.

At the conclusion of the trial the Appellant was convicted and sentenced to ten years on the alternative charge. The Appellant being dissatisfied with both conviction and sentence has filed this appeal.

The Appellant's grounds of appeal as revealed in the amended petition filed on 7th October, 2013 are:-

1. **That the learned trial magistrate erred in law and fact to convict me without prior notice that the charge sheet was fatally defective, in that the main charge was not drawn as per the law of the Sexual Offences Act inter alia;**

   a) The information of the charge does not describe the charge to requisite standard.

   b) That the particulars of the offence to the alternative charge do not support the charge of indecent act.

2. **That the learned trial magistrate erred in law and fact to convict and sentence me without considering that the prosecution's evidence was contradictory and inconsistent.**

3. **That the learned trial magistrate erred in law and fact to convict me without considering that the P3 form and the doctor's evidence did not confirm contact of my genital organ and that of the complainant.**
4. **That the trial magistrate erred in law and fact to convict and sentence me without considering some of the prosecution's mentioned crucial witnesses were not produced before the court to confirm the allegations of the complainant's family contrary to Section 150 of CPC.**
5. **That the doctor was unrealistic when he claimed that I had scratches from the human nails and bite the opinion that is directly drawn from hearsay and not from the examination.**
6. **That the trial magistrate did not consider that the complainant's evidence was untruthful, since she told the court that she left her pant and shoes at the scene of crime and at the same evidence later stating that she washed her pant, after it was seen without ashes.**
7. **That the alternative charge was not proved beyond reasonable doubt as per law since there was not enough evidence tendered before court.**
8. **That the learned trial magistrate failed to note that the charges were maliciously fabricated against me on grudge basis between my family and that of the complainant.**
9. **That the trial magistrate failed to see that the prosecution did not prove their case beyond reasonable doubt as required in Section 109 of the Evidence Act.**

The Appellant at the same time filed submissions in which he elaborated his grounds of appeal. I have looked at the grounds of appeal and submissions.

The state opposed the appeal. The State Counsel Mr. Mailanyi contended that the charge was drafted in a sufficient manner that enabled the Appellant to understand the charges that were facing him. He argued that the charge as drafted met the requirements of Section 134 of the Criminal Procedure Code (Cap.75) and did not offend the provisions of the Sexual Offences Act. He submitted that anybody reading the main count would easily conclude that the Appellant was charged with contravening Section 8(1) of the Sexual Offences Act as read with sub-section 4 of the same Section 8.

I have considered the said ground of appeal and I concur with the state counsel that the charge as drafted conveyed sufficient information as to the offence the Appellant is said to have committed and the particulars of that offence. There is no doubt that throughout the trial the Appellant knew the charge facing him.

On the alternative charge the Appellant submitted that the particulars of the offence/charge did not disclose any offence known to the law. The particulars of the alternative charge states as follows:-

> "**RAPHAEL MUSYOKA: On the 10th day of October 2010 at [particulars withheld] Location in Mwingi District, within Kitui County, unlawfully and intentionally caused contact between your genital organs and that of R.M.** (full name omitted by this Court) **a child aged 16 years."**

The Appellant contends that the particulars as disclosed are not sufficient for him to know the offence he is alleged to have committed. Section 2 of the Sexual Offences Act, 2006 states that an "indecent act":-

> **"means an unlawful intentional act which causes-**
>
> **(a) any contact between the genital organs of a person with the genital organs, breasts and buttocks of another, but does not include an act that causes penetration.**
>
> **(b) exposure or display of any pornographic material to any person against his or her will;"**

The same Act also provides that "genital organs" **"includes the whole or part of male or female genital**

organs and for purposes of this Act includes the anus."

The particulars of the offence as disclosed to the Appellant mirrors the definition found in the Act. I do not therefore understand what the Appellant is saying when he claims that the charge as drafted does not disclose any offence. This ground of appeal therefore fails.

On the Appellant's contention that he was convicted on contradictory, inconsistent and uncorroborated evidence, the learned state counsel submitted that the evidence used to convict the Appellant was not contradictory but was instead consistent, firm and reliable. He asserted that the Appellant was convicted on the alternative charge and there was no need for medical evidence, supported by a P3 form, in order to prove this particular offence.

He further asserted that all that was required was the evidence of the complainant. He submitted that the alternative charge was proved beyond reasonable doubt pointing out that the medical report, which confirmed that the Appellant had injuries, was consistent with the complainant's testimony.

In order to deal with the Appellant's other grounds of appeal, I must submit the evidence adduced to fresh scrutiny and come up with my own conclusion on the same. In doing so, I will be guided by the fact that I did not see or hear the witnesses when they testified – **see OGETO v. REPUBLIC [2004] 2 KLR 14.**

The complainant who testified as PW3 told the court that on 10th October, 2010 she was instructed by her mother PW6 S N to go and bring cattle home from [particulars withheld]. On the way she met PW4 E K K who told her that a boy by the name Musyoka Muli had taken her lesso and was at the junction. PW4 requested her to go and tell him to return the lesso. She went and told him to return the lesso to E but he did not respond. She did not pursue the matter further but instead proceeded with her journey. As she was about to enter the forest she heard footsteps from behind her. She turned back and saw the Appellant about 4 meters away. He came and held her by her left hand.

The complainant narrates the turn of events as follows:-

> **"I resisted and asked him what he wanted to do. He did not respond. When I tried to scream, he removed a lesso which he had wrapped around his waist and tied my neck and subsequently knocked me down. He then dragged me for about 4m where charcoal had been burned. He tried to remove my pant but I struggled with him. He eventually removed my pant and unzipped his long trouser. I tried to scratch his face as well as bite his cheek but he did not free me. He managed to rape me. I managed to push him away. When he released me, I stood up and ran home leaving my slippers and pant. I felt pain in my vagina. I did not bleed from my private parts."**

After the incident, the complainant proceeded home and reported the matter to her parents (PW6 S N and PW1 S M). The scene was visited and the Appellant was arrested and escorted to Mwingi Police Station.

The parents of the complainant (PW1 and PW6) and PW4 confirmed the evidence of the complainant.

PW5 Dr. Edmond Indumwa produced P3 forms filled by Dr, Allan Balongo for the complainant and the Appellant. On the medical report for the complainant, he told the court that no injuries were noted on the genitalia. He also noted that his colleague did not make any opinion on his findings. PW5 himself was of the opinion that there was no penetration. As regards the medical report for the Appellant, it was noted that he had bruises on the shoulder and chin. The probable weapon that caused the injury was human bite or finger nails.

The P3 form for the Appellant confirms the evidence of the complainant that she bit and scratched him. PW1 also told the Court that when police officers came to arrest the Appellant, they examined him and he saw scratches and human bite marks on the face and neck. PW6 also testified having seen injuries on the Appellant.

In his defence the Appellant denied committing the offence. The magistrate analyzed the defence case and found it to be mere denial. On my part, I have considered the evidence of the Appellant. He told the Court that the case against him was fabricated due to differences he has with the mother of the complainant. He denied meeting PW4 on the material day but he admitted that PW4 was a neighbour. The Appellant did not give any reason why PW4 would give false testimony against him. When the mother of the Appellant (DW2 Josephine N K) was cross-examined, she told the Court that their relationship with the family of the complainant was good. That neutralized the Appellant's claim that the cattle of the family of the complainant used to trespass into their farm thereby creating bad blood between their family and the family of the complainant. Looking at the defence case in its entirety, I find the same to be unbelievable.

I have gone through the evidence adduced by all the witnesses in the trial. Everything points to the fact that the Appellant had an unfriendly encounter with the complainant. According to the complainant that encounter resulted in forced sexual intercourse. The medical evidence did not confirm penetration and that is why the trial magistrate found it safe to convict the Appellant on the alternative charge.

There may have been one or two minor contradictions as to the colour of the lesso or the exact time of the events. This in my view does not detract from the overall story which confirms that the Appellant brought his genital organ into contact with the genital organ of the complainant. The evidence of the parents of the complainant and that of the doctor confirmed that the complainant was below the age of eighteen years at the time of the crime. She was therefore a child as defined in the Sexual Offences Act.

The Appellant submitted that there was contradiction in the evidence of the complainant as to the movement of her panties from the time of the incident up-to the time it was produced as an exhibit in Court. On this piece of clothing, the complainant told the Court that she left it at the scene together with her slippers. She further told the Court that she later led her parents and the chief to the scene where her pant was found. She also testified that she threw the panties away but the lesso and slippers were not recovered at the scene. The complainant was later recalled to identify the exhibits. She identified and produced a skirt, a lesso, a T-shirt and panties as exhibits. The investigating officer ought to have produced these exhibits.

The mother of the complainant told the Court that they took the clothes to hospital and they were told to take them back. On cross-examination she stated that the blouse, pant, lesso and shoes were intact and she could avail them to the Court if required.

The investigating officer (PW2) never talked of any exhibits recovered from the scene.

The evidence of the complainant on what she did to the panties after the incident is indeed contradictory. The evidence of the other witnesses does not seem to shed light on the movement of this crucial exhibit. The overall picture, however, points to the recovery of panties at the scene. It looks like the problem here is the poor handling of exhibits by the investigating officer. That is why the exhibits were left in the custody of the mother of the complainant. In my view, the way the exhibits were handled did not in any way deal a fatal blow to the prosecution case. There is sufficient and uncontroverted evidence on record to show that the complainant was sexually molested by the Appellant. In my view, the trial magistrate arrived at the correct decision based on the evidence that was adduced before the Court.

As for the sentence, Section 11(1) of the Sexual Offences Act 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."**

The Appellant was sentenced to ten years imprisonment as provided by the law. There is nothing wrong about the sentence imposed by the trial Court.

All in all the appeal fails and the same is dismissed. Orders will issue accordingly.

Dated and signed on this day of 2013

W. KORIR,

JUDGE OF THE HIGH COURT

Dated and delivered this 2nd day of December, 2013

S.N.MUTUKU

JUDGE OF THE HIGH COURT