IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA,OUKO & M'INOTI, JJA.)

CRIMINAL APPEAL NO. 49 OF 2015

BETWEEN

J G N …….APPELLANT

AND

REPUBLIC ……..……...RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Mombasa (Muya, J.) dated 16th September, 2014

in

H.C.CRA. No. 204 of 2010)

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JUDGMENT OF THE COURT

Samburu Police Post is situate within the jurisdiction of Taru Police Station Kinango area of Kwale County. On 1st February, 2010, **Corporal Fredrick Mongare** (PW4) was manning the report desk when he received **Z R J** (PW2) with his teenage daughter **N Z F.** (PW1) "*the victim*" in tow. PW2 lodged a complaint that the victim then aged 15 years had been sexually assaulted by another teenager, the appellant herein then aged 17 years. According to the victim she met the appellant whilst staying with her grandparents sometime in December, 2009. The appellant expressed his undying love for her. The two, then became lovebirds with occasional sexual liaisons or flings in the nearby bushes at night. Unfortunately these sexual encounters put the victim in the family way. PW2 noticed the enlargement of the victim's breasts and opted to take her to Samburu Health Centre for examination. She was duly examined by one, Njoro, a clinical officer. His findings were that she had a mass in her uterus, 6 weeks old. In other words she was 6 weeks pregnant. He filled the P3 form along those lines which was eventually tendered in evidence by his colleague, **Harrison Mbuku** (PW3). When the victim was questioned as to who was responsible for her pregnancy, she mentioned the appellant. Apparently, the appellant got wind of the complaint and went under. It was not until 6 months later on 16th August, 2010 that he was arrested and subsequently arraigned before the Senior Resident Magistrate's court at Mariakani on one count of defilement of a child contrary to **Section 8(1)** as read with **Section 8(3)** of the Sexual Offences Act. Particulars given were that on 20th December, 2009 at [particulars withheld] village Makamini Location in Kinango District within the Coast Province, the appellant unlawfully and intentionally committed an act which caused penetration of his male genital organ namely the penis into

the female genital organ namely the vagina of N.Z.F., a child aged 14 years. There was also an alternative charge of indecent act with a child contrary to **Section 11(1)** of the Sexual Offences Act whose particulars were that on the same day and place the appellant unlawfully and intentionally committed indecent act with a child namely N.Z.F by touching her private parts namely, vagina.

The appellant denied the charges and claimed that on 20th December, 2009 he was from Samburu Kilibasi when he was arrested by police officers for allegedly driving a motor vehicle, without a driving licence. Accordingly, he denied impregnating the victim.

Hon. **O.M Machage** Senior Resident Magistrate who heard the case found as a fact that:

(i) The victim knew the appellant very well.

(ii) No grudge existed between the parties that would have justified a frame up;

(iii) The testimony of the victim was a true reflection of the happenings;

(iv) The victim was aged 14 years at the time of the incident.

In essence therefore the learned magistrate found as proved the main count preferred against the appellant. However in a bizarre move and without giving any reasons for the action, Hon. Machage proceeded to find the appellant guilty of the alternative charge of indecent act and convicted him accordingly. Following the conviction, the appellant was sentenced to a jail term of 10 years.

Aggrieved by the conviction and sentence aforesaid, the appellant preferred an appeal in the High Court at Mombasa. The appeal was in good time heard by **Muya, J.** Although he eventually dismissed it, the Judge made these telling observations:-

"… I have perused the judgment delivered by the learned trial magistrate and find that he has not given any reason why he did not find the appellant guilty of the offence of defilement but instead found him guilty on the alternative count of indecent act…"

This was a proper observation. However, the learned Judge abdicated his duty when he failed to provide a solution. It is just not enough to observe or note a serious flaw in the proceedings and leave it at that. He could have asked both parties to address him on the issue. He could have warned the appellant of the likelihood of the court reinstating the conviction for the offence of defilement with the possibility of an enhanced sentence so that the appellant could elect to pursue the appeal or not. Unfortunately this did not happen.

Convinced that, that was not the end of the road in his quest for justice, the appellant lodged this second and perhaps last appeal in this court. He challenges the decision of the High Court on the grounds that his conviction for the offence of indecent assault was not legal, that his arrest was not proved and was in any event in violation of **Section 150** of the Criminal Procedure Code, that the age of the victim was not proved and finally, that his defence was not given due consideration.

The appellant urged his appeal by way of written submissions with the permission of the court. He reiterated that having been charged with the original offence of defilement on which all the prosecution witnesses gave evidence, there was no basis for his conviction and sentence on the alternative count. To the appellant therefore he was convicted and sentenced on a charge which he was not tried for nor evidence led. With regard to the age of the victim, the appellant submitted that it was not proved beyond reasonable doubt. There were contradictions as to her age and it was not clear whether she was aged 14 or 15 years at the time of the offence. The appellant therefore urged us to resolve these doubts in his favour. Finally, the appellant submitted that his defence though plausible and capable of displacing the prosecution case was nonetheless not given due consideration by the two courts below.

Responding, **Peter Kiprop**, learned Principal Prosecution Counsel submitted that **Section 150** of the

Criminal Procedure Code was complied with. That the Appellant's rights were therefore not violated. The section deals with powers to summon witnesses. All relevant witnesses were summoned and the appellant cross-examined all of them. On age, counsel submitted that the charge sheet gave the age of the victim as 14 years, victim's own evidence indicated her age as 14 years and finally, the P3 form gave her age as 14 years. In the premises age was proved beyond reasonable doubt. On the appellant's defence, counsel submitted that both courts were alive to it which they considered and rejected and rightly so in his view. Counsel too did not see anything wrong with the trial court's conviction of the appellant on the alternative count. Lastly, counsel observed that the appellant having been aged 17 years at the time of the commission of the offence he ought to have been tried as a child.

This is a second appeal. That being the case and as we stated in the case of **Boniface Kamande & 2 Others vs Republic [2010] eKLR :-**

> **"On a second appeal to the Court, which is what the appeals before us are, we are under legal duty to pay proper homage to the concurrent findings of facts by the two courts below and we would only be entitled to interfere if and only if, we were satisfied that there was no evidence at all upon which such findings were based or if there was evidence, that it was of such a nature that no reasonable tribunal could be expected to base any decision upon it…"**

We find that some of these conditions apply in this appeal. There is therefore every reason to warrant our interference with the conviction of the trial court, which was affirmed by the first appellate court. As already stated, the appellant was charged with the main count of defilement. Although all the ingredients of the offence were proved, the trial magistrate instead of convicting and sentencing the appellant on the main count that was proved beyond reasonable doubt, surprisingly convicted and sentenced him on the alternative count of indecent act with a child. Was there evidence of indecent act that would have warranted such conviction? We do not think so. **Section 2** of the Sexual Offences Act defines an indecent act to mean any unlawful intentional act which causes any contact between the genital organs, breast or buttocks of a person with that of another, or exposure or display of any pornographic material to any person against his or her will, but does not include an act which causes penetration. A charge of indecent act is usually used as an alternative to a charge of rape or defilement, and convictions of indecent act are often entered in cases where there is not sufficient evidence to sustain a rape or defilement charge.

In this case, there was proof of penetration of the victim by the appellant which therefore eliminates the offence of indecent act going by the definition of the offence aforesaid. In any event, the particulars of the indecent act complained of were clear and specific. The appellant is alleged to have unlawfully and intentionally touched the victim's vagina with his genital organ. No such evidence was led. In her own testimony, the victim alluded to several sexual encounters that put her in the family way. She never testified as to the appellant merely touching her genital organ namely, the vagina. The other witnesses could not have testified as to that fact as they were not present when it all happened if at all. It would appear that both courts below assumed that because there was penetration, then the appellant must have touched the victim's genital organ in the process. There was no basis for such assumption. The prosecution having failed to lead evidence of indecent act aforesaid and the fact that the act of penetration was proved, there was no basis legal or otherwise upon which the trial court would have found the appellant guilty of the offence of indecent act.

Even if a case of indecent act had been made out, we are still of the firm view that the way the two courts handled the matter was prejudicial to the appellant. For instance under **Section 11(2)** of the Sexual Offences Act:-

> "**It is a defence to a charge under subsection (1) if it is proved that such child deceived the accused person into believing that such child was over the age of eighteen years at the time of the alleged commission of the offence, and the accused person reasonably believed that the child was over the age of eighteen years…."**.

Did the trial court have opportunity to make such inquiries, or was the appellant accorded an opportunity to advance such a defence? No. The trial magistrate at the tail end of his judgment simply stated:-

"… I therefore trusted the testimony of the complaint and proceed to find the accused guilty of the offence of the alternative charge of indecent act contrary to Sections 11(1) of the Sexual Offences Act. And convict him pursuant to Sections 215 of the Criminal Procedure Code…"

It should also be noted that under **Section 11(4)** of the Sexual Offences Act, a person charged with such an offence who is below the age of eighteen years, the court may upon conviction sentence the accused person in accordance with the provisions of **Borstal Institutions Act** and the **Children's Act**. The trial court never reverted to these provisions of the law when imposing the sentence. Similarly the 1st appellate court failed in its duty in this regard as well. The appellant was convicted and sentenced as though he was an adult when in fact he was a child at the time of the commission of the offence. It would appear therefore that the sentence imposed was illegal. Our findings on this ground of appeal is sufficient to dispose of the entire appeal.

For all these errors and misdirections by the two courts below we are persuaded that our interference with their findings whether concurrent is absolutely necessary. The conviction of the appellant on the alternative count of indecent act with a child cannot therefore stand.

What recourse do we have? The state despite being aware of the misdirections by the trial court as well as the High Court did not as much as seek to overturn or correct the misdirection. We are also aware that we did not warn the appellant at the very commencement of the hearing of this appeal that there was the danger that we may consider the reinstatement of the original charge and give him an opportunity to think through his appeal. We cannot take such action now as it may very well be prejudicial to the appellant. In other words, it is now too late in the day to recall the parties to address us on the issue.

In the end, the appeal has merit. It is allowed. The conviction is quashed and sentence imposed set aside. The appellant should be set at liberty forthwith unless otherwise lawfully held.

Dated at Mombasa this 26th day of February, 2016.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR