REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT MOMBASA

Criminal Appeal 106 of 2007

G M M ….....…….……. APPELLANT

AND

REPUBLIC ……...…… RESPONDENT

(Appeal from a judgment of the High Court of Kenya

Mombasa (Maraga J) dated 9th July, 2007

in

H.C.CR.A. NO. 53 OF 2005)

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JUDGMENT OF THE COURT

The charge which faced *George Mwandoe Mwambaji*, the appellant herein, before the Senior Resident Magistrate at Mombasa was one of defilement of a girl contrary to *section 145 (1*) of the Penal Code. The particulars of that charge were that on 18th day of May, 2002 at about 10.00 a.m. at Leisure village in Mombasa District of the Coast Province, the appellant had unlawful carnal knowledge of B.O., a girl under the age of 16 years. There was an alternative charge of indecent assault of a female contrary to *section 144 (1)* of the Penal Code, but the learned trial magistrate having found the appellant guilty and convicted him on the main charge, correctly made no findings on the alternative charge.

The trial of the appellant opened before M/s. B. Thuranira, a Senior Resident Magistrate on 2nd July, 2002, but by the time she delivered her judgment convicting the appellant on 25th February, 2005, her names had apparently changed to B. T. Jaden and she had become a Principal Magistrate. Upon her convicting the appellant, she sentenced him to ten years imprisonment with hard labour. The appellant appealed to the High Court against the conviction and sentence but by its judgment dated and delivered on 9th July, 2007, the High Court (Maraga J) dismissed the appeal and confirmed the sentence. The appeal before us is, therefore, a second one and that being so, ***section 361 (1)*** of the Criminal Procedure Code, limits the jurisdiction of the Court to only matters of law.

The evidence on which the appellant was convicted consisted of that of the young girl herself (PW1) who was only 5½ years old, the girl's minder J.A. (PW2) and Dr. Said Seid (PW5) who examined the

young girl and concluded that she must have been sexually molested. The girl herself, though she understandably gave unsworn evidence, explained how the appellant had lured her into his room on the pretext of showing her some photographs and what happened between her and the appellant while the two of them were in the appellant's room. The evidence of the complainant child looked so innocent and so natural that the trial magistrate could not help believing her. Listen to the young girl describe what the appellant did to her:

"***We were playing outside running when the waterman [appellant] called me. The waterman said I go inside to the bed to see pictures. This was at his house. The house of the waterman is near that of my brother's friend. My brother's friend is known as J. The waterman said I go to see his small picture. I went. I was alone. I looked at the picture. I was with the waterman alone. The waterman closed the door. He held my hands and legs. He then removed his underwear. He then removed my knickers. He then did bad manners to me. He then touched me and placed me on the bed. I was facing up. He then slept on me. He then placed some oil on his part that is used to urinate. He then placed the oil on the window. He then put his part that is used to urinate, into this part of mine (points between the legs). This is my part that I use to urinate in the toilet".***

It was simply incredible that a 5½ year old girl would have the imagination to invent this kind of story.

But the story was fully corroborated by the evidence of the two other witnesses. The girl's aunt and minder (PW2) looked for her. She had been informed the girl was inside the appellant's house. She entered the sitting room but saw neither the appellant nor the young girl. She (PW2) could not have seen them because the young girl and the appellant were in the bedroom. When PW2 eventually saw the girl, she told her what had happened and, according to PW2 whose conduct in the whole matter was entirely irresponsible, she noticed that the girl's underpant was wet. But PW2 carried out no inspection at all on the young girl whose mother was up-country. The father of the girl was apparently available but PW2 would not tell the father what the young girl had said had been done to her. Even when the mother arrived back from up-country, PW2 would not tell her what had happened to her daughter until the neighbours goaded her into telling the mother (PW3). Dr. Said Seid (PW5) examined the young girl, apparently some ten days after the alleged sexual assault. We quote his evidence:

"***I received this P3 form (MFI 1) from OCS Nyali Police Station on 27.5.02. I was to examine one BRENDA ONGONDE, 5½ year old female. I examined the patient. She claimed to have been defiled by a person she could identify. On examination, I found the labia majora was intact that is vaginal lips. The labia manora (main vagina lips) was bruised on the left side. There was a 2cm bruise. The hymen was torn with rugged edges. The genitalia was tender/painful and there was a foul smelly brown discharge. Investigations done showed pus cells. This was through higher (sic) vaginal swab. This is indication of a bacterial infection. I arrived at the opinion that the child had been defiled. I filled and signed the P3 form on 27.5.02 and now produce it as an exhibit (exhibit 1)".***

The learned trial Magistrate accepted the evidence of PW1, corroborated as it was by that of the Doctor and to some extent by that of PW2. The learned Judge on first appeal confirmed this position and concluded as follows:-

"***Having carefully considered the evidence on record, like the learned trial Magistrate I am satisfied that the Appellant, whom the complainant child knew well as their neighbour who was a waterman, defiled her. Consequently I dismiss the appeal against conviction".***

This Court will only interfere with concurrent findings of facts where it is demonstrated either that there was absolutely no evidence on the record upon which such findings could have been made or that the evidence that was there was so unreasonable that no reasonable tribunal, properly directing itself to that evidence and the applicable law, could have come to the conclusions made. Neither of the two factors is applicable in this case and that being so, there is no basis upon which we could possibly interfere. We have looked at the elaborate written submissions handed to us by the appellant during the hearing of this appeal. There is absolutely nothing in those submissions to warrant our interfering with the findings of facts and law arrived at by the two courts below. The sentence imposed upon the appellant was lawful.

That being the view we take, this appeal fails and we order that it be and is hereby dismissed both as to conviction and sentence.

Dated and delivered at Mombasa this 25th day of January, 2008.

R.S.C OMOLO

……**…….**

JUDGE OF APPEAL

E.O. O'KUBASU

…….

JUDGE OF APPEAL

J.W. ONYANGO OTIENO

…….**…..**

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR