



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BOMET**

**CRIMINAL APPEAL NO. 79(A) OF 2015**

**VINCENT KIPROTICH TONUI.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence in criminal case No. 12 of 2014 PM's Court Sotik – Hon Barasa – RM)*

**JUDGMENT**

The appellant herein was convicted and sentenced to ten years imprisonment for the offence of committing an indecent act with a child Contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.

The particulars being that on the 4<sup>th</sup> day of February 2014 within Kericho County, he intentionally touched the buttocks, breast, anus, vagina of M C a child aged 6 years with his penis.

The appellant had been charged with the offence of defilement Contrary to Section 8(1) as read with Section 8 (2) of the Sexual Offences Act. The court found that there was no sufficient evidence as regards the offence of defilement and acquitted the appellant but found him guilty on the alternative count of the offence of indecent act Contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.

Being aggrieved of the decision of the learned trial magistrate the appellant filed this appeal whose grounds are:- that the conviction was against the weight of the evidence adduced by the prosecution

- (1) The learned trial magistrate did not consider the evidence tendered by the defence.
- (2) There was no proper age assessment.
- (3) There was contradiction between the evidence tendered by the complainant and that by the Doctor.
- (4) Sentence was not lawful.

This is the first appellate court. It has a duty to evaluate and re-consider the evidence on record so as to arrive at a just conclusion bearing in mind that this court did not have the opportunity of observing the demeanour of the witnesses.

**Brief facts**

Upon conducting a *voire dire* examination on the complainant, the learned trial magistrate was satisfied that she was possessed of sufficient intelligence to give a sworn statement.

She testified of how she was sent to call her two brothers from a hotel nearby. She was not able to enter into the hotel as she was confronted by the appellant who was standing at the door to the kitchen.

He got hold of her hand and pulled her towards the toilet. While in the toilet, he undressed her by removing her biker and pants. He removed his pants and lay on top of her and inserted his male organ into hers. She felt pain but suddenly she heard her mother calling Vincent (the appellant) who ran away. She dressed and went and reported to her mother and grandfather of what had transpired.

The appellant was sought for and detained and later taken to police station, meanwhile the complainant was taken to hospital for treatment and examination.

Complainant's mother (PW2) operates *[particulars withheld]*. She testified that on the 4<sup>th</sup> day of February 2014 at 7.00 p.m. she enquired the whereabouts of the complainant. She was told that she was in the house with the grandfather. When she called out for her she saw her coming out from the toilets. She had a worried look on her face.

She interrogated her while in the presence of her grandfather and she mentioned Vincent (the appellant) as having done bad manners to her.

Vincent was called from the bathroom where he was. He was taken to police station. The complainant's mother did inform the court that her daughter was aged 8 years. She had a birth certificate which showed that she was born on 7<sup>th</sup> November 2007.

W K S PW3 is the grandfather of the complainant. He operates *[particulars withheld]* together with complainant's mother. He testified that he stays on a house which is about 10 metres away from the hotel and stays with his daughter and granddaughter. He had send the complainant to go and call her brothers when he heard the mother calling out for her. He went outside to check and he saw M (the complainant) emerge from behind the house. She appeared scared. Upon interrogation she disclosed that Vincent had taken her behind the house and had done bad manners to her. Vincent was looked for. He emerged from the bathroom and he was taken to police station. The complainant was taken to hospital for treatment and examination. He gave the date of birth of the complainant as 7/11/2004.

George Ouma (the clinical officer) testified to have examined the complainant on 5/2/2014 with a history of sexual assault upon examination he found that her clothing was normal. She had no physical injuries on the main body. Her genitalia was normal. There was no discharge and no spermatozoa seen. The report was negative on penetration.

In his defence the appellant testified to have been an employee of Sitienei (PW3) at his hotel. He feigned surprise as to why he was arrested and taken to police station without being informed any reasons. He further told the court that complainant's mother was his girlfriend and they had disagreed and that's why she had decided to fix him.

In his judgement the learned trial magistrate did point out that he was satisfied that there was no penetration as per the evidence of the Doctor who examined the child a day after the incident. He was however, satisfied that it is the accused who took the complainant to the toilet but there was no evidence of penetration but he was satisfied that the accused had removed the complainant's innerwear and that there was an element of contact between the Accused person's penis and the complainant's private parts.

The appellant was convicted on the alternative count of indecent act with a child Contrary to Section 11(1) of the Sexual Offences Act which provides:- "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."

Section 2 of the Sexual Offences Act defines "indecent act" to mean an unlawful intentional act which causes act which causes-

(a) 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.

(b) Exposure or display of any pornographic material to any person against his or her will.

The particulars in the charge sheet are to the effect that the appellant intentionally touched complainants buttocks, breasts, anus and vagina. The complainant herself did not testify that the appellant fondled her breasts and buttocks and or touched her anus. Her evidence is that he lay on her and inserted his male organ into hers.

What the learned trial magistrate did was to presume that there was contact between the appellants penis and the complainant's private parts.

It is trite law that presumption alone, however how strong should not form the basis of conviction.

The learned trial magistrate correctly found that there was no evidence sufficient to convict for the offence of defilement.

I am satisfied that there was inadequate evidence to find sustenance of a charge of indecent act. The fact that penetration had not been proved and hence a charge of defilement could not be sustained, does not mean that an automatic finding ought to be made for an alternative count of indecent act without sufficient evidence. There must be adduction of such evidence to the stipulated standards of proof in a criminal trial which is proof beyond reasonable doubt.

I find the conviction was not safe and the sentence was not lawful. The appeal has merit and it is allowed. The appellant is set at liberty unless otherwise lawfully held.

Judgment delivered dated and signed in open court this 29<sup>th</sup> day of November 2017 in the presence of learned counsel for the prosecution Mr. Barasa learned counsel for the defence Mr. Bii, court Assistant Rotich.

**M. MUYA**

**JUDGE**

**27/11/17**



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