



REPUBLIC OF KENYA



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**Mroka v Republic (Criminal Appeal E077 of 2022)
[2023] KEHC 22169 (KLR) (31 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 22169 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E077 OF 2022**

**A. ONG'INJO, J
JULY 31, 2023**

BETWEEN

GODFREY MOSES MROKA APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the judgment of Hon. R. M. Amwayi Senior Resident Magistrate, delivered on 2nd June 2022 in Mombasa Chief Magistrate Court Sexual Offences Case No. E009 of 2020)

JUDGMENT

1. The Appellant Godfrey Moses Mroka was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the [Sexual Offences Act](#) No. 3 of 2006 in Mombasa CMC S.O. Case No. E009 of 2020.
2. The particulars of the charge were that the Appellant on 19th day of September 2020 in Likoni Sub-County within Mombasa County intentionally and unlawfully caused his penis to penetrate the anus of C.M. a child aged 5 years. Upon the trial Magistrate considering evidence of 5 prosecution witnesses and appellant and his witnesses defence found appellant guilty and he was convicted and sentenced to serve 30 years imprisonment upon consideration of his mitigation and period he was in custody during trial.
3. The Appellant was aggrieved by the conviction and sentence and he filed his petition and grounds of appeal on 28th July 2022. The grounds of appeal are:-
 - i. That the learned trial Magistrate erred in law & fact for not appreciating that the prosecution case was not proved beyond reasonable doubt.



- ii. That the learned trial Magistrate erred in law & facts by failing to consider that the prosecution failed to bring sufficient evidence within a reasonable time frame to prove their case beyond all reasonable doubt.
 - iii. That the learned trial Magistrate erred in law & facts for not noticing that the medical evidence was not established to corroborate the Complainants evidence.
 - iv. That the learned trial Magistrate erred in law & facts for not considering that crucial witness was not summoned in court.
 - v. That the learned trial Magistrate erred in law & facts by dismissing the appellant's defence without any legal basis.
4. The Appellant prayed that his appeal be allowed, conviction quashed and sentence set aside.
 5. The prosecution's case was that PW 1 sent the Complainant to go and buy for her soap on 19/07/2020 at 10.00am. That the Complainant took long to return and his sister went to go and look for him. That the Sister returned said she didn't see the complainant. That when the Complainant returned later he was smelling of faeces and looked scared and tired. That the Complainant disclosed that uncle had done bad manners to him in his house.
 6. PW 1 reported to her Sister who consulted a doctor who referred them to Manyatta Hospital. At Manyatta Hospital the child was examined and it was confirmed the child had been penetrated in the anus. The matter was reported to the police who issued a P3 Form that was duly filled – EXP.3. The complainant took the child to the house where he had been sodomized and on 29/07/2020 identified the appellant who was arrested.
 7. The Complainants certificate of birth was identified by PW 1 & produced by PW 5, the Investigating Officer, – EXP 5. PW 1 said the Complainant was given by the Appellant but he threw it behind the house. She said that the accused used spirit while sodomising the child. She said that it is appellant who is called jomba. She also said that the child identified accused persons house to the police. He said that when they were led to the house by the child they found the appellant and his mother. That the Complainant said the incident took place in the kitchen where there is a bed.
 8. PW 2 Salim, a volunteer in health matters testified that on 19/10/2020 at about 4.00pm went to her with the child and reported the child had pooped on his clothes and it appeared he had a problem. PW 2 called the nurse incharge Mtongwe Hospital and she advised that they take the child to Manyatta Hospital. PW 2 said the child looked stressed and traumatized. That they took the child to hospital and upon examination they were told to go and report to the police and later appellant was arrested. PW 2 said she knew Jomba the Appellant who lives in Mtongwe and works at Mtongwe Bamako.
 9. The Complainant gave unsworn statement and said that the appellant whom he calls as Jomba lives in Mtongwe near their home. He said that Jomba inserted his finger into his anus and also put spirit into his anus. That he also inserted his thing for urinating into his anus. That after that he gave him five shillings. He said he threw the five shillings away. PW 3 said that he was defiled in the appellant's house and that there was nobody else in the house. PW 3 said he went home and told his mother what had happened and he was taken to hospital. The Complainant identified the appellant in court as the person who defiled him.
 10. PW 3 in cross examination said that he had Sisters called A and B. He said he was going to the shop to buy Omo for 10/=. He said it is on his way home that he met the Appellant who told him to go with



him to his house. He said the Appellant inserted his male organ into his mouth and anus. He said his shorts were soiled with stool. He said it was only the Appellant who was known as Jomba. PW 3 said his father did not beat the appellant. He said that it is after the incident he went for long call on his clothes but he could not tell how it happened.

11. PW 4 Stephen Kalai Clinical Officer at Likoni Sub-County Hospital testified that on 19/9/2020 at 5.00pm the Complainant aged 5 years was taken to hospital after being referred from Vijiweni Police Station on allegations of suspected sodomy. PW 4 interrogated and examined the Complainant who told him that he was sodomised by a person well known to him and was also forced to suck the penis of the alleged perpetrator.
12. That upon examination the sphincter muscles were loose and stool came out freely upon the Complainant being told to cough. That lab tests were conducted and police visited the hospital on 21/09/2020 with P3 form which was duly filled as well as PRC form. PW 4 said the complainant's sphincter muscles were loose and there were healing lacerations at 12 O'clock of the anus. He said there was a scar. PW 4 produced treatment notes – EXP1, PRC form- EXP.3. PW 4 referred the child for counselling as he was traumatized.
13. PW 5 Chief Inspector Damel Cheruiyot of Vijiweni Police Station testified that on 20/09/2020 he received a report from the mother of the Complainant who reported that on 19/9/2020 the Complainant had been defiled by the accused. That the report and Complainant referred to Likoni Sub-County Hospital where the allegations of Sodomy were confirmed. PW 5 said he interrogated the Complainant and took his statement. The offence was said to have taken place at appellant's single room house. PW 5 visited the scene & confirmed the appellant and the Complainant's mother were neighbours and living in the same plot.
14. PW 5 said that accused was arrested on 29/9/2020 because he was nowhere. He said the Complainant identified the appellant and said he is known as Jomba. When prosecution case was closed the appellant was placed on defence and he said he was a security guard at Bamako Organization Initiative. He said the Complainant was not known to him. He said he met them for the 1st time in court. He said that on 19/9/2020 he was in church and he did not defile the Complainant. He said he was in church upto around 4.00pm. He said that the following day he went to church with his family. He said he lives with his sister and mother in a single room. He said the house where he lived was a Swahili type of house with 11 rooms occupied by different tenants and there is no particular time the plot remains without people. He said he was arrested on 29/9/2020 and he did not know why it took 10 days for him to be arrested.
15. He said he was always at home. He said he is not known as Mjomba. He said that his mother is always at home but his sister sometimes goes for casual work. He said he had seen the Complainant at home within the estate. He said [Particulars Withheld] had threatened him before. He said he didn't know if Complainant has a reason to give false testimony. He said his mother was a witness but no witness was to come from church.
16. DW 2 testified that the appellant was her son and that she was with him in church on 19/9/2020 until 4.00pm. She said they had gone to clean the church. She said that the Appellant was a guard in Mtongwe. She testified that on 29/9/2020 she was in the house with the appellant when the OCS Vijiweni went and arrested him and took him to the police station. She said the police had not looked for the appellant before. She said they live in a Swahili type house that has 11 rooms and she occupied one room with her Son. She said there is no shop nearby. She said that the plot is always having tenants at anyone given time. DW 2 said she was with the appellant and her grandchildren and she does not believe he committed the offence on the alleged date. She said that on Saturday and Sundays they are



- always at church and [Particulars Withheld] wife sells fish at the gate. She said she had no grudge with the Complainant's mother. She said that they don't live in the same plot but neighbouring plot.
17. DW 2 said in cross examination the complainant was known to her and plays nearby with other children in the estate. She said accused works at night and comes back at 10.00am. She said they usually go to clean the church at 2.00pm. She said there are shops nearby.
 18. DW 3 said that she sells fish at Mtongwe and appellant was known to her. DW 3 also said she knew the Complainant. She said she had not seen the appellant interact with children and she never saw the Complainant go to the appellants house. She said the appellant did not commit the offence. She said she does not live with the appellant in the same house. She said she lives in same plot and sells fish at the main door but did not have evidence of her tenancy. She said there was a shop at the back of the plot which serves the residents in the area. She said she did not see the Complainant go into the appellants house and she could not tell if he was defiled.
 19. This appeal was canvassed by way of written submissions as per directions made on 18th May 2023. As at 27/07/2023 there were no submissions filed by either party. However, this being a 1st appeal, this court has a duty with or without submissions to re-evaluate the evidence in the trial court as against the grounds of appeal raised by appellant and come up with its own conclusion.
 20. From the evidence on record, the judgment of the trial Magistrate and the grounds of appeal the issues for determination are:-
 - i. Whether the prosecution proved the charge of defilement beyond reasonable doubt.
Proof of age – Certificate of birth dated 6th January 2017 was produced indicating that the Complainant was born on 26/08/2014 and as such by the time of the incident herein i.e. 19.09.2020, he was 6 years and 24 days. The Section under which the appellant was charged was therefore proper.
 - ii. On the element of penetration, the child said that on his way from the shop he met the appellant who was their neighbour known as Jomba and he took him to his house and defiled him in the anus. He said that he went to the house and reported to his mother and he was taken to hospital and to police. He said by the time he reached home his short was soiled with stool. He said he felt a lot of pain after he had been defiled.
 21. The complainant's mother said when the Complainant returned she felt he was smelling of faeces and when she inquired the Complainant said Jomba had done tabia mbaya to him in his anus. The Complainant was taken to hospital and examined and was found to have a loose sphincter muscles with lacerations and healing scar at 12 O' clock in the anal area. He said this was evidence of penetration. The prosecution therefore proved that there was penetration by evidence of PW 3 – the Complainant and the medical evidence
 22. Whether the prosecution proved that the appellant was the perpetrator the Complainant said it was Jomba whom he identified as the appellant herein and he took the police to the house where he said the appellant defiled him. He said there was no one else in that house. It was him and the appellant. He gave a very detailed description on how the appellant used his finger to penetrate his anus. How the appellant put spirit in his anus, how the appellant made him suck his penis before using it to penetrate his anus and when he was done he gave him 5/= and sent him to go home. These are details which a child of such tender years could not have imagined. The Appellant confirmed he knew



- the Complainant and his mother. The Appellants mother confirmed he knew the Complainant, his mother & even PW 2 and that they had not differed.
23. PW 1 said he sent the child to the shop at 10.00am and when he delayed to return, she sends the sister who didn't get him at the shop. When he returned, he was smelling of faeces. He could not control his bowels because the muscles of the Sphincter had been loosened by forceful penetration of his anus. This offence was committed in broad day light and the person who committed it was not a stranger. He took advantage of the vulnerability of the child in strength and age and defiled him in the shadow of his house.
 24. The Appellant's mother said they went to church at 2.00pm to clean the church. The offence took place in the forenoon. The child was sent to the shop at 10.00am and it is on the way from the shop that he was lured by the appellant in his house and he defiled him.
 25. This court finds that the 3 elements of defilement under Section 8(1) of the *Sexual Offences Act* were proved by the prosecution to the required threshold.
 26. The 2nd Ground that the prosecution failed to bring sufficient evidence within a reasonable time frame to prove their case beyond reasonable doubt has not been clarified.
 27. The record shows the appellant was arraigned in court on 1st October 2020. The prosecution closed its case on 26th October 2021 and the appellant and his witnesses testified on 19th January 2022 and Judgment was delivered on 2nd June 2022. The trial was concluded within a record 2 years and 7 months.
 28. The evidence by the Complainant together with his mother PW 1 & PW 2 as well as the Investigating Officer was that the Complainant was defiled. This court has found that indeed there was penetration confirmed by the Clinical Officer – PW 4 who examined the Complainant and treated him. He produced treatment notes, PRC & P3 forms as exhibits in support of prosecution case. The 3rd ground that medical evidence did not corroborate complainants evidence is not sustainable.
 29. The only other witness that may have been called is the Sister of the Complainant whom PW 1 said she sent to go and look for the Complainant but she did not find him. The complainant, PW 3, said that he was alone with the appellant. Had it not been the mother who smelled faeces when he returned, probably, what might have happened may not have been discovered.
 30. The trial Magistrate dismissed the appellants defence on the ground the appellant was known to the Complainant as a neighbour and the offence was committed during day time when there was plenty of natural light. She also said that the appellant and his mother did not bring anyone from church to confirm he was in church & not in the house when the offence was committed. Even without calling anyone to prove the appellant was in church, the appellants mother said they went to church at 2.00pm and not at 10.00am which the Complainant alleges he was taken to the appellant's house and defiled.
 31. In conclusion I do find that appeal on conviction and sentence has no merit save that appellant appears to have gone through trial while in remand custody and therefore entitled to benefit from right under Section 333(2) of the *Criminal Procedure Code*. His sentence should commence from 1st day of October 2020.
 32. Right of Appeal 14 days explained.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 31ST DAY OF JULY 2023

HON. LADY JUSTICE A. ONG'INJO



JUDGE

In the presence of:-

Ogwel – Court Assistant

Ms. Anyumba for Respondent

Appellant – present in person

HON. LADY JUSTICE A. ONG'INJO

JUDGE

