



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO. 52 OF 2019

ALFRED KIOKO MUTISYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of Hon. A. Ndungu (SRM) in Makindu

Senior Principal Magistrate's Court Sexual Offence Case No. 19 of 2017

delivered on 3rd April, 2017).

JUDGMENT

1. **Alfred Kioko Mutisya** the Appellant was charged with two counts of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006. The particulars in **count I** are that the Appellant on diverse dates between 2nd day of May 2017 at [particulars withheld] village in Makindu location within Makueni county intentionally and unlawfully caused his male genital organ namely penis to penetrate the anus of **DM** a child aged 11 years.

The particulars in **count II** are that the Appellant on diverse dates between 1st day of May 2017 and 4th day of May 2017 at [particulars withheld] village in Makindu location within Makueni county intentionally and unlawfully caused his male genital organ namely penis to penetrate the anus of **MMM** a child aged 10 years.

He also faced an alternative count of committing an indecent act on each of the complainants on diverse dates between 1st May and 4th May 2017.

2. He denied the charges and the matter proceeded to full hearing with the prosecution calling seven (7) witnesses. The Appellant gave an unsworn statement of defence and called no witness. He was finally, found guilty, convicted and sentenced to serve twenty (20) years imprisonment on each of the two main counts of defilement. It was ordered that the sentences run concurrently.

3. He was aggrieved by the judgment and filed this appeal raising the following grounds: -

a) **That**, the learned Magistrate erred on points of law by failing to observe that the ingredients of establishing the offence of defilement i.e. penetration was not proven by the prosecution evidence which was untenable, unworthy, contradictory, inconsistent, and full of lies hence not capable to pass the test of credibility.

b) **That**, the learned Magistrate erred in law and fact in convicting on identification that was not proved.

c) **That**, the whole of the prosecution's case is riddled with material contradictions and hearsay which not only impeach on the credibility of witnesses but also goes to show that the burden of proof was not discharged as required in law.

d) **That**, the learned Magistrate failed to see that the matter was not proved beyond reasonable doubt.

4. The complainants in this case are male minors aged 11 years and 10 years respectively. They testified as Pw1 (DM) and Pw2 (MMM) respectively. It was their evidence that on 2nd May 2017 they were in [particulars withheld] bus stage where there was a crusade. The two boys were school going and were in standard two (2) at [particulars withheld] school Makindu. They used to collect waste bottles at Makindu town. On this day as they walked near the stage they were called by the Appellant who they knew as Kioko. He asked them to go with him to

his home. He carried them on his bicycle.

5. The Appellant's wife was away in hospital with a sick child. They assisted in holding the Appellant's child whom they found at his home. They had dinner of ugali which was prepared by Pw2. On this night Pw1 slept with the child and another boy called Michael in one room while Pw2 slept with the Appellant in different room which was the master bedroom. The next morning the Appellant assigned them the duty of drawing water.

6. It was Pw2's evidence that after taking water to the Appellant's house they decided to go to their homes. While on their way to their homes and in the presence of Michael, Pw2 told them how the Appellant had sodomised him in the night. As they walked home and near [particulars withheld] guest house the Appellant saw them and called them again. This time he carried Pw2 on his bicycle as Pw1 followed from behind. They reached the Appellant's house.

7. While at the Appellant's house he told Pw2 that they should leave for their homes but he declined. He convinced him that they sleep there. They cooked, ate and went to sleep. On this night of 3rd May 2017, Pw2 slept with the child while Pw1 slept in the small room. Pw1 woke up to find the Appellant raping him. The pain in his anus is what woke him up.

8. The next morning, they went to Kari river to fish and crossed the fence to Kari farm. They were arrested by Kari officers as they did the fishing. The officers asked them what they were doing there yet children had been raped there. They were taken to the hospital by police officer Wafula after they told him that they had been sodomised by the Appellant.

9. The boys' mothers were informed of this incident by the police. Pw2's mother testified as Pw3. She denied that Pw2 slept away from home on any given night.

10. The children were examined by Pw4 **Dr. Esther Musyoki**. Her findings were as follows: -

Pw1

- Tenderness on the anal orifice.
- Sperms were collected
- Other testes were negative.

Pw2

- Tenderness on anal orifice.
- Other tests were negative.

She produced the P3, PRC forms and treatment notes for Pw1 as EXB1 and 2 while those for Pw2 were produced as EXB3 and 4. She confirmed that the children were sodomised.

11. Pw5 **DMK** and Pw6 **ENN** had found Pw1 and Pw2 at the Mawasco water pumping station. They were naked and when they saw people they started running away towards the dam which was risky. They reported to Pw5 and Pw6 that Msanii alias Mutinda the Appellant had been defiling them at his home. The boys took Pw5 and another to the Appellant's homestead. He was asked about this and he said he was living with the children.

12. Pw7 **No. 235917 Inspector Faith Chesire** was the investigating officer herein. She told the court that on 5th May 2017 at around 2:30 pm she received Pw1, Pw2 and the Appellant from members of the public while at Makindu police station. Pw1 and Pw2 told her they had been defiled by the Appellant. She took them to Makindu sub-county hospital where they were tested and P3 forms filled.

13. She also took them for age assessment and Pw1 was found to be aged between 11-13 years while Pw2 was aged between 10-12 years. He produced the two respective age assessment reports as (EXB 8 and 9). Pw7 also confirmed that the parents of Pw1 and Pw2 had not reported about them missing from home.

14. In his unsworn defence the Appellant stated that on 5th May 2017 12:30 pm he was at his home with his wife and children when his neighbor (Pw5) called him to the river. He went and they started fighting. Pw5 then left for Makindu police station. He went back to his home and his wife gave him his shirt and he proceeded to the police station.

15. He was detained upon arrival. He said Pw5 was his servant for seven (7) years and the dispute between them has a history since they used to do business together. He told the court that in April 2017 Pw5 had passed by his farm and assaulted his wife saying he would ensure his business collapsed. He also told him the ways of killing a rat are many.

16. It was his evidence that Pw6 was like a mother to him and she used to take care of his children when he was not at home. So she knew him well. On Pw3's evidence he said the lady had confirmed that none of her children had spent a night out of her home. He alleged that it was Pw5 who had convinced Pw3 to record a false statement. Finally, he stated that Pw6 who knew him well and is also a village elder is the only witness who spoke the truth in court over this matter.

17. In his submissions the Appellant has argued that there was a contradiction in the evidence of Pw1 and Pw2 as to who was defiled first between them. Referring to the evidence of Pw3 he submits that she mentioned that the boys were found being defiled by two men at the river. He wondered who the two men were and why the boys did not scream. His submission is that Pw2 slept at their home on the night in question and was not defiled.

18. He raises issue on the failure by the trial court to call for a DNA test when sperms were collected. This failure, to him was a fatal injustice.

19. He questions his identification by Pw1 who said he had not seen him before yet he referred to him by name as Kioko. He questioned the complainant's (Pw1) character and why he was to be taken to a rehabilitation school. He submits that Pw1 and Pw2 were street boys whose testimony cannot be relied on. They had admitted to collecting and selling bottles at the market to make money. They had been caught fishing in a restricted area and they had to mitigate to defend themselves.

20. Another contradiction he mentions is on what they each said about the Appellant's home. He submits that Pw7 carried out no investigations and admitted that much. On these inconsistencies he submits that they cast doubts on whether he was involved or not in this case. He referred to the case of **Parvin Singh Dhalay –vs- Rep (1997) eKLR** Criminal Appeal No. 10 of 1997 where the Court of appeal stated:

“We think that if there be other co-existing circumstances which would weaken or destroy the inference of guilt, then the case has not been proved beyond any reasonable doubt an accused is entitled to an acquittal.”

21. Further in **Miller Ministry of Pensions (1947) 2 ALLER 372 Lord Denning** defines reasonable doubt to be:

“That degree is well settled. It need not reach certainty, but must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favor which can be dismissed with the sentence, of course it is possible but not in the least probable, the case is proved beyond reasonable doubt but nothing short of that will suffice.”

Analysis and determination

22. This is a first appeal and this court is therefore guided by the principles set out in the case of **Okeno –vs- R (1972) E.A** where the Court of Appeal stated:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters Vs Sunday Post [1958] E.A 424.”

23. These principles were later reiterated in the case of **David Njuguna Wairimu –vs- Rep (2010) eKLR** where the Court of Appeal stated:

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.”

24. I have considered the evidence on record, grounds of appeal, submissions by both parties and cases cited. The issues I find falling for determination are as follows:

- i. Whether the ages of Pw1 and Pw2 were assessed and determined correctly by the trial court.
- ii. Whether there was improper, intentional and unlawful penetration of the anuses of Pw1 and Pw2.
- iii. Whether the Appellant was positively and properly identified.

Issue (i) Whether the ages of Pw1 and Pw2 were assessed and determined correctly by the trial court.

25. The issue of age is very critical in a case of defilement under the Sexual Offences Act. This is so because the penal provisions under the said Act are pegged on age. For that reason, the particulars in a charge of defilement must state the age of the victim.

26. Pw7 **No. 235917 Inspector Faith Chesire** the investigating officer herein said there were no documents availed by the parents of Pw1 and Pw2 to show the victim's ages. She therefore organized for them to have their ages assessed. The reports which she produced as EXB 8 and 9 confirmed that Pw1 was aged between 11-13 years while Pw2 was aged between 10-12 years. They were therefore children of tender

years and the court took each of them through a *voir dire* examination before taking their evidence. My finding is that their ages were established which confirmed the ages stated in the charge sheet.

Issue no. (ii) Whether there was improper, intentional and unlawful penetration of the anuses of Pw1 and Pw2.

27. The evidence by Pw1 and Pw2 is that each of them was defiled separately by a man. Pw1 testified that on the material night he had slept with this man in the same room. He was woken up by excruciating pain from his anus. He found the man to have pulled his trouser up to the knees and placed his penis in his anus.

28. Pw2's testimony was that he had heard Pw1 yell saying he was being defiled. Later the man came to his room and removed his shorts and underpants. He was lying on his left side while the man lay behind him. He was in a lot of pain as the man had inserted his penis in his anus. A torch was on and he saw the man so well. He did not have his trouser on as he defiled him.

29. They said they were caught at a fish farm where they had gone fishing in the morning. Upon interrogation they said they had been defiled by a man whose name they gave. Pw5 and Pw6 confirmed to the court that Pw1 and Pw2 had complained to them of their having been defiled by the man they referred to as Msanii.

30. Pw1 and Pw2 were taken to hospital and examined by **Pw4 Dr. Esther Musyoki**. She said each of the boys had tenderness on his anal orifice. Her finding was that they had each been sodomised. She further assessed the injury to each of them as grievous harm (EXB 2 -5).

31. Penetration has been defined under section 2 of the Sexual Offences Act as:

“Penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person

Going by the above definition and the evidence adduced by Pw1, Pw2, and Pw4 I am satisfied that there was unlawful penetration of Pw1's and Pw2's anuses by a male organ namely penis.

Issue no. (iii) Whether the Appellant positively and properly identified.

32. The Appellant has raised the issue of inconsistencies and contradictions in the evidence of Pw1 and Pw2. It is true that the two boys were collecting used bottles and selling them at Makindu market. They may have been street children yes, but that in itself does not disqualify them as witnesses.

33. Pw3 **RM** who is Pw2's mother said her son had never slept away from home. There is no other evidence supporting her statement. The evidence of Pw1 and Pw2 is that the Appellant found them at Makindu at the stadium and it was daytime. He was riding his bicycle and invited them to his home. He carried them on the said bicycle. This was on 2nd May 2017 and they remained at the Appellant's home for two days. They were caught at the fish farm on 5th May 2017 morning hours.

34. They explained to those who caught them how they had found themselves there. They specifically told Pw5 and Pw6 (*village elder*) how they had been defiled by a man called “Msanii”. It was Pw5's evidence that they asked the boys to take them to Msanii's home. They took them to the Appellant's home and identified him as the perpetrator. His home is not far from the fish dam. He was then taken to the police station together with the complainants.

35. Pw5 also confirmed that he had been seeing Pw1 and Pw2 at the Appellant's home three (3) days before 5th May 2017. I therefore find no serious discrepancy in what Pw2 said as she was not with these children. The learned trial Magistrate handled this issue of Pw2's evidence very well.

36. In his statement of defence the Appellant did not say anything about the days he is accused of having defiled these boys. All he talked about was the happenings of 5th May 2017 which was his date of arrest. He raised issues about Pw5 whom he accused of having a long dispute with. He never put any of these serious allegations against him in cross examination so that he could respond to them. It was a clear forethought.

37. The Appellant praised the village elder (Pw6) for being the only witness who spoke the truth. This witness repeatedly said the children told them Msanii otherwise known as Mutinda had defiled them at night, and they had been at his homestead for three (3) days. They also told them they had come from Makindu. This evidence by Pw6 does not support him and is taken as the truth.

38. Further the Appellant in his defence alleged that it was Pw5 who told the children (*Pw1 and Pw2*) what to come and tell the court. Again, as before he never put this to the witnesses (Pw1, Pw2 and Pw5) to accept or deny. Had that been the case he could have asked them about it.

39. It should also be borne in mind that the Appellant is accused of what transpired between him, Pw1 and Pw2 on the nights of 2nd – 4th May 2017 and not what transpired at the fish dam on 5th May 2017. The children being found at the fish dam is what finally led to his arrest. This was properly captured by the evidence of Pw5 and Pw6.

40. I am satisfied with the findings made by the learned trial Magistrate. The witnesses had no reason whatsoever to lie against the Appellant. He is the one who brought Pw1 and Pw2 from Makindu and ended up sodomising them. His wife was not at his home at the time.

41. I therefore find the conviction of the Appellant on both counts to be safe.

42. Section 8(2) of the Sexual Offences Act provides as follows:

“A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”

The Appellant was courtesy of the **Muruatetu case**, given twenty (20) years imprisonment on each count with an order that the sentences run concurrently. The trial court indicated that it had considered that the Appellant was a first offender and his mitigation that he was a family man with children who depend on him.

43. There is nothing that has been placed before this court to make me interfere with that sentence. The upshot is that the appeal lacks merit and is hereby dismissed.

Orders accordingly.

Delivered, signed & dated this 25th day of June 2020, in open court at Makueni.

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H. I. Ong’udi

Judge