REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 25 OF 2016

OMAR BAKARI HINZANO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From Original Conviction and Sentence in Criminal Case No. 527 of 2014 of the Principal Magistrate's Court at Kilifi – L.N. Wasige (Mrs.), SRM)

JUDGEMENT

1. Before the trial court, the Appellant, Omar Bakari Hinzano, was in count 1 charged with defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act, 2006. The particulars of the offence being that on 4th December, 2014 within Kilifi County he intentionally and unlawfully caused his penis to penetrate the anus of Z.T., a child aged five years.

2. In the alternative to count 1, the Appellant was charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act, 2006. The particulars being that on the date and place mentioned in the main count, the Appellant intentionally touched with his penis the anus of Z.T., a child aged five years.

3. The Appellant was faced with what was stated to be a third count but which is actually the second count in which he was charged with sexual assault contrary to Section 5(1)(a)(1)(2) of the Sexual Offences Act, 2006. It was alleged that on the date and place mentioned in count 1, the Appellant intentionally and unlawfully used his fingers to penetrate the vagina of Z.T.

4. At the conclusion of the trial, the Appellant was found guilty on count 1 and sentenced to life imprisonment. He was acquitted on count 2. The Appellant being aggrieved against both conviction and sentence has appealed to this court on grounds which can be summarised as: that the conviction was against the weight of the evidence and that trial court failed to consider the defence case.

5. This being a first appeal, this court is obligated to consider the evidence afresh in order to reach its own independent conclusion. In doing so, I must bear in mind that, unlike the trial court, I did not have the opportunity of observing the demeanour of the witnesses as they testified.

6. The evidence that emerged at the hearing, and which did not receive much resistance from the defence, was that on 4th December, 2014 at around 3.00 p.m. Z.T., who testified as PW2, was playing outside their house with other children who included her sister, PW3 Z T, when the Appellant who was well known to them as he worked for their mother, PW1 A R K, summoned Z.T. to a shed about 50 metres from their house. Inside the shed, the Appellant generously applied saliva on the complainant's anus before penetrating her. The complainant's screams and cries attracted PW3 who went and found the Appellant in the act.

7. When the children later went home, the complainant went to sleep and when her mother enquired from her what the matter was, the complainant informed her that she was unwell. When the complainant was later woken up to eat and take medicine, she refused.

8. The following day at around 9.00 p.m. PW1 who was with the complainant's grandmother noticed that the complainant could not sit properly. The complainant was interrogated and that is when she disclosed that Omar Juice had inserted his penis in her anus. The Appellant was known as Omar Juice as he used to help PW1 prepare juice for sale. The complainant also disclosed that the Appellant had inserted his fingers in her vagina. Asked why she did not scream, the complainant disclosed that she had indeed screamed and PW3 had responded to her alarm. PW3 did indeed confirm this evidence.

9. The next day the matter was reported at Kilifi Police Station before the complainant was taken to Kilifi County Hospital where she was examined and treated.

10. PW4 Dr. Hassan Bachu and PW6 Dr. Hashim Suleiman both testified that the complainant's outer genitalia was normal but the hymen was broken.

11. In his defence, the Appellant stated that he was employed by PW1, the complainant's mother in January, 2014 to sell juice. In June, 2014 his bicycle developed a problem and when he informed PW1 about the problem she instead sacked him. He was consequently employed by a relative of PW1's husband to sell juice and PW1 asked him to go back to work for her but he declined. PW1 threatened him. That is when he heard about the charges.

12. A perusal of the evidence adduced discloses a very straight forward case. The complainant clearly narrated what the Appellant did to her. PW3 saw what happened and heard the Appellant tell the complainant to put on her pants and leave. Although the evidence of a child cannot be used to corroborate the evidence of another child, the trial magistrate acting on the proviso to Section 124 of the Evidence Act found the complainant to be truthful. She gave reasons in her judgement for reaching that conclusion. I find no reason to disturb that conclusion.

13. I also note that the trial magistrate considered the defence and concluded that the same was a sham. The Appellant's claim that his defence was not considered is therefore not factual. His appeal on the ground that his defence was not considered therefore fails.

14. The question is whether count 1 was proved to the required standards. The best evidence to prove penetration is that of a medical officer. In order for a conviction to ensue where an accused person is charged with defilement, one of the ingredients that the prosecution should establish is partial or complete insertion of the genital organs of the accused into the genital organs of the victim. In the case at hand, although the trial court reached the conclusion that the complainant's anus was penetrated, the medical evidence did not support such penetration. Indeed, the complainant's anus was not examined by any of the medical officers who saw the child. That the child screamed and could not sit properly may support the allegation of penetration. However, in this case the mother of the child never examined the child's anus. There is no evidence that there was injury or blood. The conviction of the Appellant on count 1 was therefore not supported by evidence.

15. What should this court do now? Although the charge sheet clearly indicated that there was an alternative charge to count 1, the trial court erroneously proceeded to treat the alternative charge as an independent count and proceeded to acquit the Appellant stating that:

> **"With respect to Count 2 to wit sexual assault, I observe that the prosecution did not adduce any evidence in support of the charge. PW2 only spoke of the accused inserting his penis into her anus which act amounts to defilement. There being no evidence linked to the accused of the offence of sexual assault, I acquit him of the same under Section 215 Criminal Procedure Code."**

16. Where an accused person is faced with an alternative charge and the trial court convicts him of the main count, the trial court should make no finding on the alternative charge. It is only where the accused is acquitted of the main charge that the trial court should consider the alternative charge. In the case at hand, the Appellant had been found guilty of the main count and the trial court ought not to have made any finding on the alternative charge. The acquittal of the Appellant on the alternative charge was therefore in error. The trial court's finding in respect of the alternative charge is set aside.

17. Section 5 of the Sexual Offences Act provides that:

> **"5. Sexual assault**
>
> **1. Any person who unlawfully**
>
> **a. penetrates the genital organs of another person with –**
>
> **i. any part of the body of another or that person; or**
>
> **ii. an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;**
>
> **b. manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault.**
>
> **2. A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life."**

A conviction under Section 5 would have required the prosecution to establish that there was penetration. As already stated, penetration was not proved in this case.

18. Should the Appellant go scot free? The answer is in the negative. Section 11(1) of the Sexual Offences Act, 2006 provides that:

> **"11(1) 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.**

19. Section 2 of the Act defines indecent act to mean an unlawful intentional 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."**

20. The evidence that was adduced established that the Appellant unlawfully and intentionally caused his penis to come into contact with the complainant's anus. He is thus guilty of indecent assault and the trial court ought to have convicted him of this lesser charge.

21. In the circumstances of this case, I quash the conviction and set aside the sentence imposed on count 1 and substitute therewith a conviction for indecent act with a child contrary to Section 11(1) of the Sexual Offences Act, 2006 as charged in the alternative to count 1. The Appellant is sentenced to serve ten years imprisonment from 29th June, 2016 being the date of his conviction and sentence by the trial court.

Dated, signed and delivered at Malindi this 12th day of April, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT