



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CRIMINAL APPEAL 112 OF 2014

PATRICK MWANZIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**(An appeal arising out of the judgment and sentence of Hon. I.M. Kahuya RM in Criminal (SO)
Case No. 9 of 2012 delivered on 18th December 2012 at the Senior Principal Magistrate's Court at
Kangundo)**

JUDGMENT

The Appellant was convicted of, and sentenced to serve fifteen years imprisonment on 18th December 2012, for the offence of defilement of a child with mental disabilities contrary to section 7(1) of the Sexual Offences Act No 3 of 2016. The particulars of the offence were that on 24th April 2012 in [particulars withheld] Location, Matungulu District within Machakos County he intentionally caused his penis to penetrate the anus of M K, a child with mental disabilities aged 15 years, within the view of E M K.

The Appellant is aggrieved by the judgment of the trial magistrate, and has preferred this appeal against the conviction and sentence. The grounds of appeal are in his Petition of Appeal filed on 9th June 2014, as amended in the Amended Grounds of Appeal dated 13th September 2016 he availed to the Court. The Appellant also availed two sets of submissions to the Court dated 13th September 2016 and 13th December 2016 respectively. The grounds raised by the Appellant are as follows:

1. THAT, both the main and alternative charges as drafted are incurably defective in particulars hence unlawful.
2. THAT the evidence adduced by the prosecution is at variance with the details pertaining to the charge sheet.
3. THAT, the evidence of the purported eye witnesses PW2 and PW4 was inconsistent and contradictory hence should not have been relied upon a basis for Appellant's conviction.
4. THAT the prosecution failed to prove the case beyond a reasonable doubt.
5. THAT the Appellant's constitutional right to legal representation was violated and contravened.

The Appellant submitted that the alleged offence was purported to have been committed in the view of PW3 namely E M K, however the testimony of all the prosecution witnesses did not allude to the said representation, and consequently the evidence as adduced was at variance with the particulars pertaining to the charge sheet as read to the Appellant during plea. Further, that the said E M K was not near the alleged scene and hence could not have viewed the alleged offence. It was also contended by the Appellant that both the main and alternative charge particulars do not contain the term "unlawfully" as provided for under section 3 and 6 of the Sexual Offences Act, and consequently the Appellant was charged with offences not known in law. Reliance was in this respect placed on various decisions including the decision in **Yongo vs Republic (1983) KLR 5**.

The Appellant also alleged that PW2 and PW4 who were at the scene of the crime contradicted themselves and was therefore not reliable, and that the evidence of PW3, the mother of the complainant was not reliable as she testified that she left her mentally unstable child in the hands of a stranger.

Ms Mogoi Lillian, the learned prosecution counsel, filed written submissions dated 21st November 2016 in opposition to the appeal. It was urged therein that from the law as drafted in section 7 of the Sexual Offences Act, the word unlawfully has not been included, hence the ground that the charge is defective because of the elimination of the word unlawfully is baseless, and that the offence of defilement of a child with mental disability does exist in our law.

According to the prosecution, the inclusion of the words "within the view of E M K" at the end of the facts was in error however, the same does not render the charge sheet defective as it does not raise any ambiguity in the interpretation of the offence. Further, that the Appellant was alive to the proceedings and having effectively cross examined the witnesses, it showed that he did understand the offence he was facing and did not suffer any prejudice arising thereof.

It was argued that the prosecution in proving its case called a total of 5 witnesses, but did not call the victim to testify in view of his mental capacity. Further, the evidence adduced by the five witnesses was analysed, and the Prosecution submitted that it proved the charges against the Appellant beyond reasonable doubt as it showed that the Appellant was found in the act of defiling the victim who is mentally unstable, arrested by members of the public and re-arrested by a police officer, whom upon completion of the investigations charged the Appellant with the offence herein.

As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

Upon consideration of the grounds of appeal, submissions made and evidence in the trial Court, I find that the substantive issue raised in this appeal are firstly, whether the charge as framed was defective, and secondly whether the Appellant's conviction for the offence of defilement of a child with mental disabilities was based on sufficient evidence.

Section 7 of the Sexual Offences Act provides for the offence of acts which cause penetration or indecent acts which are committed within the view of a family member, child or person with mental disabilities as follows:

"A person who intentionally commits rape or an indecent act with another within the view of a family member, a child or a person with mental disabilities is guilty of an offence and is liable upon conviction to imprisonment for a term which shall not be less than ten years"

I disagree with the Appellant that the particulars of the charge as framed ought to have included the word "unlawfully", as there is no such word in the ingredients of the offence as set out in section 7 of the Act, and the particulars as framed did disclose an offence known in law as shown by the said section. However, I do agree with the Appellant's that the evidence adduced by the prosecution witnesses while showing that there was an indecent act committed on the complainant, did not demonstrate that the same was not done in the view of E M K as alleged in the particulars of the offence.

In addition, contrary to the Prosecution's submissions, the fact that an act of penetration or indecent is done in view of a family member, child or person with mental disabilities is a key ingredient of the offence in section 7 of the Sexual Offences Act. The said E K testified as follows in this regard:

“I am E K from [particulars withheld]. On the material day at about 9 a.m. I was at home doing laundry when the accused came over and picked my son whose mentally unstable. They left for a stroll and an hour later, I saw a mob of people having tied the accused with a rope. That is when I was informed he was found sodomizing my son. When I checked my son, it was true he had a torn anus. So, we referred the matter to the police and took the boy for medical advice at Kangundo District Hospital. I knew the accused on that material day only. He is present in court.”

The evidence adduced by the Prosecution did not therefore prove the main charge that the Appellant was charged with, of defilement of M K in the view of E M K, or of the alternative offence of an indecent Act in the view of the member of the family with a child with mental disabilities.

This finding notwithstanding, this Court notes that the evidence adduced by A K (PW2) was as follows:

“I am Albanus Kyalo from Nguluni. I am a business man. On 29 th April 2012 at about 10 a.m. I was heading to the river to look for sand. That is when I heard noises from a bush. On moving closely, I saw two naked people i.e. Mwanzia and M. I saw the victim lying on his stomach and the accused on top of him. So, I asked the accused what he was doing and he asked "what do you think I am doing?" As we talked he continued defiling him. So, I left them rushed to the river where there were village elders. On returning, we found the victim still there. He had dirt on his behind and a lot of mud. The accused was at a distance running away. So, we pursued and caught him. He pleaded for his life and I advised the crowd to take him to the Administration Police Post. We took the victim too after informing his mother. On perusing the victim's pocket, we found a torn 50/- note. The accused told me he had paid the victim for sex. That was when I caught them earlier.”

Fidelis Wambua (PW4) on his part testified as follows:

“I am Fidelis Wambua. I work in the quarry at Syathe. I live in Nguluni. On the material day at noon, I was at the river in Katile when we saw Kirevi call us. We approached and he explained that the accused was defiling the minor. We moved to the scene and true we found the accused in the act; having removed the boy's trouser and defiling him. So we asked him what he was doing and he stood up and started running as he held on his trouser. We pursued him, about nine people on catching him he said he had paid for the sex. We went back to the scene and found the boy dressing up. On checking his trouser, we found a torn 50/- note. The boy is usually mentally unstable. The accused is present in court. I have known him as a person of my locality. I have never quarreled with the accused before. Finally, we took the child to his mother. By that time, many people had gathered. He was taken to Nguluni Post.”

It was therefore evident that the Appellant was found and seen by the two witnesses committing an indecent act with the M K. An indecent act is defined in section 2 of the Sexual Offences Act as

“indecent act” means 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;

There was no material inconsistency or contradiction in the evidence by the two witnesses, as it was not stated that they both arrived at the scene at the same time once PW2 alerted members of the public as to the Appellant's activities, and it is possible that PW4 could have arrived at the scene before PW2 came

back.

The provisions of **section 179** of the *Criminal Procedure Code* in this regard empower a court to convict an accused person for an offence which he was not charged but which is proved and was a lesser offence than that charged. The said section provides as follows:

“(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.”

It was explained by Asike-Makhandia J. (as he then was) in *Kyalo Mwendwa v Republic* [2012] eKLR that the *jurisdiction of the Court is to impose a substituted conviction for a minor cognate offence only*. I accordingly find that the evidence before the trial Court disclosed a lesser cognate offence of committing an indecent child contrary to section 11(1) of the Sexual Offences Act, which provides as follows:

“(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.”

Lastly, this Court would like to observe and comment that the Appellant had earlier on in my view been correctly charged with defilement under section 8(1) and 8(3) of the Sexual Offences Act, before the charges was amended to read defilement of a child with mental disabilities under section 7 of the Sexual Offences Act. Section 8 is the applicable section when a child is defiled, whether or not the child has a mental disability, and such a disability only becomes a relevant factor during sentencing as it is an aggravating factor in the defilement.

In addition, Section 7 of the Sexual offences Act is commonly used as the section for charging persons who defile children with mental disability which is in my view wrong, as the ingredients of the offence created by section 7 as shown in the foregoing do not include defilement of children, and therefore also fails to capture the different age categories of children and sentences provided for by section 8. To this extent there is no offence known as defilement of a child with mental disabilities created by section 7.

I hereby therefore quash the conviction of the Appellant of the offence of defilement of a child with mental disabilities contrary to section 7 of the Sexual Offences Act, and substitute it with the conviction of the Appellant for the offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act, pursuant to the provisions of section 179(2) of the Penal Code. I also substitute the sentence of fifteen (15) years imprisonment with a sentence of ten (10) years imprisonment for committing an indecent act with a child, which sentence is to run from the date of conviction by the trial Court.

Orders accordingly.

DATED AND SIGNED AT MACHAKOS THIS 27th DAY OF FEBRUARY 2017.

P. NYAMWEYA

JUDGE