



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT AMCHAKOS
CRIMINAL APPEAL NO.5 OF 2014

SHADRACK MUTIE NDAKA APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the judgment of Principal Magistrate's Court at Kithimani delivered by Honourable M.A. O. Opanga (Ag Senior Resident Magistrate) on 2nd October, 2013 in KITHIMANI P.M.CR CASE NO. (S.O.A) 11 OF 2012)

JUDGMENT OF THE COURT

1. The Appellant **SHADRACK MUTIE NDAKA** was charged with offence of Sexual Assault contrary to Section 5 (1) (a) (i) as read with Section 5(2) of the Sexual Offences Act. No.3 of 2006. The particulars of the charge are that on the 26th April, 2012 at 12.30p.m. in Kithimani trading centre the Appellant unlawfully used his finger to penetrate the anus of C.R.J. a minor aged two years and four months.

2. The facts of the case as recorded by the trial court are that on 26/4/2012 at about noon. The mother of the victim was washing clothes outside when her son C.R.J. walked towards the Appellant's house. The Appellant was a neighbour and who and just emerged from a common bathroom. The boy overstayed inside Appellant's house and his mother was prompted to go knock on Appellants door whereupon the minors emerged while pulling up his pant and uttered the words "***Mutie paka mimi mafuta***" and was in tears. The minor was escorted to Yatta Medical Clinic and then Matuu District Hospital. The minor was eventually examined and was found to have been assaulted on the anus. A report was made to Yatta police station. The Appellant was arrested and charged. The Appellant was tried and convicted at the Principal Magistrate Court at Kithimani and was sentenced to serve ten (10) years imprisonment.

3. The Appellant was aggrieved by both conviction and sentence and raised the following grounds of appeal:-

(a) The learned Magistrate misdirected herself in law and fact when she sentenced the Appellant on the offence without any direct evidence on record.

(b) The learned Magistrate misdirected herself in law and fact when she failed/refused to consider all the evidence on record so as to arrive at a proper judgment.

(c) The Appellant's defence was not considered in light of Section 169(1) of the Criminal Procedure Code.

(d) The learned Magistrate misdirected herself in law and fact when she put much consideration on hearsay as the child's words yet the child was in court and refused to confirm the same from the child.

(e) The learned Magistrate misdirected herself in law and fact when she rejected and caused imprisonment of the Appellant herein without proper evidence on the medical report and P.3 form sufficient to support the charge.

(f) The learned Magistrate misdirected herself in law and fact when she failed to consider the whole of the words or actions from the child as evidenced by witness in court and only leaned on the complainant's side.

4. Parties agreed to canvass the Appeal by way of written submissions. It was submitted for the Appellant that the evidence tendered before the trial court was riddled with contradictions. It was further submitted for the Appellant that the trial court should have allowed the minor to testify or if not to fully comply with the Provisions of Section 31 of the Sexual Offences Act relating to a vulnerable witness. Further the Appellant faulted the trial court for disregarding his defence more particularly the defence that the charges had been brought up to punish him for rebuffing advances by the minors mother who wanted a relationship with the Appellant.

5. On the part of the Respondent, it was submitted that the case before the trial court had been proved against the Appellant beyond reasonable doubt. It was further submitted for the Respondent that the Appellant's defence had been considered by the trial court. Finally it was submitted that there was sufficient medical evidence adduced before the trial court by PW.2 and PW.4 which confirmed that indeed the minor had been sexually assaulted and further confirmed by the P.3 form.

6. As this is a first appeal this court is obligated to re-evaluate the evidence presented before the trial court and come to its own conclusion but bearing in mind that it neither heard nor saw the witnesses testifying (see **OKENO =VS= REPUBLIC [1972] EA 32**).

7. PW.1 was the mother of the minor C.R.J. and who testified that she was washing clothes outside when the minor went to the Appellant's house and went the minor overstayed, she went and found Appellant's door locked from inside and she was forced to knock and called out the minor's names requiring him to come out. It was her evidence that the minor emerged while pulling up his pant and uttered words "**Mutie paka mimi mafuta**" and pointed towards his buttocks. The witness further testified that she took the baby to a nearby clinic where he was examined by PW.2 a registered a registered Community Health nurse who noticed cracks on the anus which was swollen. PW.2 then suggested that the minor was escorted to the said District Hospital. The minor was escorted to the said District Hospital where he was examined by PW.4 who noticed mild tenderness perianally and formed the opinion that there had been an attempted sodomy. He produced the P.3. Form as exhibit. PW.5 was the investigating officer and he testified that the minor intimated to him that the Appellant had applied some oil on his anus and inserted his finger.

8. The Appellant was placed on his defence and he tendered a sworn testimony. His evidence was that on the material date he had gone to attend a meeting and came back around 3 – 4 p.m. and found the mother to the minor washing clothes outside her house and as he prepared to go take a bath the minor rushed to his house and after a while went back to his mother. He stated that the allegations were false and had been instigated by the mother to the minor who had wanted him to be her lover and who used to give him breakfast and lunch at her house.

9. With the leave of the Court parties filed written submissions. It was submitted for the Appellant that there was no direct evidence adduced before the trial court and further the evidence was not corroborated and further the trial court did not consider all the evidence so as to arrive at a proper judgment. It was also submitted for the Appellant that the trial court failed to consider the Appellants defence more particularly the issue that the mother of the minor had wanted him to have a love affair to which the Appellant rebuffed and thus the allegations levelled against him so as to punish him for snubbing her.

The Appellant counsel further submitted that the trial court relied on hearsay evidence in that it received the evidence of PW.1 and did not bother to ask the minor to corroborate that evidence yet the minor was in court. Counsel further faulted the trial court for failing to comply with the Provisions of Section 31 of the Sexual Offences Act regarding a vulnerable witness and the aid of an intermediary. Finally counsel for the appellant submitted that P.3 form and evidence of PW.4 was not conclusive of the offence. The following cases were relied upon:-

(1) HCCRA 22/15 AHMEDMUHSIN MOHAMED =VS=REPUBLIC [2016] eKLR.

(2) KITALE HCCRA 48/13 ----- GALIETH MUBARAK ELKANA =VS= REPUBLIC

(3) KAKAMEGA HCCRA 124/13- PATRICK BARASA WAWIRE =VS= REPUBLIC

(4) KITALE HCCRA 153/11 – DOMINIC KIBET WARENG =-VS= REPUBLIC

10. I have considered the evidence adduced before the trial court as well as the submissions of learned counsels for the parties. I have also considered the authorities cited herein. The issues raised in the grounds of appeal herein all boil down to one major issue namely whether the Prosecution had proved its case against the Appellant beyond any reasonable doubt before the trial court. The matters that coalesce around this issue as raised by the Appellant's counsel revolve around whether the evidence of the mother to the minor was sufficient, whether there was sufficient medical evidence, whether there was proper compliance with the provisions of Section 31 of the Sexual Offences Act, whether the appellant's defence had been considered.

11. As regards the issue of sufficiency of the evidence of the mother of the minor, the record of Appeal reveals that PW.1 was with the minor on the date of the incident. She had been washing clothes outside when the minor dashed into the Appellant's room. The Appellant had been their neighbour. When the minor took too long, she went to check and found the Appellant's door locked from inside and thus she knocked it and called out to her son., the minor emerged while pulling up his pants and then uttered the words "**Mutie paka mimi mafuta**" loosely translated as "**Mutie applied oil on me**". PW.1 stated that the following morning she arranged to bathe the minor but the minor claimed he was feeling pain on the buttocks where the Appellant had applied oil. PW.1 then took the child to a nearby clinic where PW.2 examined him and confirmed that the child's anus had been interfered with. PW.1 took the minor to Matuu District Hospital where PW.4 examined him and noted there had been an attempted sodomy on the minor. PW.1 then alerted the police who subsequently arrested the Appellant and subsequently charged him. PW.1 was present when the minor entered the Appellant's room and she later knocked on Appellant's door after the minor overstayed and as the minor emerged she saw him pulling up his pants and was crying and later uttered the words "**Mutie paka mimi mafuta**". PW.1 had been allowed to testify as an intermediary due to the age of the minor and she was therefore presenting the evidence as a single witness since she had been alone with the minor at the time of the incident. PW.1 was cross-examined at length by the Appellant's counsel and at no time was an application by the Appellant made to disqualify her from testifying on behalf of the minor. That being the position, the provisions of Section 124 of the Evidence Act became applicable as regards evidence of a single witness in offences of Sexual nature. The court had assessed the minor and found he was too young and thus allowed his mother to testify as an intermediary. PW.1 being the mother of the minor gave her version of events right from the time the minor emerged from the Appellant's house through to examination of the minor in hospital and at the police station to the trial court. She presented to the trial court what she gathered from the minor and what she also observed and perceived herself. I am satisfied that PW.1 had given sufficient evidence before the trial court.

12. As regards the issue of sufficiency of medical evidence, I need to revert back to the offence for which the Appellant had been charged with. The Appellant was charged with an offence of Sexual Assault contrary to Section 5(1) as read with Section 5(2) of the Sexual Offences Act No.3 of 2006. Under the said provision, the offence is committed by the doing of an act which causes penetration of the genital organs of any person by any part of the body of the perpetrator or of any other person or by an object manipulated to achieve penetration. Penetration need not be limited to penetration of genitals but the

penetration of the victim's genital organs by any part of the body of the perpetrator of the offence, or of any other person or even by objects manipulated for the purpose. The minor was examined by two medical personnel (PW.2 and PW.4) who all confirmed that the anus of the minor had been tampered with. The P.3 from produced before court shows that there was mild tenderness on peri-anal area whereby the doctor formed the opinion that there was attempted sodomy. The said witness found that there was no discharge but ruled out diarrhea as a cause and maintained that there was an attempted sodomy. The Appellant's counsel submitted that no explanation for delay in carrying out the examination of the minor was given. Indeed it took about nine days for the examinations to be carried out but despite the said delay, the doctor was able to establish that indeed there had been an attempted sodomy on the minor and therefore the delay did not erase the medical evidence.

13. As regards the issue of PW.1 being made an intermediary, the record of appeal indicates that on the 15/04/2013 the prosecutor informed the court that the minor had just turned three (3) years and had not started school and it was the opinion of the Prosecutors that the minor was too young to testify and thus sought that he be declared a vulnerable witness. The Appellant's counsel indicated that he had no objection whereupon the learned trial magistrate ordered the matter to proceed in camera. The record further reveals that the court questioned the child as captured as follows:-

“Court questions the child asking him his name. He runs after his mother and clings onto her dress. The child cannot testify. I will declare him a vulnerable witness under Section 31 of the Sexual Offences Act 2006 due to his tender age.”

It was then that the evidence of PW.1 was received. At no time did the Appellant or his learned counsel object to the said witness testifying as an intermediary. The witness was cross-examined by the Appellant's counsel at length. The Appellant's Counsel has submitted that the learned trial magistrate should have compelled the minor to give evidence and to corroborate that of his mother and further to comply with Provisions of Section 31 (4) and (5) of the Sexual Offences Act.

Section 31(4) provides:-

“Upon declaration of a witness as a vulnerable witness in terms of this Section, the Court shall subject to the Provisions of sub-section (5) direct that such witness be protected by one or more of the following measures:-

- (a) Allowing such witness to give evidence under the protective cover of a witness protection box;***
- (b) Directing that he witness shall given evidence through an intermediary;***
- (c) Directing that the proceedings may not take place in open court;***
- (d) Prohibiting the publication of the identity of the Complainant or of the Complainant's family including the publication of information that may lead to the identification of the complainant or the complainants family; or***
- (e) Any other means which the court deems just and appropriate.***

Section 31(5) provides that:-

“ Once a court declares any person a vulnerable witness, the court shall direct that an intermediary referred to in sub-section (3) be appointed in respect of such witness unless the interest of justice justify the non- appointment of an intermediary, in which case the court shall record the reasons for not appointing an intermediary .”

14. The record of the trial court shows that the learned trial Magistrate questioned the minor and upon observing his conduct ruled that he was a vulnerable witness under Section 31 of the Sexual Offences

Act. The minor's mother was called to testify and was cross-examined at length. It was obvious that the mother while testifying was indeed an intermediary as there was no objection from the Appellant's counsel throughout her testimony. The fact that the court did not specifically record the names of the minor's mother and indicated that she was to act as an intermediary, I find such failure did not prejudice the Appellant since both his counsel, the Prosecutor and the court confirmed that the minor could not testify due to his tender age. The court having tried to question the minor and who immediately took refuge and clung to his mother's dress was thus mandated to declare the minor a vulnerable witness. It is clear that the minor might not have testified even if cajoled by the court. Hence for all intents and purposes the mother to the minor was being treated as an intermediary and her evidence was what she had gathered from the minor regarding the incident. I am satisfied that the trial court had complied with the Provisions of Section 31 of the Sexual Offences Act No.3 of 2006.

15. As regards the Appellant's defence, I note that not only did he deny the charges before the trial court, he also raised an issue to the effect that the minor's mother had previously sought him out and wanted to start a relationship with him to which he rebuffed and it was the Appellant's contention that the minor's mother had hatched up a plot to fix him so as to teach him a lesson for spurning her advances. Indeed the Appellant was cross-examined by the Learned Prosecutor and he admitted that he and the minor's mother had a cordial relationship and had no grudges with each other. The Appellant also admitted that he had not cross-examined the mother of the minor regarding the issue of the intended love affair. The trial court considered the defence evidence of the Appellant and noted that it was an afterthought more so as regards the Appellant's assertion that the charges had been instigated by the mother of the minor to settle scores with him after he rebuffed sexual advances from her. The learned trial Magistrate stated in her judgement that the Appellant should have raised the issue before close of Prosecution's case. Indeed the Appellant admitted in his defence that he had not cross-examined the minor's mother regarding the issue of the intended love affair. I am unable to fault the trial Magistrate in rejecting the Appellant's defence as an afterthought. As the Appellant confirmed in his defence that he and the minor's mother had no grudges, I find it was quite remote and highly unlikely for her to use her young vulnerable son to be a victim of sodomy so as to get at the Appellant for spurning her sexual advances towards him. I find the mother to the minor had no reason to frame the Appellant. I find the Appellant's defence was properly considered and rejected by the trial court.

16. In the result it is the finding of this court that the Prosecution had proved its case against the Appellant beyond any reasonable doubt. The Appeal herein lacks merit and same is ordered dismissed. The sentence imposed by the trial court is the minimum possible in law. The lower court's conviction and sentence is hereby affirmed.

It is so ordered.

Dated, signed and delivered at Machakos this 29th day of MAY 2017.

D. K. KEMEI

JUDGE

In the presence of:-

Makau Mutua for Appellant

Machogu for Respondent

C/A: Kituva