REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL 45 OF 2015

PETER KIIO KYULI……...…APPELLANT

VERSUS

REPUBLIC…….…….…….RESPONDENT

(An appeal arising out of the conviction and sentence by Hon. M.A.O Opanga SRM delivered on 14th January 2014 in Sexual Offences case No. 12 of 2015 in the Principal Magistrate's Court at Kithimani)

JUDGMENT

The Appeal

The Appellant was convicted of, and sentenced to serve fifteen years imprisonment for the offence of sexual assault, contrary to section 5(1)(a)(1) (2) of the Sexual Offences Act. The particulars of the offence were that on 8th March 2014 at [particulars withheld] village, in Mwala District within Machakos County, he intentionally and unlawfully used his genital organ namely penis to penetrate the anus of J M K.

The Appellant has filed the appeal herein against his conviction and sentence. He in this respect filed a Petition of Appeal on 12th February 2015, and also availed supplementary grounds of appeal and submissions during the hearing of the appeal.

The Appellant contended that firstly, the prosecution failed to properly consider the doctor's evidence and the content of P3 form which indicated that the victim was examined on 11/3/14, and yet the offence was alleged to have been committed on 8/3/14. Therefore, that it is not clear as to why complainant stayed for two days without being examined, and it is thus difficult to prove an offence to have been committed on 8/3/2014 with reasonable certainty. In addition, that the medical examination report from the initial medical facilities where the victim was examined as testified by PW5 was not produced, and that the P3 form was therefore secondary evidence.

Secondly, that the prosecution failed to summon vital witnesses being the police officers who arrested the Appellant at Mbiuni Police station, and there was also a violation of section 36 of the Criminal Procedure Code as the Appellant was brought to Yatta Police Station on 11th March 2014, three days after his arrest on 8th March 2016. Thirdly, that the Appellant's conviction was manifestly unsafe as the same was based on suspicion and there were no eyewitnesses to the offence.

Fourthly, that the learned trial magistrate did not take into account the relevant matters before he rejected the Appellant's alibi defence. Lastly, the Appellant alleged that that the burden of proof was not discharged by the Prosecution.

Ms Mogoi Lillian, the learned prosecution counsel, filed written submissions in response dated 31st January 2016, wherein she gave a summary of the evidence given in the trial Court, and contended that the trial Court duly analyzed the evidence led by the Prosecution and Defence and was satisfied that it led to the conclusion that the Appellant did commit the offence. Further, that the decision of the Court was well reasoned and supported by evidence.

The Evidence

As this is a first appeal, I am required to re-evaluate the evidence tendered in the trial Court, 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**).

The prosecution called five witnesses to prove their case against the Appellant. PW1 was J M K, the complainant; PW2 was A K M, a worker at the complainant's home; PW3 was J N M, the complainant's mother; PW4 was PC Boniface Owuor, the investigating officer of the case, and PW5 was Richard Kemei, a clinical officer at Matuu District Hospital who examined the complainant.

The testimony by PW1 was that on 8th March 2014 he left his mother's kiosk at around 5:00pm, and in the company of PW2, went to Thome bar where he ordered for a soda and sat alone at a table. He was later joined by the Appellant who was chewing khat. PW1 testified that after a while he went outside to answer a telephone call from his father, and left the Appellant at the table with his soda. PW1 went back to the table after about ten minutes and continued taking the soda, when he suddenly felt dizzy and started vomiting. He the requested PW2 to take him home and they left the bar.

PW1 stated that he was awakened by a knock on the door by PW2 at around 3:00am later that night, and asked PW2 whether he had gone to the toilet since his trouser was unzipped and he was feeling pain at the anus. PW2 told him he couldn't know since he had just come back. Both PW1 and PW2 then saw the Appellant sleeping next to PW1, and when asked why he was sleeping there and whether he had done anything to PW 1, the Appellant remained silent

PW2 corroborated the evidence of PW1 that they visited Thome bar, where he left PW1 taking soda having been joined by the Appellant at the table. PW2 then went home, and when he came back to the bar he found PW1 ill and vomiting. PW2 in the company of the Appellant took PW1 home who did not lock his door, and PW2 testified that he then parted ways with the Appellant at PW1's gate. It is his further evidence that when he came back at 3:00am, he found the Appellant sleeping next to PW1.

PW3 and PW4 testified as to the reports the received of the incidents, and were not present at the scene at the time of the alleged offence.

The testimony of the last witness (PW5) was based on the physical examination of the PW1, which established that PW1 had warts and lacerations on the anus, and a foul smelling discharge from the anus which was indicative of sodomy. He filled a P3 form which was produced as the Prosecution's exhibit 1 in the trial Court.

Analysis and Determination

I have considered the grounds of appeal and the arguments made thereon by the Appellant and Prosecution. I note that the main issue raised by the Appellant is whether he was convicted for the offence of sexual assault on the basis of sufficient and satisfactory evidence.

I will firstly dispose of the arguments by the Appellant that section 36 of the Criminal Procedure Code was contravened. The said section provides that if it does not appear practicable to bring a person taken to custody without a warrant before an appropriate subordinate court within twenty-four hours, unless the offence appears to the officer to be of a serious nature, the person should be released upon executing a bond with or without sureties. However, where a person is retained in custody he shall be brought before

a subordinate court as soon as practicable.

After perusing the trial record, I have noted that the Appellant did not raise this issue in the trial Court, and cannot therefore raise it on appeal as there is no opportunity at this stage to take new evidence and arguments on that issue.

As regards the remaining grounds raised by the Appellant, section 5 1(a) (1)(2) of the Sexual Offences Act provides for the offence of sexual assault as follows:

> **"(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."**

The Court of Appeal sitting in Mombasa **(Makhandia, Ouko, & M'inoti, JJ.A.) stated as follows as regards the key elements of the offence of sexual assault in John Irungu vs Republic (2016) eKLR**

> **"Thus, for purposes of sexual assault, the penetration is not limited to penetration of genitals by genitals. It extends to 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 that purpose."**

It is my view in this regard that the evidence by PW1, PW2and PW5 did not establish the fact of penetration of PW1 whether by a genital organ or object. Section 2 of the Sexual Offences Act defines penetration as follows:

> "**the partial or complete insertion of the genital organs of a person into the genital organs of another person."**

The same definition therefore also applies to penetration by an object in place of a genital organ.

PW1 in this regard testified that he became unconscious and when he woke up he felt pain in his anus, and did not know what had caused the pain. PW2 testified that he was told of the pain by PW1, while PW5 did not testify as to who or what caused the wars and lacerations in PW1's anus.

In addition, neither PW1 or PW2 testified as to any insertion of a genital organ or object by the Appellant, or as to the cause of the pain in PW1'S anus, and while the evidence of PW5 raised the possibility of sodomy of PW1, it was not conclusive as to the perpetrator. It is thus my finding for these reasons that the prosecution did not prove the penetration of PW1's anus either by the Appellant's genital organ or any object beyond reasonable doubt, and the offence of sexual assault was therefore not proved.

To this extent the Appellant's allegations that he was convicted of the offence of sexual assault on the basis of suspicion and without proper regard and analysis of the evidence in the P3 form produced by PW5 have merit.

These findings notwithstanding, the evidence on record did in my view prove that the offence of committing an indecent act with an adult contrary to section 11(A) of the Sexual Offences Act which provides as follows:

> **"Any person who commits an indecent act with an adult is guilty of an offence and liable to imprisonment for a term not exceeding five years or a fine not exceeding fifty thousand shillings or to both."**

An indecent act is defined in section 2 of the said Act as 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;**

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*. In the same vein, the Court of Appeal stated as follows in ***Robert Mutungi Muumbi v. Republic, Cr App. No. 5 of 2013:***

> ***"An accused person charged with a major offence may be convicted of a minor offence if the main offence and the minor offence are cognate; that is to say, both are offences that are related or alike; of the same genus or species. To sustain such a conviction, the court must be satisfied on two things. First, that the circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by the charge, constitute the minor offence. Secondly, that the major charge has given the accused person notice of all the circumstances constituting the minor offence of which he is to be convicted***.

The Court of Appeal sitting in Nyeri also observed as follows in ***James Maina Njogu v. Republic, Cr App No. 38 of 2004*** regarding section 179 of the Criminal Procedure Code:

> ***"It is clear from this section that the power of the court to convict an accused person of an offence lesser than the offence with which the person is charged is only available when the "remaining particulars are not proved", the "remaining particulars" being the particulars necessary to prove the major offence and which particulars are not required to be proved in respect of the minor offence."***

The offence of committing an indecent act with an adult contrary to section 11(A) of the Sexual Offences Act, is a lesser cognate offence to sexual assault for reasons that since penetration is not an ingredient of the offence, the offence can still be committed in the absence of proof of penetration. In addition while the penalty for the offence sexual assault under section 5(2) of the Sexual Offences Act is a minimum sentence of ten years, the sentence for an indecent act with an adult is imprisonment for 5 years.

In the present appeal the PW1 and PW2 positively identified the Appellant having been with him the

previous evening in the Thome bar, and having found him in the same bed with PW1's bed. In addition the evidence of PW1 and PW2 that placed the Appellant in PW1's bed where he was found sleeping next to PW1 while PWI's trousers where halfway down, and the evidence by PW1 and PW5 that while PW1 was asleep there was interference with PW1's anus, leads to an inescapable conclusion that the Appellant did cause something to come into contact with PW1's anus.

Lastly, the P3 form produced by PW5 showed that PW1 was an adult aged 19 years, and PW1 did testify that he had at the time completed his secondary education and was waiting to join university. In conclusion and in response to the Appellant's arguments about the contents of the P3 form, I note that the findings in the P3 form were based on the personal physical examination of PW1 by PW5, and no reliance was made on any treatment notes from the previous health facilities attended by PW1. There was therefore no reason to produce the treatment notes as exhibit, and the P3 form was properly produced as a primary document.

I accordingly hereby therefore quash the conviction of the Appellant of the offence of sexual assault contrary to section 5(1)(a)(i) and (2) of the Sexual Offences Act, and substitute it with the conviction of the Appellant for the offence of committing an indecent act with an adult contrary to section 11(A) of the Sexual Offences Act, pursuant to the provisions of section 179(2) of the *Criminal Procedure Code*.

I also substitute the sentence of fifteen years imprisonment with a sentence of five (5) years imprisonment for committing an indecent act with an adult, which sentence is to run from the date of the Appellant's conviction by the trial Court.

It is so ordered.

DATED AT MACHAKOS THIS 27th DAY OF JUNE 2017.

P. NYAMWEYA

JUDGE