



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

HCRA No. 142 OF 2016

OMAR MBELA.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence of life imprisonment by Hon. L.K Gatheru (RM) In Cr. Case No. 381 of 2016 at Mariakani law courts)

JUDGMENT

1. The Appellant was charged with defilement of a child contrary to section 8 (1) as read with section 8 (2) of the sexual offences Act No. 3 of 2006.
2. The appellant was convicted and sentenced to life imprisonment.
3. The particulars of the charge were that on diverse dates between 31st day of May 2016 and 3rd day of June 2016 within Kilifi County, the Appellant caused his penis to penetrate the anus of RM, a child aged 11 years old.
4. The Appellant was charged with an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the sexual offences Act No. 3 of 2006 in that on the same material particulars as in count I (above), the Appellant intentionally touched the anus of RM, a child aged 11 years old with his penis.
5. The prosecution evidence in summary was that the complainant, a standard 4 pupil at [particulars withheld] primary school was sent by his mother on 30/05/2016 to go and buy fish at the butchery.

The complainant found the Appellant seated near the butchery and he greeted him. The Appellant told the complainant that someone was going to visit him (the complainant) the following day. The complainant said it is okay and he went away.

The following Monday, the complainant was sent home for school fees and again he saw the Appellant outside the school and the Appellant asked him if he had seen the visitor. The complainant said he had not and again the Appellant told the complainant the visitor would come.

The complainant said he was given part of the fees which he went and paid but he was told to go back home. On the way home, the complainant was with a friend when they met the accused person who told them that they should go for a walk.

The friend to the complainant went to greet his sibling who was a tailor and the Appellant remained with the complaint.

The Appellant led the complainant through bushes along a foot path. He said it was a shortcut but when they were in the bush, the Appellant removed his pants/underwear and he used his penis to penetrate the anus of the complainant.

After the incident, the Appellant ran away. The complainant met his friend R and they went and reported the matter to the Headmaster. The complainant was taken to Hospital by his mother.

PW4, a Senior Clinical Officer who examined the complainant on 7/06/2016 said his sphincter muscles were very loose and his stool was popping out.

PW 4 formed the opinion that the child had been sodomized.

6. The Appellant in his defence stated that on 15/06/2016 at 2 p.m. while at his place of work, a person went there with 2 students and told him that the head teacher had sent them to pick him for questions. One of the people said he was a brother to the complainant.

The Appellant said he was neither examined nor interrogated.

He said he was taken to Mariakani police station and put in custody and charged in court. He said he is innocent.

7. The trial court found the Appellant guilty as charged and convicted him on the main count and sentenced him to life imprisonment.

The Appellant has now appealed against both conviction and sentence on the following grounds: -

(i) That the trial Magistrate erred in the rule of law by arriving at his conclusion without putting into consideration that the age of the complainant was not conclusively proved hence the conviction and sentence was unsafe.

(ii) That the learned trial Magistrate erred in law and in fact by arriving at his conclusion and sentence of life imprisonment without considering that the charge of defilement was not properly established hence the sentence was harsh and excessive.

(iii) That the learned trial Magistrate erred in law and fact in convicting the appellant while relying on contradictory evidence of hearsay.

(iv) That the learned trial Magistrate erred in law and fact by convicting and sentencing the appellant in the instant case yet failed to find that the prosecution did not prove a prima facie case against the Appellant.

(v) That the learned trial Magistrate erred in law and fact by failing to consider the appellant's reasonable defence statement which was reasonable enough to create doubt upon the prosecution case.

8. The Appellant submitted in writing as follows:-

(i) That the prosecution did not prove penetration as the Clinical Officer said the complainant's anus was not cut. That there was no penetration or spermatozoa.

(ii) That the age of the complainant was not proved as PW2 the mother of the complainant said in her evidence that "I do not have a birth certificate for my son".

(iii) That the prosecution evidence is not clear and there is contradiction in the charge sheet as it is not clear when the report was made and when the complainant was examined.

(iv) That the defence by the Appellant was reasonable enough to create a doubt in the prosecution case and the person who stays with the Appellant during the day denied the incident.

9. The Respondent opposed the Appeal and submitted as follows:-

(i) During voir dire, the complainant indicated he is 11 years old therefore the age of the complainant was proved.

(ii) The Respondent testified that all the ingredients of defilement were proved by the prosecution.

(iii) The defence evidence did not dislodge the prosecution evidence.

10. I have re-evaluated the evidence in this case bearing in mind that I did not have the advantage of seeing the witnesses. This being a first appeal, it is incumbent upon this court to re-analyse and re-evaluate the evidence adduced before the trial court and come up with its own conclusion while at the same time bearing in mind that I did not have the advantage of seeing the witnesses testify. This role is in line with well-known and established principles of law which have been cited with approval in numerous cases. For example, in **Kiilu & Another Vs Republic** the court citing **Okeno v. R** held:-

'An appellant on a first appeal is entitled to expect, the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. 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 courts findings and conclusions; 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. '

11. My findings are as follows:-

(i) The prosecution has proved the three ingredients of defilement to the required standard. The three are penetration, the identity of the perpetrator and the age of the victim. The first element, penetration is defined under Section 2(1)(d) of the Sexual Offences Act as

"the partial or complete insertion of the genital organs of one person into the genital organs of another person".

(ii) The complainant testified that the Appellant defiled him on several occasions. On 30/05/2016, the Complainant said the Appellant removed his pant/underwear and used his penis to penetrate the Complainant's anus. There is evidence that the Complainant's sphincter was loose. The Doctor confirmed the defilement.

Section 2 of the Sexual Offences Act which defines a genital organ as follows:-

"genital organs" includes the whole or part of male or female genital organs and for purposes of this Act includes the anus;

(iii) The second element that the prosecution was required to establish is the identity of the perpetrator. I find that the Appellant was properly identified by the complainant. The Appellant was also identified by PW3 who said the Appellant used to come to school and pass near the class room and the Complainant would ask for permission to go to the toilet and they would go away.

(iv) The third element that the prosecution is required to prove is the *age* of the complainant. Under Section 2(1) of the **Sexual Offences Act**, the definition of a child is the one assigned thereto in the Children Act. This means any human being of less than eighteen (18) years.

(v) The age of the complainant was 11 years according to the clinic card and the age assessment Report produced as Exhibits and therefore the complainant was 11 years old at the time of the incident.

(vi) Finally, I find that the trial court considered the defence evidence and found that the averments were untrue and it is therefore not true that the same created a reasonable doubt in the Prosecution case. The trial court referring to the defence evidence stated as follows:-

"On the other hand the accused stated that he was arrested for no unknown reasons to him and the allegations against him were false"

(vii) I accordingly find that the prosecution proved the guilty of the Appellant to the required standard. The conviction herein is safe and the sentence lawful.

(viii) The Appeal is accordingly dismissed and the sentence confirmed.

Dated, Delivered and Signed at Mombasa this 20th day of June 2017 in the presence of the parties.

ASENATH ONGERI

JUDGE.