



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA
CRIMINAL APPEAL NO. 32 OF 2016

(Being an Appeal from Original Conviction and Sentence in Criminal Case No. 813 of 2012 of the Chief Magistrate's Court at Naivasha before E. Boke – PM)

JAMES MBUGUA WAINAINA.....APPELLANT

-VERSUS-

REPUBLIC.....PROSECUTOR

J U D G M E N T

1. The Appellant was charged with Defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act. In that on the 10th day of March 2012 at [particulars withheld] area of Gilgil in Nakuru County intentionally and unlawfully caused penetration of his genital organ namely penis into genital organ namely anus of **H H** a child aged 2 years. He denied the charge. Following a full trial the Appellant was convicted and sentenced to life imprisonment.

2. He lodged an appeal to this court. His amended grounds of appeal, supported by written submissions are:-

“1. THAT, the trial magistrate erred in law and in facts in convicting the Appellant yet the evidence on record does not support the charges.

2. THAT, the trial magistrate erred in law and in facts in convicting the Appellant yet vital witnesses were not availed for truth to be established and occasion justice.

3. THAT, the trial magistrate erred in law and in fact in convicting the Appellant as he misdirected himself on the evidence and in compromising the Appellants case.

4. THAT, the trial magistrate erred in law and in fact in convicting the Appellant on prejudice as he treated the prosecution case in isolation of the defence case.

5. THAT, the trial magistrate erred in law and in facts in relying on the weakness of defence to convict the Appellant and not in the strength of prosecution case which was an erroneous approach in a criminal trial.” (sic)

3. Grounds 1, 2 and 3 all challenge the quality and adequacy of the prosecution evidence. The Appellant referring to the evidence of the victim and the doctor asserted that penetration was no proved. He further highlighted the prosecution failure to call as witnesses the house worker who had the responsibility of taking care of the victim on the material date; and the fundi under whose supervision the Appellant was working.

4. On the 4th and 5th grounds the Appellant took issue with the trial court's handling of the evidence. He submitted that the trial court treated the prosecution and defence evidence separately. His defence, he complains, was dismissed without good cause and that the court shifted the burden of proof upon the Appellant.

5. The appeal was opposed by the DPP through Mr. Mutinda. He submitted that all the necessary witnesses testified for the prosecution, and that the charges against the Appellant were properly proved. He therefore urged the court to dismiss the appeal.

6. The duty of the first appellate court is to analyse afresh the trial evidence and to draw its own conclusions. As stated in **Pandya -Vs- Republic [1957] EA 336:-**

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen.”

7. The prosecution evidence was that the Appellant was well known to the mother of the victim **H H A (PW2)**. In the material period the Appellant and another man had been hired to carry out some work at **PW2's** homestead. On 10/3/2012, **PW2** left the victim her 2 ½ year old son, **H H (PW1)** in the care of her newly employed house help identified as **Dama**. Upon her return later in the evening, **PW2** found **H H** crying incessantly and took him to hospital, as neither **H H** nor **Dama** could say what the problem was.

8. After his treatment for fever, **PW2** returned home. **Dama** was missing did not answer **PW2's** calls. In the night the child woke up in pain. That is when **PW2** learned from the child that he had a wound on his genitalia (penis) and had difficulty passing urine. He named the Appellant as the assailant, explaining that the Appellant had cut him with a piece of wire.

9. On the next day **H H** was escorted back for treatment, as the matter was also reported to police. The Appellant was arrested. The second examination of **H H** revealed inflammation of the penis and bruising in the anal region. The Appellant was then arraigned in court.

10. In his defence, the Appellant denied the offence while admitting he was well known to the complainant's mother. His evidence dwelt on the day of his arrest, the 12th of March 2012. The fact of the age of the victim and that he was defiled was not really disputed. In my view, this appeal turns on the question of the identity of the defiler.

11. The Appellant's main challenge to the prosecution evidence is that it did not rise up to the required threshold of proof. He questioned, as this court has, the unexplained disappearance of **Dama** the new house help on the material night and the failure by the prosecution to call her. It is pertinent that **PW2** admitted that he did not see the Appellant at her home and that only **Dama** was at the home on the material date. Surprisingly, even while crying in pain early in the evening the child did not state what exactly the problem was, only doing so late in the night. According to **PW2**, **H H** named “**Mbugua**” whom he also identified in court as the assailant.

12. While there is no dispute that the child had sustained cuts to his penis and bruises to the anus, the abrupt and unexplained departure of **Dama** raises suspicion against her too. The trial court alluded to this

fact but concluded, without giving reasons, that **Dama** may have feared to be questioned about what the “*Accused did to the victim.....or maybe she was Accused person’s accomplice.*” Equally, the “fundi” whom **PW1** said was in the home was inexplicably not called as a witness. He too should have been questioned by police. No specimens were taken from **H.H.** and the Appellant for purposes of DNA analysis.

13. In a proper case however, the evidence of a minor victim such as **H H** need not be corroborated to sustain a conviction. In his evidence **H H** said the Appellant cut his penis with a piece of wire but did not mention injuries to the anus or how he had sustained them.

14. Commenting on this aspect, of the evidence, the trial magistrate stated in her judgment:

“Comparing this entire prosecution evidence with Accused person’s denial, the victim knows Accused person well and Accused has not denied that. He told the court and was telling all the prosecution witnesses that Mbugua whom he pointed out to the court and to the arresting officer injured him on his penis with a wire. The medical record, P3 Form and PRC have proved that the victim had an injury on the penis and also injury on his anus since there were bruises on the anal region. Then, most likely the person who injured the boy’s penis also knows what happened to his anus and the injuries on the anus indicate that the victim had been sodomised.”

15. Seemingly, there had been no bad blood between **PW1, PW2** and the Appellant prior to this incident. What could have been the motive unless the Appellant was a psychopath, to torture the young child by injuring his penis with a piece of wire? That is a question that required consideration, especially since there was no evidence by the victim himself that the Appellant caused the bruising in the anus. Nor could **H.H.**, possibly on account of his tender age, tell how he sustained the latter injuries.

16. In my considered view, the trial court’s conclusion, that it was “most likely” that the Appellant who allegedly injured boy’s penis also knew how the injuries to the anus were sustained, appears forced. Is it believable that **PW1** could state clearly who injured his penis with a piece of wire but fail to know how and who inflicted the anal injuries? He did not mention the latter injuries to his mother at any time at all. And it seems these were detected by the doctor on the second examination.

17. Reviewing all the evidence before the trial court, I think it raises reasonable doubt as to whether indeed the Appellant is the person who defiled the complainant in this case. Had the trial court given careful consideration to the entire evidence, it would have come to the same conclusion and allowed the Appellant the benefit of doubt. The burden of proof always lies with the prosecution. Thus grounds 1 – 3 of the appeal have some merit in my view. The police did not investigate this case with any thoroughness, unfortunately.

18. As reprehensible as the assault upon the minor victim was, I find that the conviction of the Appellant herein is unsafe and do proceed to quash it. Consequently the life sentence imposed by the trial court is also set aside and the Appellant set at liberty unless otherwise lawfully held.

Delivered and signed at **Naivasha**, this **28th** day of **July, 2017**.

In the presence of:-

Mr. Baraka for the DPP

N/A for the Appellant

C/C – Barasa

Appellant - present

C. MEOLI

JUDGE