



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL APPEAL NO: 11 OF 2017

Criminal Appeal from Conviction and Sentence

Of S.N Makila – RM in S.O.A Case No: 22 of 2012

Oyugis CM's Court

REPUBLIC.....PROSECUTOR

VERSUS

BENSON ONDIEK ODHIAMBO.....ACCUSED

JUDGMENT

1. BENSON ONDIEK ODHIAMBO (the appellant) was convicted on a charge 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** and sentenced to serve 28 years imprisonment.

The prosecution case was that on 16th August 2012 at [particulars withheld] within RACHUONYO SOUTH district, Homa Bay County, he intentionally caused his penis to penetrate the anus of D.J.O., a child aged 5 years. The appellant denied the charge. (Initials used to protect child's identity).

2. On 16/08/12 at about 10.00 am I O (PW1) aged 13 years was at their home in [particulars withheld] when he saw the appellant pass in the company of a child named D.O* (initials used to protect his privacy) D.O was following the appellant who was eating a lollipop. The appellant greeted PW1 and the pair walked on towards [particulars withheld] Primary school.

3. PW1 later met D.O's father at about 1.00pm, who asked him the whereabouts of the child. PW1 told him he had spotted the pair earlier on. He later learnt that the D.O was found bleeding.

4. On cross examination PW1 stated that although the appellant was not holding the minor's hand, he heard appellant telling him to walk fast. The appellant was not s stranger to him and PW4 stated:

“I had seen you many times before..... I only knew you by appearance. You told him to hurry up when D was lagging behind you.....You greeted me in dholuo and asked how I was.”

5. The minor's father J O O (PW3) testified that 5 year old D.O had gone out to play on 16/08/2012 at around 10.00 am. At 1.00pm he realized the child had not come home and he began looking for him.

6. At about 5.30 pm he met PW1 who was herding animals and inquired on the whereabouts of the child.

PW1 described to him the man he had seen with the child as a light skinned limping man with rastas, saying they had gone towards [particulars withheld] Primary school.

7. PW 3 followed the general direction and inquired from the general public about the described individual and they said the description fitted one BENSON and a boda boda rider said he knew the man's house and took him there.

8. On arrival, after knocking and getting no answer, he pushed open the door and found his son who was lying on a bed on his stomach when PW3 picked the child, he started crying and PW3 noticed that his mouth was swollen and his nose was bleeding.

9. The child's buttocks at the anus had stains of blood and whitish fluids with little blood.

10. The appellant was beaten up by angry members of the public upon realizing what had happened. As a result of the incident the minor suffered bowel incontinence where faeces would spill out uncontrollably- a condition he had not suffered before the sexual assault.

11. W O O (PW 2) is the boda boda man who took PW3 to the appellant's house. He too confirmed that when PW3 entered into the appellant's house he shouted that he had found his son. However when PW3 came out with child, PW2 noted that the child had an injury on the mouth and he was bleeding on his shorts behind the buttocks. He also observed that the minor could not speak and was only crying.

12. Dr PETER OGOLA (PW5) who examined D.O found that indeed the child was bleeding from the nose and mouth, and had fresh severe lacerations above the anal muscles which were also bleeding. He had stool incontinence which flowed freely and he was in severe pain.

13. On cross examination the Dr. stated;-

“Minor suffered lacerations at the annular area and had lost control of stool.....could have been caused by forceful opening of the anus by a blunt object. Injuries was consistent with the minor being sodomised. There was appearance of semen...”

14. Eventually the appellant was apprehended by members of the public who handed him over to PC BRENDA AKINYI (Pw 5).

15. The minor was presented to court but remained silent after the preliminary of stating his name and that he was in nursery. The trial Magistrate then recorded that he was of tender years and not a competent witness pursuant to **Section 124 (1) of the Evidence Act 1, Section 31 (i) (b) and 31 (4) of the Sexual Offences Act.**

16. The appellant contested the decision saying his was a case of mistaken identity.

17. Mr. Oluoch conceded the appeal on two limbs;

(1) Once the trial magistrate noted that the minor who was aged 5 years was of tender years and incapable of giving evidence, then she ought to have invoked provisions of section 31(5) of the Sexual Offences Act and appointed an intermediary to testify on his behalf..

(2) The matter was heard by two different magistrates and the appellant had requested for a recall of PW3 and PW4, yet the trial magistrate rejected the request without even hearing the views of the prosecutor.

18. It is submitted that by so doing the trial magistrate disregarded the provisions of **Article 25(c) of the Constitution of Kenya.**

19. He urged the court for orders of a retrial saying the witnesses were available. Incidentally the

appellant was agreeable to a retrial.

20. Indeed the minor in this case fell within the category of persons classified as vulnerable witnesses within the meaning of **Section 31(1)** this was a victim and a child within the defilement of section 2 of the children's act. Secondly on accounts of the child's age, trauma suffered and the nature of the subject matter of the evidence the child was indeed a vulnerable witness as contemplated by **Section 31(2)** of the **Sexual Offences Act**.

21. Once the victim was deemed to be a vulnerable witness, then the Trial Magistrate was required under section 31(5) to direct that he gives evidence through “an intermediary to represent his interest **unless** the interests of justice justify the non-appointment of an intermediary, in which case the court **shall record the reason** for not appointing an intermediary” (emphasis mine).

22. From the trial court's record, there is nothing to suggest that the Trial magistrate applied the provisions of **Section 31(5)**, and this was prejudicial to the victim.

23. The other issue for consideration is with regard to the right to a fair trial. Under **Section 25(1)** of the **Constitution**, the right to a fair trial is a fundamental right which may not be limited. I need not belabour the point. I think Mr. Oluoch has aptly set out why the appellant's right to a fair trial was violated and I can't fault that submission – I concur with him.

24. Consequently the appeal is merited and shall be allowed. Should the matter be required for retrial? Mr. Oluoch submits that the same warrants a retrial as the prosecution was not to blame for the anomaly and in any event, the witnesses are ready available.

25. Apart from that, the appellant has only served slightly over 3 years of the 28 years sentence – so a retrial will not occasion great hardship.

26. I am persuaded that it is in the interest of justice both for the victim and the defence that a retrial be ordered – which I hereby do.

27. I therefore direct that:

a) the appellant shall appear before the Chief Magistrate at Oyugis on 29th August 2017 for trial directions.

b) The matter shall be heard by a magistrate other than the one who heard and determined the matter.

Delivered and dated this 17th day of August, 2017 at Homa-Bay

H. A. OMONDI

JUDGE