



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CRIMINAL APPEAL NO.36 OF 2016

TACHE WAKO TUNICHA..... APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from the Judgement of the Senior Resident Magistrate, Hon. M.S. Kimani delivered on 2.12.2016 in Moyale court Criminal Case No.211 of 2016.)

JUDGEMENT

The appellant was charged with the offence of defilement Contrary to Section 8(1)(3) of the Sexual Offences Act No.3 of 2006. He was convicted on the alternative count of committing an indecent act with a child contrary to Section 11(1) of the same Act. The particulars of the offence for the alternative charge were that the appellant, on the 19th day of May 2016 at 3.00am in sololo District of the Marsabit County intentionally touched the anus of A. G. D. a child aged 12 years with his penis.

The trial Court convicted the appellant and sentenced him to serve ten (10) years imprisonment. The grounds of appeal are that:

- 1. The appellant pleaded not guilty to the charges.***
- 2. The whole case was a frame up and based on false allegations.***
- 3. The exhibits produced including the P3 form did not prove the case.***
- 4. The medical evidence did not prove the prosecution case as the complainant's anal was found to be normal.***
- 5. The witnesses are family members. The independent witness who were at the scene were not called to testify.***
- 6. The appellant is a first offender. He has eight children and a blind wife who depend on him. The sentence is excessive.***

In his submissions, the appellant contends that the identification was through torch light but the torch was not produced. PW1 said he only heard someone trying to defile him but did not see the appellant committing the act. The doctor did not see anything on the complainant. The appellant was only claiming

his one year salary arrears totaling Ksh.36,000/=. The alleged belt and short trouser were not produced. Some witnesses namely Jarso, Anna Dambale, Boru Kotola and Molu Abduba who were with the complainant were not called to testify.

Mr. Chirchir for the state opposed the appeal. Counsel submit that the sentence is lawful and is the minimum. It is not excessive. The appellant was positively identified. PW1 was 12 years old and had known the appellant for about one month. The appellant was herding cattle together with PW1.

This is a first appeal and the evidence has to be analysed afresh and the Court make its own conclusion. PW1 is the complainant. He told the Court that he was twelve years old. On 19.5.2016 they were herding cattle together with the appellant and other people. At night they went to an open area and lit fire. They then slept. At about 3.00am he woke up and found himself half naked. His belt had been loosed and his short lowered to ankle length. He was sleeping on his side. He felt the appellant trying to insert his penis into his anus. He felt pain and that's why he woke up. He quickly turned and saw the appellant. He had a torch and saw the appellant beside him. He had known the appellant for one month and they used to herd cattle together.

It is PW1's evidence that he flashed his torch and saw the appellant. There were other adult people with them and he went to wake them up. The appellant was confronted by the adult people and was taken to Ambalo A.P camp. PW1 was left behind. PW1 was later taken to hospital and was examined. The matter was reported to the Police.

PW2 M G is PW1's mother. She was informed about the incident on 21.5.2016. She accompanied PW1 to hospital where he was examined. She had known the appellant for about two months. PW3 BARGO GUYO is a pastoralist. He was with PW1 and the appellant grazing cattle on 19.5.2016. They slept. At about 3.00am PW1 woke him up and told him that the appellant had had sex with him. PW3 confronted the appellant but he denied. Other people woke up. The appellant was arrested and taken to Ambalo AP camp. The appellant had worked for him for four months and he had paid him all his dues.

PW4 SOMO GALMA is a clinical officer who was based at Ramala Health centre in Moyale sub County. He examined PW1 on 21.5.2015. There were no lacerations at the anal area. The perinum was intact. There was mild tenderness. The anal canal was of normal texture. The appellant was also examined and no injuries were noted. PW4 concluded that there was an attempt to commit a sexual act but there was no penetration.

PW5 PC KIZITO ANANGAI was attached to the Sololo Police station. He investigated the case. The appellant was taken to the station on 21.5.2016 by AP Hassan Ibrahim from Ambalo AP camp. He referred PW1 to hospital. PW1's age was assessed and he was found to be 12 years old. The appellant was charged with this offence.

In his unsworn defence, the appellant testified that he stays at Ambalo in Sololo. He is a herdsman. His employer is Barako Sesa. He had worked for him for two years. His employer had declined to pay his accumulated wages for one year. He was claiming Ksh.36,000. He was earning Ksh.3000 monthly. On the material day the victim was sleeping at a separate place near his father's goats. In the morning he was told he had committed the alleged act. He denied that he had committed such an act. He was taken to Sololo Police station. The victim was brought two days later. The witnesses who were present at the scene were not called to testify.

The issue for determination is whether there was an indecent act and if it is the appellant who committed the act. There undisputed facts is that both the appellant and PW1 were grazing cattle on the material day. It is also not in dispute that in the evening the herders went to sleep at an open area. The complainant's evidence is that he was woken up by the pain he felt at about 3.00am. He found himself half naked. His trouser had been lowered. PW1 had been grazing with the appellant for about one month. He knew the appellant. It is PW1's evidence that he was sleeping on his side and the person who was trying to defile him was behind him. He turned quickly and saw the appellant. He flashed his torch and saw the appellant. It is also part of the evidence that the herders had lit a bonfire in between.

The evidence of PW3 is that he was woken up by PW1 that night who told him that the appellant had had sex with him, this is the same time PW1 felt the pain and noticed that the appellant was behind him.

The appellant's defence is that he did not commit the offence. He was claiming his salary presumably from PW3. PW3 testified that the appellant had worked for him for four months and he paid him all his dues. Apart from the issue of salary, the evidence of PW1 is quite independent. There is no connection between the alleged salary arrears and PW1's complaint. There is no evidence that PW1 was coached by PW3 to implicate the appellant. The only relative to PW1 who testified is his mother PW2. The rest are not family members.

The prosecution evidence does prove that there was an attempt to defile PW1. The appellant was charged with committing an indecent act. The two offences of attempted defilement and committing an indecent act carries the same minimum sentence of ten(10) years imprisonment. The appellant contends that the medical evidence does not prove anything as the complainant's anus was found to be intact. That is true. However, the charge the appellant was convicted of involves indecent act and not defilement. An indecent act is committed if the accused's genital organ contacts any part of the complainant's body. The evidence proves that the appellant's penis came into contact with PW1's buttocks and anus. There was no penetration. However, an indecent act was committed.

From the evidence on record, I do find that the trial Court came to the correct conclusion. The prosecution did prove its case beyond reasonable doubt. PW1's age was assessed and he was found to be twelve years old. This corroborates the evidence of PW1's mother that the child was twelve years old.

The ten year imprisonment is the minimum sentence Under Section 11(1) of the Sexual Offences Act. The appellant committed the offence and was properly convicted. The sentence has to be suffered even if the appellant is a first offender. I do find that the appeal lacks merit and is hereby disallowed.

Dated, Signed and Delivered at Marsabit this 21st day of November 2017

SAID CHITEMBWE

JUDGE