



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO.46 OF 2016

ELIAS MALOBA MASIKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. This is an appeal arising from the judgement of Hon. D. Onyango SPM in Kimilili Criminal Case No.437 of 2013 that was delivered on 17th December, 2015. In the Case the appellant had been charged with the offence of defilement contrary to **Section 8(1)** as read with **8(3) of the Sexual Offences Act**. The particulars thereof were that between the 10th of February and 14th March 2013, within Bungoma County the appellant caused his penis to penetrate the anus of a minor P.B. a male child aged 14 years.

2. The appellant had also faced an alternative Count of indecent assault of the same child. He was convicted of the main Count to 20 years imprisonment. It is against the said judgement that he preferred this appeal.

3. The appellant filed his Petition of appeal on 18th February, 2016 thereafter his Counsel filed a supplementary Petition on the 31st May 2016 to the effect that; the Complainant's evidence was not corroborated, evidence of the Complainant's age was not placed before the Court; the evidence of the Prosecution was contradictory; no treatment notes were produced and crucial witnesses did not testify.

4. At the hearing of the appeal Counsel for the appellant submitted that **PW1 the Complainant** had said that he was sodomised ones yet PW2 his father said he was sodomised twice, that Evidence adduced and the investigating Officer on date of report were different, there was delay in reporting, the two were relatives which the Prosecution did not mention and the Complainant had a right to visit the accused and that the Complainant was not sodomised as alleged.

5. The appeal was opposed on grounds that there were no contradiction as relates to the number of times the Complainant was sodomised, Section 124 Act of the evidence is clear, that the Court can believe the victim and if the Court so believed PW1 it was enough to convict.

6. This is the first Appeal Court and I will therefore consider, analyse and evaluate the evidence a fresh in order to arrive at an independent opinion See **Okeno Vs R (1973) E.A. at 322**

7. The issue for consideration will include; (i) **age of the Complainant** (ii) **whether there is evidence of defilement** (iii) **and whether there is evidence linking the accused to the offence.**

8. In his evidence the Complainant stated that he was aged 14 years. The other witness who testified to his age was PW5 one of the investigating Officers.

The Clinical Officer PW3 also did an age assessment and arrived at the conclusion that the Complainant was a minor.

The appellant heard the evidence on age he seemed to agree with the averments and did not question the same. And age was not an issue at the trial. In any event the assessment that he was a minor corroborates the statement by PW1.

9. One of the grounds of Appeal is that the evidence of the Complainant was uncorroborated and evidence of witnesses was contradictory. There were no eye witnesses in this Case. In Sexual Offences Cases you rarely get eye witnesses so that all witnesses testified to what they learnt from the Complainant; who stated that he visited the Appellant twice, where Appellant penetrated his anus once although PW2 said the Complainant had been defiled severally.

The Law relating to evidence in Sexual Offences is to be found in the Proviso to **Section 124 of the evidence Act**, where it provides that the Court may convict based on the evidence of the victim. PWII was not an eye witness he may have exaggerated his evidence. Nonetheless this Court found the Complainant to have been truthful and would rely on his evidence that the appellant penetrated his anus once. This

evidence is sufficient dispute what his father said.

10. This evidence of the Complainant cannot be said to have been uncorroborated as the evidence of PW3 the Clinical Officer who prepared the P3 form based on the initial hospital report was that the Complainant had bruises on the anal opening and had been sodomised.

With the above I arrive at a finding that indeed the Complainant had been sodomised.

11. The Complainant named the Appellant as the assailant and I do not doubt his evidence in this regard.

12. I do not agree with the Appellant as all crucial witnesses testified. If there was one left out the appellant could have called him as his witness as the calling of witnesses is the prerogative of the Prosecution.

13. The Law gives a minimum sentence which is what was meted out to the appellant.

14. Having found the conviction safe there is no basis to find the sentence unlawful. Same is affirmed and the appeal dismissed.

DATED and DELIVERED at BUNGOMA this 21st day of December, 2017

ALI-ARONI

JUDGE