



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 9 OF 2013

D L.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of E.W. Muleka – RM in Hamisi Senior Principal Magistrate’s Court Criminal Case No. 358 of 2012 delivered on 18th January, 2013.)

J U D G M E N T

1. The appellant was charged with the offence of defilement of a boy child contrary to section (8) (1) as read with section 8 (3) of the Sexual Offences Act No. 3 of 2006.
2. The particulars of the charge were that on the 4th day of June, 2012 at [particulars withheld] village, [particulars withheld] sub-location Shamakhokho location in Hamisi District within Vihiga County willfully and unlawfully defiled a boy namely JM [name withheld] by causing penetration of his genital organ namely penis into his genital organ namely anus a boy (sic) aged 14 years old.
3. The appellant faced the alternative charge of Indecent Act with a boy child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006.
4. The particulars were that on the 4th day of June, 2012 at [particulars withheld] village, [particulars withheld] sub-location, Shamakhokho location in Hamisi District within Vihiga County willfully and intentionally caused his genital organ to make contact with his genital organ of a boy (sic) namely JM [name withheld] aged 14 years by touching his anus.
5. After a full hearing of the case, the appellant was found guilty of the charge of defilement and sentenced to serve 20 years imprisonment. The appellant being aggrieved by the judgment of the lower court filed a petition of appeal on 23rd January, 2013.

The appeal

6. The petition of appeal indicates that the learned trial magistrate should have handled the evidence of prosecution witnesses with the greatest care before relying on their evidence to convict, that the complainant's medical evidence did not connect him with the offence and that the learned trial magistrate shifted the burden of proof and rejected the appellant’s alibi defence.

The appellant's submissions

7. At the hearing of the appeal, the appellant relied on his written submissions and stated that PW3 was his step-mother but in court she testified that he was her son. He indicated that she framed up the charges against him because he requested for his share of his late father's properties after his death in the year 1998. In his written submissions the appellant indicated that the trial court did not consider that the land issues and domestic wrangles could have contributed to the frame up against him.
8. Through his submissions, he stated that he was medically tested to confirm if he committed the alleged act but the results were negative and that the Medical Doctor did not categorically specify that PW1 was defiled or if something else was used to harm him.
9. The appellant's written submission also indicated that he was convicted on the evidence of a single eye witness and that if PW1 was indeed defiled, he could have raised the alarm.
10. The appellant also stated that the age of PW1 was not ascertained as the authenticity of the baptism card produced in court was never varified.

The appellant prayed for his appeal to be allowed.

The respondent's submissions

11. Mr. Omwenga, learned prosecuting counsel submitted that he supported the conviction and sentence. He informed the court that with regard to ground No. 2 of the petition of appeal, even though PW2 and PW3 did not witness the commission of the offence, their evidence supported that of PW1 and did not contradict the same in any way. It was submitted for the respondent that PW2 stated that the appellant called PW1 and PW2 told him to go out as he had been called. When PW3 returned home, PW1 had not gone back home. This prompted PW3 to start looking for him. PW1 and the appellant went back home later and after having a meal, PW1 informed PW2 that he had been defiled. PW3 also stated that she did not find PW1 at home and she started looking for him and after failing to find him, she went back to the house and found that PW1 and the appellant had returned. PW1 was crying and had mud all over his body.
12. On ground No. 3 of the petition of appeal, Mr. Omwenga submitted that a P3 form was produced as exhibit 3 and treatment notes were produced as exhibit 4 by PW5 who confirmed to the court that PW1 was defiled. According to Mr. Omwenga, there was no need to obtain a sample from PW1 to confirm the appellant's culpability.
13. In response to grounds No. 4 and 5 of the petition of appeal, it was submitted that the appellant in his defence gave an unsworn statement and did not raise an alibi defence. Mr. Omwenga concluded by stating that sufficient evidence was adduced to prove the case against the appellant and urged this court to dismiss the appeal.

The duty of the first appellate

14. The duty of the first appellate court is to analyze and re-examine the evidence adduced before the trial court with a fresh eye and come to its own conclusion and finding on the evidence that was adduced before the trial court. This was so held in the case of **Okeno vs. Republic [1972] EA 32**, where the court had this to say:-

“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 the appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion. It must make its own finding and draw its own conclusions only then can it decide whether the magistrate's finding 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.”

This court will now embark on its duty as stated in the above case.

The Prosecution's case

15. PW1, JM [name withheld] adduced evidence on oath after the magistrate conducted a voir dire examination. He testified that he lives with his grandmother and that on 14th June, 2012 at 8.00 p.m. he was in the kitchen cooking with his sister AK [name withheld] when D (appellant) called him. PW1 did not go outside. The appellant entered the house and asked him why he was quiet and got hold of PW1 and left with him. He was taken to a maize field where the appellant forced him to the ground and sodomised him. He could not free himself as he was pinned to the ground and the appellant threatened to kill him. The appellant thereafter ordered him to dress up and they walked home which was about 80 metres away.
16. PW1 told his sister AK what his uncle, the appellant, did to him. PW1's grandmother was not there when the incident happened. He later told her and she reported to the sub-chief and Police.
17. PW1 was examined at Serem Dispensary where a P3 form was filled which was marked as MFI - 3, PW1's pair of shorts was marked as MFI- 1, T-Shirt MFI -2, PW1's baptism card was marked as MFI-4.
18. PW2, AK a minor was sworn after a voir dire examination was conducted by the learned trial magistrate. PW2 who lives with her grandmother and PW1 narrated how the appellant called PW1 on 14th June, 2012 at 8.00 p.m. It was PW2's evidence that the appellant shouted PW1's baptism name and PW2 told him to go. Their grandmother had gone to a place known as Serem. Their grandmother returned home and started looking for PW1 as he had not gone back home. At 9.00 p.m., the appellant went back home together with PW1 who was crying. His face was soiled with mud. PW1 informed her that the appellant had sodomised him twice in the maize field. She informed the court that the appellant who is their uncle stays in the same home with her and PW1.
19. PW2 informed their grandmother about the defilement the following morning. The appellant was later arrested by Administration Police (AP) from Shamakhokho. On cross examination, PW2 informed the court that they have a land dispute and that part of the land has been sold and a part of it has remained.
20. PW3, ML [name withheld], who is PW1's and PW2's grandmother, informed the court that on 14th June, 2012 at 8.00 p.m., she was at Serem in a woman's group. She had left PW1, PW2 and others at home. When she returned home, PW2 told her that the appellant had gone to their house while very angry and called PW1. PW2 did not know where PW1 was. PW3 went out in search of PW1 but did not find him. She went back to the house at 9.00 p.m., and found PW1 and the appellant had returned. PW1 was crying and was muddy. He refused to tell PW3 what had transpired.
21. PW2 informed PW3 that PW1 had been sodomised by the appellant. PW3 called the chief who advised her to report to the Police. She reported the incident to Shamakhokho AP who accompanied her home where they arrested the appellant. PW1 was picked up from school and they went to Serem where they recorded their statements. PW1 was taken to Serem Health centre where he was treated. PW3 informed the court that the appellant was her son who does casual jobs and that she has no personal issues with him.
22. On cross-examination, PW3 informed the court that they had sold land at Mabusu and that the share of land at home was not for PW1. She confirmed that she refused the appellant from carrying a posho mill to Matunda from their home. She informed the court that the appellant had sold land at Matunda for Ksh. 24,000/= and she was angry with him. She denied that the case was a frame up against the appellant.

23. PW4, Tegla Tumei was attached to Serem Police Station when she received a report of sodomy on 15th June, 2012. The appellant was taken to the said station by an AP from Shamakhokho in the company of PW1. They reported that PW1 was sodomised by the appellant on 14th June, 2012 at 8.00 p.m. in a maize plantation. PW4 issued PW1 with a P3 form and advised them to go to Serem Health Centre. She identified the P3 form and produced PW1's pair of shorts as exhibit 1, a T-shirt as exhibit 2 and PW1's baptism card as exhibit 5.
24. On cross-examination, PW4 informed the court that PW1 was walking with difficulties. She was informed that PW3 gave the appellant money and he squandered it and that she was aware that there was a grudge over land. On re-examination, PW4 indicated that the grudge over land had nothing to do with this incident reported to her.
25. PW5, Koskey Erick, a Clinical Officer at Serem Health Centre adduced evidence that on 15th June, 2012 (date confirmed from the learned trial magistrate's handwritten proceedings), PW1 was taken by a Police Officer to the said centre on a report of defilement. On examination, PW5 noted a bruise in the anal region of PW1. There was no bleeding or discharge. Blood tests for HIV and VDRL were carried out on PW1 and the results came out negative. The appellant was also examined and the results came out negative. PW5 produced the P3 form for PW1 as exhibit 3 and post care report as exhibit 6. He produced the medical notes as exhibit 4. PW5 classified the degree of injury sustained by PW1 as harm.

The defence case

26. The appellant gave an unsworn statement in his defence. He informed the court that he was at home in Kisasi on 15th June, 2012 at 7.30 a.m. when some people went to his home and told him that he was under arrest. He was taken to Shamakhokho then Serem where he was told that he had sodomised someone. He asked them to take him to hospital which they did. He denied having committed the offence and informed the court that they (PW3 and the appellant) have had a land dispute for a long time from the year 2011. The appellant stated that PW3 sold land and wasted the money and the disagreement between them is about the land and a posho mill.

Determination of the case

27. The evidence adduced by the prosecution is straight forward. The appellant who is PW1's uncle got hold of PW1 on the night of 14th June, 2012 at around 8.00 p.m. took him to a maize plantation where he pushed PW1 to the ground forcefully, removed his shorts, the appellant also removed his shorts and sodomised PW1. PW1 tried to free himself but the appellant pinned him down. On reaching home, PW1 told his sister, PW2, about the ordeal. He confirmed that his grandmother was not there when the incident happened. He was taken to hospital the following day where he was examined, treated and a P3 form filled.
28. On cross-examination, he indicated that the appellant told him that he would finish him hence he could not raise the alarm.
29. PW1's evidence to the effect that it was the appellant who called him out of their house on the night of the incident was supported by PW2 who was at home with him on the material night. PW1 and the appellant went missing from the homestead for sometime and when they returned home at 9.00 p.m, PW1 told PW2 that he had been sodomised by the appellant. PW2 observed that PW1 was muddy on the face and he was crying. PW2 informed her grandmother (PW3) who reported the incident to the Chief and the Police.
30. PW3 corroborated PW2's evidence that PW1 and the appellant were absent from their home when she reached there after attending a meeting. PW3 searched for PW1 in vain and on going back to the house at 9.00 p.m. she found that he and the appellant had returned home. Like PW2, she also noted that PW1 was muddy and he was crying. PW2 told her that PW1 had been

sodomised. PW3 agreed that she had issues with the appellant involving land and a posho mill. She however denied that the case is a frame up against the appellant.

31. The medical report corroborates PW1's evidence that he was sodomised. In this aspect, this court notes that the prosecution's evidence flows seamlessly and is so well interconnected to show that the appellant is the only person who had the opportunity to commit the offence on the night of 14th June, 2012.
32. Contrary to the appellant's assertion that the learned trial magistrate shifted the burden of proof, the lower court record does not support that assertion. The appellant did not put forth an alibi defence as he talked of the events of the 15th June, 2012 being the day he was arrested. The said defence did not cast any doubt on the prosecution evidence.
33. I have considered the issue of the disagreement between PW3 and the appellant and I am of the view that the said disagreements could not have led PW3 to frame up the case against the appellant. PW1 and PW2 were in no way involved in the disagreement between mother (PW3) and her son (appellant). If anything, PW3 was very candid and did not try to shield the appellant in the face of the offence he had perpetrated against her grandson, PW1. The evidence by PW1, PW2 and PW3 was congruent and points to no other party, apart from the appellant as having been the one who sodomised PW1.
34. In regard to the appellant's submission that the age of PW1 was not established and that there is a possibility of the baptism card not being genuine, I am satisfied that the baptism card produced as proof of PW1's age was properly produced in evidence. It showed that PW1 was 14 years old at the time of the commission of the offence as he was born on 13th December, 1998. If at all the appellant had suspicions as to the authenticity of the said baptism card, he should have raised any objection he had with regard to the same at the earliest opportunity in the trial court. He did not do so.
35. With regard to the appellant being convicted on the evidence of a single witness, section 124 of the Evidence Act provides that corroboration is not mandatory in sexual offences if the trial court is satisfied of the credibility of the complainant. In this case, the learned trial magistrate based the appellant's conviction on PW1's evidence and the circumstantial evidence adduced by PW2 and PW3 which points to no other perpetrator of the offence apart from the appellant. In addition, section 143 of the Evidence Act provides that no particular number of witnesses shall, in the absence of any provision of law to the contrary be required for the proof of any fact.
36. I find that the appellant was convicted on sound evidence. His appeal is therefore devoid of any merit and is hereby dismissed in its entirety.
37. The appellant has the right to appeal within 14 days.

It is so ordered.

DELIVERED, DATED and SIGNED in open court at **KAKAMEGA** on this **18TH** day of **MAY**, 2016.

NJOKI MWANGI.

JUDGE.

In the presence of:-

..... **for the Appellant.**

..... **for the Respondent .**

..... **Court Assistant.**