REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

HCCRA NO. 93 OF 2015

(FORMERLY NAKURU CRIMINAL APPEAL NO. 31 OF 14)

(Being an appeal against conviction and sentence in Naivasha

Criminal Case No. 1036/2012- T. A. Sitati Ag. SRM)

J K K...APPELLANT

VERSUS

REPUBLIC...RESPODENT

J U D G M E N T

1. The Appellant was charged with defilement of his son H.K. aged two years, contrary to Section 8 (1) as read with Section 8 (2) Sexual Offences Act.. The particulars are that the Appellant on 2nd August, 2012 at [particulars withheld] trading Centre, Narok caused his penis to penetrate the anus of H. K. a child aged 2 years.

2. He was in the alternative count charged with indecent act with a child contrary to section 11 (1) of the Sexual offences Act. In the second count he was charged with being in possession of one roll of cannabis sativa contrary to section 3(1) as read with section 3 (2) of the Narcotic Drugs and Psychotropic Substances contrary Act. The Appellant denied all the charges. He later changed his plea on the 2nd count and was convicted and sentenced.

3. At the trial, the grandmother of H.K. one L. K. C. was appointed by the court as an intermediary as the child complainant could not express himself verbally. The prosecution case was that the Appellant was the boyfriend/husband of the mother of the minor Complainant one **M** and in the material period was living with the said mother. On 2/8/12 the grandmother of the complainant abandoned her water vending business on receiving information that her grandchild who was born on 10/8/10 had been defiled.

4. On arrival at home she found **M,** the Complainant's mother holding the boy who appeared frail and was unable to stand. He had an injury on his anus. He was rushed to Longisa District Hospital where he was admitted. Meanwhile the mother escaped but was later arrested. Members of the public arrested the Appellant also and handed him over to the police on 13/8/12.

5. The medical officer who treated the victim was **Christine Rono (PW3).** She stated that the minor had anal bruises and discharge upon arrival at hospital. He was admitted in the hospital for 3 days. **PW3's**

opinion was that the child had been sodomised. She completed the P3 form in this regard on 15/8/15. She estimated the age of the child to be 2 ½ years and assessed the injuries to be 10 days old.

6. In his defence the Appellant all but admitted the offence. He told the court in an unsworn statement that he was under the influence of cannabis sativa when he assaulted the child by inserting a candle in his anus. He claimed to have been bitter and angry because the complainant's mother whom he described as a **"prostitute"** had deserted him with the child and eloped with another man. He sought forgiveness. Upon conviction, the Appellant was sentenced to life imprisonment.

7. The Appellant filed amended grounds of appeal at the hearing which state:

> 1. **THAT the learned trial magistrate erred in law and fact in passing the sentence in the Count (1) yet failed to comply with the provision of Section 201 Criminal Procedure Code. He also attached written submissions which he relied upon during the hearing of the appeal.**
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> 2. **THAT the learned trial magistrate erred in law and fact when he convicted me in the present case yet failed to find that the mandatory practice as provided under Section 2 (1) paragraph (6) of the sexual offences act No. 3 were not duly observed.**
>
> 3. **THAT the learned trial magistrate erred in law and fact when he convicted me in the instant case yet failed to find that I was subjected to an unfair trial process.**
>
> 4. **THAT the pundit trial magistrate erred both in law and fact when he declined to find that my defence illustrated the truth and remorse hence inadequately considered.**

8. The duty of the first Appellant court was stated in **Okeno -vs- Republic 1973 (E.A 322** as follows:

> **"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya –Vs- R [1957] EA 336) and to the Appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala -Vs- R [1957] EA 570. It is not the function of the first appellate court merely to scrutinize the evidence to see there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings 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, see Peters –Vs- Sunday Post [1958] EA 424."**

In the case of **Republic -vs- Francis Oyier (1983) KLR 353** the court held that the Appellant Court will not interfere with findings of the trial court that are based on the credibility of witnesses, unless no tribunal could reach such findings or the same were plainly wrong.

9. The trial magistrate was transferred after the close of the defence case but before he could deliver judgment. The judgment delivered on 30/12/13 by T. A. Sitati as SRM was written and signed by the trial magistrate C.A. Nyakundi. It is dated 23/12/13. With regard to the said judgment the Appellant submits that the said Judgment contravenes Section 201 of the CPC. On the second ground it is argued that he ought to have been examined together with the child Complainant to confirm the defilement and his role thereto.

10. He asserted that his defence was truthful and should have been accepted there being no proof that he sodomised the child. He took issue with the quality of investigations conducted. He complains with regard to ground 3 & 4 that he was denied access to witness statements, thus prejudiced in the trial and further that the trial court did not give due attention to his admission to have injured the child and not to sodomy. On behalf of the DPP Mr. Koima apposed the appeal. He reiterated the prosecution evidence stating that the Appellant admitted penetration.

11. The prosecution evidence at the trial was primarily based on circumstantial evidence that the Appellant was at the material time living with the Complainant and the mother, and that on 5/8/12 **PW1** was called urgently, presumably to the Appellant's home where she met the mother of the Complainant holding the Complainant who had injuries to the anus. That the minor child appeared to have been injured in a defilement and was admitted for treatment as he had bruises and a discharge on the anus. That the Appellant was subsequently arrested. The age of the minor was 2 years and 2 months.

12. While the prosecution evidence circumstantially pointed to the Appellant as the assailant, having been left with the child by its mother, his defence was as follows. That it is true he injured the child by inserting a candle, not his penis in the anus of the child; that he was under the influence of cannabis, some of which was found on him; that he was bitter and angry because the mother of the child was a **"prostitute"** who eloped with another man, abandoning him with the minor victim.

13. The outlined defence amounts to an admission of the issue of penetration of the minor victim. The Appellant was at pains to clarify that the penetration and injuries were caused by a candle he inserted into the child's anus and not the penis. On this score trial magistrate stated in his judgment:-

> **"He (Appellant) denied using his penis to injure the boy and alleged he used a candle. However the findings of the medical officer (PW3) demolished the accused's defence. PW3 stated clearly that the injuries she saw were inflicted by a male genital organ. Since he was alone with the baby at the material time he is the only male with the child….."**

14. **PW3** treated the victim and completed his P3 form. She noted **"reddening on the anal canal with bruising"** as well as **"prurient discharge from the anal canal (recent)".** She concluded that there was evidence of sodomy. During cross-examination she reiterated this finding and denied that a metal object could have caused the injuries. At the time, the Appellant did not suggest that the injuries could have been caused by a candle as he was later to claim in his defence. On my own part, having analyzed the evidence of **PW3,** I would agree with the finding of the trial magistrate on the question.

15. On the question of the age of the victim **PW1** gave his date of birth as 10/8/10. She said that the child was born in her home as the daughter was the living with her at the time, and that she acted as the midwife who assisted the birth by cutting the umbilical cord since the hospital is far and it was in the night. The evidence was not challenged. The accused did not cross-examine the witness. **PW1's** evidence was confirmed by **PW3** who estimated the age of the child to be 2 years and 2 months.

16. Ground 1 and 2 of the appeal have no merit as the Judgment read to the Appellant by Sitati SRM had been signed and dated by the trial magistrate. There is no mandatory requirement for a joint **'DNA'** test of the victim and alleged offender under the Sexual Offences Act, whether or not the offender is HIV positive which the Appellant claims to be, in his submission. **PW3** indicates that the minor was advised to return later for HIV tests.

17. The Appellant has argued that the trial was conducted unfairly as he was not provided with witness statements to enable him prepare his defence. An order to provide the Appellant with statements was made on 11/10/2012. On the hearing date he said that he had not been supplied and the case was briefly adjourned. However when the case resumed, the Appellant said he could not afford to pay for photocopying of statements. He opted to proceed. That the hearing commenced about 30 minutes earlier after the brief adjournment is insignificant as the Appellant chose to proceed without the statements.

18. Possibly out of deference, he did not cross-examine **PW1** the mother to his wife/girlfriend. But he did cross examine other witnesses, and in particular canvassed part of his defence with **PW3.** It is too late for the Appellant to raise the issue of the statements. His submissions reiterate his defence that he assaulted the child with a candle and that the trial magistrate did not consider that defence. On the contrary, the trial magistrate considered the Appellant's defence which was principally that, he inserted a candle in the anus of the victim out of anger, having smoked bhangi, and dismissed it. The trial court correctly relied on the medical evidence tendered and found that **PW3's** evidence established that the child was sodomised.

19. On the assertion that the Appellant was under the influence of bhang, it is evident from his own account that he knew what he was doing and that it is wrong. His excuse is that he was angry after being abandoned by the child's mother. The clear intention was to punish the mother through harming the child, as he states in his defence. Suffice to say that his sketchy defence of intoxication cannot pass muster the stringent conditions in Section 13 of the Penal Code. The trial magistrate in my considered view cannot be faulted for arriving at the conclusions that he made as they are well supported by the evidence of the prosecution as well as the self- serving admissions of the Appellant himself. Grounds 3 and 4 have no merit.

20. In the result I find that the appeal on conviction cannot succeed. For the offence charged the law prescribes a mandatory life imprisonment. This appeal must fail in its entirety and is accordingly dismissed.

Delivered and signed at Naivasha this **13TH** day of **May** 2016.

C. Meoli

JUDGE

In the presence of:

For the DPP	Mr. Koima
For the Appellant	In person
Appellant	present
Mr. Barasa	Court Clerk