



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL APPEAL NO. 8 OF 2016

THOMAS ONTITA MONENEAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being appeal from the conviction and sentence of Hon. N. Wairimu (SRM) in Ogembo SPM'S CR. NO. 1737 of 2013)

JUDGMENT

1. This appeal arises from the decision and judgment of the Senior Resident Magistrate at Ogembo in Criminal Case No. 1737 of 2013, in which the appellant, **Thomas Ontita Monene**, was convicted and sentenced to life imprisonment for the offence of defilement, contrary to section 8(10 read with section 8(2) of the Sexual Offences Act.

2. It was alleged that on the 22nd October 2013, at Kisii County, the appellant intentionally and unlawfully caused his penis to penetrate into the anus of S N A, a boy aged seven (7) years.

There was an alternative count of indecent act, contrary to section 11(1) of the Sexual Offences Act, in that the appellant committed an indecent act with the said S N A, by touching his anus with his hand.

3. After trial, the appellant was convicted on the main count and sentenced accordingly. However, being dissatisfied with the conviction and sentence, he preferred the present appeal on the basis of the grounds contained in the petition of appeal filed herein on the 10th February 2016, by the firm of **Sonye J. Ondari & Co. Advocates**.

4. At the hearing of the appeal, the appellant was represented by the learned counsel, **Mr. Ondari**, who essentially submitted in support of the grounds of appeal and in particular on the language used during the trial of the appellant. He thus argued that the proceedings of the trial court were not properly conducted in that the language used was not understood by the appellant as he only understood the Ekegusii language yet no interpretation was provided for him.

5. That, this was demonstrated by the fact that when the charge was initially read to the appellant in the Kiswahili language he pleaded guilty but when the charge was read in the Ekegusii language he changed his plea and pleaded not guilty. That, in the proceedings conducted on 23rd August 2014, there was no indication of the language used and when PW 1 spoke in Kiswahili, the appellant did not cross-examine because he did not understand the language and necessary interpretation into Ekegusii language was not done.

6. That, the appellant never understood the language when the victim testified in Kiswahili and could not therefore understand what was meant by the statement that the victim was treated as though he was a woman. That, PW 3 was cross-examined by the appellant because he testified in the language understood by the appellant.

7. Learned counsel further argued that S.198 of the Criminal Procedure Code (CPC) is very clear in providing the guidelines for the conduct of proceedings but in this case, the language used was not recorded. That, this court, being a first appellate court has a duty to consider whether the appellant understood the language used in court and being a person whose hearing power is impaired, this court ought to find that justice was not accorded to him.

8. Learned counsel contended that the offence of defilement was denied by the appellant and was never proved by the prosecution as it was not shown how the offence occurred. That, the investigations officer (PW 4) did not carry out proper investigations and relied on treatment notes which did not establish defilement. That, according to the doctor, the offence committed was that of sodomy. That, the appellant was not at the trial represented by a legal counsel and was never advised by the court to engage one. That, the doctor failed to give a detailed explanation of the meaning of the word “reddened anus” and how it could be caused. That, the trial of the appellant was not properly conducted as even in this court he was completely off and in his own world such that he should be acquitted or be re-tried.

9. In response to the foregoing, the learned prosecution counsel, **Mr. Otieno**, submitted on behalf of the state/respondent that the appellant adequately understood and followed the proceedings in the trial court as they were conducted in a language understood by him i.e. the Ekegusi language. That, the complainant actually communicated in the Ekegusi language and in any event, necessary interpretation from English or Kiswahili into the Ekegusi language was done.

10. The learned prosecution counsel further submitted that the appellant may have hearing problems but he was mentally fit as to be able to follow the proceedings very well. That, the minor complainant gave credible and corroborated evidence against the appellant and since the trial was not conducted in a single day, the appellant had adequate opportunity to engage a legal counsel if he so wished. That, this appeal has no merit and should be dismissed.

11. In his rejoinder, learned counsel for the appellant submitted that there was indeed necessary interpretation into the Ekegusi language but only in some instances. That, most of the witnesses testified in a language not understood by the appellant. The minor complainant merely alluded to “bad manners” which could mean anything. That, the appellant is not mentally ill but suffers from a hearing impairment and did not therefore undergo fair trial and treatment.

12. This court, having considered the appeal in the light of the rival submissions had an obligation to re-consider the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses. Indeed, this is a cardinal obligation of a first appellate court as has been held by several decisions of the Court of Appeal starting with **Okeno Vs. Republic (1972) EA 32** and **Achira Vs. Republic (2003) KLR 707**.

13. In that regard, the case for the prosecution was briefly that on the material date, the complainant minor, **S N A (PW 2)**, was in the company of **R O C (PW 1)**, herding cows by a roadside when the appellant appeared and sent the complainant to go and buy sugarcane. He, however, decided to accompany the complainant and both left together.

14. After about ten (10) minutes, the complainant rejoined Richard (PW 1) while crying and alone. He informed Richard that the appellant had treated him as though he was a woman. Richard removed the complainant’s trousers and examined his buttocks only to see a whitish substance thereon. He (Richard) went looking for the appellant and notified the area chief.

15. The complainant (PW 2) confirmed what Richard said. He knew the appellant. He (appellant) accompanied him to buy sugar-cane but when they reached a bushy area, he (appellant) removed his

clothes and those of the complainant and then did “bad manners” to the complainant i.e. had sex with the complainant using his male sexual organ and against the order of nature.

16. The matter after being reported to the police was investigated by **PC Abel Mangela (PW 3)**, who issued a medical form (P3 form) which was filled at Etago Sub-district hospital by a medical officer, **Zakayo Thadius Mitenti (PW 4)**, after examining the complainant.

The examination revealed that the complainant was sexually assaulted by being sodomized.

The appellant was arrested and charged with the present offence. He elected to remain silent when placed on his defence.

17. After considering the evidence, the trial court concluded that the complainant was defiled on the material date and that the person responsible for the offence was the appellant.

This court having re-considered the evidence is satisfied that the evidence by the complainant (PW 2), Richard (PW 1) and the medical (PW 4) was cogent in proving beyond reasonable doubt that the complainant was indeed sodomized and therefore defiled in terms of S.8 (1) of the Sexual Offences Act, which provides that a person who commits an act which causes penetration with a child is guilty of defilement.

18. There was no dispute that the complainant was a minor aged seven (7) years old at the material time of the offence.

The medical evidence (P.Ex 1) established that the complainant was penetrated through his anus.

Under the Sexual Offences Act, penetration means the partial or complete insertion of the genital organs of a person into the genital organs of another person. Genital organs under the same Act, includes the anus.

19. With regard to the person responsible for penetrating the complainant’s anus using his sexual organ, the evidence by the complainant as supported by Richard (PW 1) credibly implicated the appellant. He was a person very well known to the two witnesses and there was no suggestion that they implicated him without good cause.

20. In sum, the prosecution’s evidence against the appellant was not only credible but also overwhelming such that this court finds no reason to upset the appellant’s conviction by the trial court.

The sentence imposed against the appellant was lawful in terms of S.8 (2) of the Sexual Offences Act, which provides that a person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life. This is a mandatory sentence which cannot be reduced by this court.

21. With regard to the submissions by the appellant’s counsel, that the proceedings in the trial court were not conducted in a language understood by the appellant, the record of the court indicates otherwise and shows that though the appellant was more conversant with his mother language (i.e Ekegusi) necessary interpretation was done in instances where the witnesses spoke in Kiswahili. Throughout the trial, there was an appropriate court clerk to do the necessary interpretation.

22. The fact that the appellant suffers from hearing impairment did not mean that he never followed the proceedings. The record does not show that he raised any complaint with regard to hearing what was being said in court.

Even in this appeal, he followed the proceedings as interpreted by the court clerk in Kiswahili. Indeed, the court clerk had to raise his voice and go near the appellant so that he could hear and follow the proceedings which were in any event conducted in the presence of his legal counsel who actively

participated in them.

23. The impression given to this court by the appellant is that it is not that he does not understand Kiswahili, his ability to properly express himself in the language is the problem. However, there was always a court clerk to assist him.

Ultimately, this court must find and hereby finds that this appeal is lacking in merit. It is therefore dismissed in its entirety.

J.R. KARANJAH

JUDGE

[Delivered and signed this 30th day of June 2016].