



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT CHUKA
HCCRA NO. 42 OF 2015
(FORMERLY MERU HCCRA 27 OF 2014)

JOSEPH MURIUNGI MUGAMBI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the Judgment and conviction of P.M. KIAMA – P.M made on 21/1/2014 in Marimanti Principal Magistrate’s Court Criminal Case No. 530 of 2013).

J U D G M E N T

1. Joseph Muriungi Mugambi, the Appellant herein was on 17th September, 2013 arraigned before the Principal Magistrate’s Court, Marimanti with the offence of Committing an indecent act with a child contrary to section 11 (1) of the Sexual Offence Act No. 3 of 2006. The allegations against the Appellant were that on 14th September, 2013, in Tharaka South District within Tharaka Nithi County, the Appellant intentionally touched the mouth of “LM” a child aged 4 years with his penis.

2. The Appellant denied the charge but after trial, he was found guilty of the offence, convicted and sentenced to ten (10) years imprisonment. Aggrieved by that decision, the Appellant appealed to this court citing several grounds. These are: that the trial court failed to observe the existence of a grudge between the complainant’s mother and cousin with the Appellant whereby the complainant was forced to give false evidence against him; that the medical evidence did not link the Appellant to the offence; that the evidence adduced was contradictory, was not corroborated and was sheer hearsay and that crucial evidence was not tendered.

3. At the hearing of the appeal, the Appellant submitted that the evidence of PW1 was pure hearsay; that the evidence of PW2 and PW3 was not consistent; that because the offence occurred in a relatively busy environment, PW2 must not have seen what was happening; that none of the witnesses said they saw the Appellant insert his penis into the victim’s mouth and that it was wrong to be implicated just because he was found with two hard cakes otherwise locally known as “Ngumu” in his pocket. The Appellant therefore urged that his appeal be allowed. On her part, Ms Njagi Learned Counsel for the state opposed the appeal and submitted that the complainant testified through an intermediary; that the alleged grudge between the Appellant and the complaint’s mother was not proved; that there was sufficient evidence to sustain the conviction; that the conviction was based on direct evidence and that there was no need for medical evidence as this was not a case of penetration. Counsel therefore urged that the appeal dismissed.

4. This being the first appellate court, it behoves it to review and re-evaluate the facts afresh in order to draw its own independent conclusions and findings. **Okeno .V. Republic (1972) E A 32.** However, in

doing so, the court must at all times bear in mind that it did not have the advantage of seeing the witnesses testify.

5. The Prosecution case was that on 14th September, 2013, FK (PW1), was at home at around 6 pm when Damaris Mwikali (PW2) came with the complainant “LM” and told her that the Appellant was forcing “L M” to suck the Appellant’s testicles. She noticed that the child had a watery discharge around his mouth. She questioned the child who informed her that he had been told by the Appellant to accompany him to Kibung’a market to buy “Ngumu”. That then the Appellant forced him to suck the Appellant’s private parts. That the Appellant was arrested by members of the public and two ‘Ngumus’ PExh 1 (a) and (b) were recovered from his pockets. PW1 then reported the matter to Marimanti Police Station and took “L M” to hospital. The child vomited about four (4) times. Damaris Mwikali (PW2) told the court how on the material day at about 6 p.m, she got outside her house only to find the Appellant urinating. That she saw the Appellant hold the boy by his right hand and told him to suck the Appellant’s penis. The Appellant was at a distance of about 50 metres and she could see clearly what was happening as there were no obstructions. She rushed to the scene whereby the Appellant ran away. She held the child and took it to its mother (PW1) and informed her of the incident. She denied the Appellant’s suggestion that he had once requested her to live with him.

6. On her part, Doreen Karithi (PW3) told the court that on the material day at about 6 pm, PW2 called her to come and see what the Appellant was doing. When she arrived at the scene, she found the Appellant buttoning his trouser and the child “L M” was standing next to him. She denied seeing the child sucking the Appellant’s penis. Dr. Oindi from Tharaka District hospital produced a P3 form. The examination on the child revealed nothing untoward. APC Gilbert Mutea (PW5) told the court how PW1 and members of the public brought the Appellant to Turima AP Post at around 8 pm of the same day alleging that he had committed an indecent act against a child. He recovered two “Ngumus” from inside his pockets. He arrested the Appellant and book him to Marimanti Police Station. PW6, Alfred Maritim told the court how he investigated the case and confirmed that the Appellant had committed the offence.

7. In his defence, the Appellant told the court that on the material day at about 6 pm, he went behind Mwinji’s house intending to pass urine. The child “L M” passed by and PW2 came when he was zipping. That he had done nothing to the child. At 8 pm, PW1 with the child and two people came to his house, arrested him and took him to the AP Camp and then Marimanti Police Station. In cross-examination, he told the court that he had taken some alcohol on the material day. That when the boy saw him, he came to where he was urinating. The child was only standing near where he was urinating but he did not do anything to the child.

8. This court has reviewed the record and the submissions of both the Appellant and the state. The first ground was that the trial court failed to consider that there was a grudge between the Appellant and the complainant’s mother and that the complainant was forced by his mother to give false testimony. From the record, it is clear that the complainant was a 4 years old child. His mother (PW1) was appointed by the trial court to be an intermediary under section 32 of the Sexual Offences Act. She is the one who testified on behalf of the complainant. The issue of the complainant being forced to give false testimony therefore does not arise. As regards the alleged grudge between the Appellant and PW1, none was established either through cross-examination or alleged in the defence. Apart from stating that PW1 was his in-law the Appellant did not explain how such a relationship amounted to a grudge. That ground is accordingly rejected.

9. The second and fourth grounds are intertwined and they were that the medical evidence did not link the Appellant to the offence and that the crucial evidence of the child’s vomit was not examined and produced. The testimonies of PW1 and PW2 were that the Appellant forced the complainant to suck the Appellant’s penis. The complainant was taken to hospital for examination on 15th September, 2013. According to PW3 Dr. Oindi the P3 form (PExh 2) which was filled on 17th September, 2013 did not disclose anything untoward. Since this was not a case of penetrative sex, it was not expected that the medical examination will yield any results. The Appellant submitted that the child’s vomit should have been examined and be compared with the Appellant’s sperms to ascertain whether they came from him. This court takes the view that, that was not necessary for two reasons. Firstly, it would seem from P EXh

2 that the child was examined after 3 days from the date of the incident. It is unlikely that anything could be recovered or detected in his mouth. Secondly, the evidence of PW2 was direct on the issue of indecency on the part of the Appellant. Her evidence firmly did not require any corroboration by way of medical evidence. She stated what she saw and the Appellant was unable to shake her said evidence. These grounds are also rejected.

10. The last ground was that the prosecution evidence was contradictory uncorroborated and pure hearsay incapable of being relied on to hold a conviction. The evidence of PW2 was that on the material day at about 6 pm, she stepped outside her house and saw the Appellant open his trouser fly, hold the child by his right hand and tell the child to suck the Appellant's penis. She saw the child suck the Appellant's penis. The Appellant was at a distance of about 50 metres from where she was. When she called the complainant's mother ((PW1) the Appellant ran away but was apprehended by members of the public. PW3 on her part told the court how on the material day and time PW2 called her to the scene to see what the Appellant was doing to a child. When she arrived at the scene, she found the Appellant zipping up his trouser and the child was standing next to the Appellant. PW1 stated how PW2 called and informed her of how the complainant had been forced to suck the Appellant's penis. When she threatened the child, the child told her that the Appellant had asked the boy to accompany him to Kibung'a market to buy "Ngumu" and that the Appellant forced the boy to suck the Appellant's private parts. When she examined the child's mouth, she noticed that the child had a watery discharge in the mouth.

11. From the foregoing, it is clear that the evidence of PW2 and PW3 told the court what they had witnessed. Theirs was direct evidence and it was not hearsay as suggested by the Appellant. PW1 also witnessed the watery discharge in the mouth of the child. Their evidence is in consonance with Section 63 of the Evidence Act. The evidence of PW2 and PW3 was in my view direct and consistent. They did not contradict each other in any material particular. Their evidence corroborated the testimony of PW1. In my view, the prosecution's case remained unshaken and proved the case beyond any reasonable doubt. That ground is rejected.

11. Accordingly, this court finds the appeal to be without merit and the same is hereby dismissed.

DATED and DELIVERED at Chuka this 9th day of June, 2016.

A.MABEYA

JUDGE

Judgment read and delivered in open court in the presence of all parties. Right of Appeal 14 days explained.

A.MABEYA

JUDGE

9/6/2016