REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 26 OF 2005

DAVID MITHIKA ITHIBA ..... ACCUSED

VERSUS

REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the Senior Principal Magistrate's Court at Nyahururu, Hon. P. O. Muholi –Resident Magistrate delivered on the 30th October, 2014 in SPMCR Case No. 967of 2013)

JUDGMENT

The Appellant **DAVID MITIKA ITHIBA** has filed this appeal in the High Court at Nakuru challenging his conviction and sentence by the learned Resident Magistrate sitting at Nyahururu Law Courts. The appellant had been arraigned before the lower court on 25/6/2013 facing a charge of **DEFILEMENT CONTRARY TO SECTION 8(1) as read with SECTION 8(3) OF THE SEXUAL OFFENCES ACT, 2006**. The particulars of the charge were that:

> ***"On the 24th day of June 2013 at [Paticulars withheld] Village in Laikipia County, intentionally and unlawfully caused his genital organ namely a penis to penetrate the anus of J W M, a child of 15 years"***

Additionally the appellant faced an alternative charge of **COMMITTING AN INDECENT ACT WITH A CHILD CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT, 2006, and Count No. 2 DELIBERATE TRANSMISSION OF HIV CONTRARY TO SECTION 26(1)(b) OF THE SEXUAL OFFENCES ACT, 2006**.

The appellant entered a plea of **'Not Guilty'** to all the three charges. His trial commenced on 25/10/2013 at which trial the prosecution led by **INSPECTOR MUGAMBI** called a total of six (6) witnesses in support of their case.

The complainant **J W M** testified as **PW1** in the trial. The complainant told the court that he was 15 years and a pupil in class 8 at [Particulars withheld] Primary School. He stated that on 24/6/2013 at about 9.00am he was on his way home from school going home to collect money (probably for payment of his school fees). On the way he met appellant who was carrying a sickle saw and a sack. The appellant called the child to accompany him to go and cut grass. As they walked the appellant led the child to an ant hill. He removed the boy's shorts and proceeded to defile him through the anus. The appellant warned **PW1** not to scream or he would be killed.

After the act the appellant left the boy lying on the ground. The complainant got up and ran away. He bumped into **PW2 ELIUD MUGO WAWERU** who was in his shamba. The complainant narrated to **PW2** the ordeal he had been subjected to **PW2** alerted the father of the child and they all began to search for the perpetrator. Within a short while the appellant was found hiding inside a nearby shamba. He was apprehended and after the complainant identified the appellant he was taken to the police station.

The complainant was taken for medical attention together with the appellant. Upon conclusion of police investigations the appellant was taken to court and charged.

Upon the close of the prosecution case the appellant was found to have a case to answer and was placed onto his defence. He gave an unsworn statement in which he totally denied having lured and/or defiled the complainant. On 30/10/2014 the learned trial magistrate delivered his judgment. He convicted the appellant on the main charge of Defilement but acquitted him of the second charge of wilful transmission of HIV. Being dissatisfied with both his conviction and sentence the appellant filed this present appeal. The appellant was unrepresented during the hearing of his appeal.

The appellant made oral submissions in which he indicated that he did not seek to challenge his conviction but only sought to appeal against the 28 year sentence imposed by the trial court which he termed as harsh and excessive.

MR. CHIRCHIR learned State Counsel who appeared for the respondent State opposed the appeal. He urged the court to uphold and confirm the conviction and sentence of the trial court.

This being a first appeal this court is required to re-examine and re-evaluate the prosecution evidence and thereafter make its own conclusions on the same. See **AJODE Vs REPUBLIC [2002] KLR**. Similarly in the case of **MWANGI Vs REPUBLIC [2004] KLR 28** the Court of Appeal held that

> ***"1. 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 to have the appellate courts own decision on the evidence***.
>
> ***2. The first appellate court must itself weigh the conflicting evidence and draw its own conclusions"***

As indicated earlier the appellant stated that he did not wish to challenge his conviction. He only sought to have his sentence reduced. Nevertheless for completeness, this court will consider the evidence adduced at the trial to determine whether the prosecution did in fact prove the case to the required standard in law.

The appellant had been charged with the offence of Defilement. Section 8(1) of the Sexual Offences Act, 2006 defines the Act of defilement as follows:

> ***"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement"***

In order to prove the charge the following questions needed to be answered positively

(1) Was the complainant defiled as alleged?

(2) Was there proper identification of the appellant as the person who defiled the complainant?

(3) Was there proof of the age of the complainant?

In his evidence the complainant told the court that on the material date he was going home to collect his school fees when he was lured by the appellant to join him in collecting grass. On going some distance and upon reaching an ant hill the appellant forcibly undressed the boy and proceeded to have sexual

relations with him through the anus. In his evidence at page 7 line 11 the complainant described what happened in the following words:-

> ***"He (appellant) removed my inner clothes, he removed my short, he was putting on a long trouser. He started touching me. He took his penis and inserted it in my anus. I was lying down, almost 3 minutes, I felt pain. He told me to open my legs wide so that he can penetrate me...."***

The complainant here has given a very graphic description of the ordeal he suffered. This is unlikely to be a fabricated story. **PW2** confirmed to the court that immediately after the incident the complainant reported to him that he had been defiled.

PW5 BEATRICE CHESIRE a medical practitioner at Nyahururu District Hospital where the child was medically examined produced his P3 form **P. Exb 1**. The witness stated that at the time of examination the complainant's clothes were found to be soiled and covered with dirt. This corroborates his evidence that he was laid against an ant hill. There were scratch marks on the boy's knees and finger marks around his head and neck. All this is indicative of the use of force.

Upon further examination, the anus was found to have a whitish discharge, was bruised and had features of inflammation. This strongly indicates that there was interference and penetration of the boy's anus. The medical report concluded that the child had indeed been defiled. This P3 form together with the testimony of **PW5** provides conclusive proof of the fact that the complainant was sodomized. This was expert medical evidence and was not in any way challenged or controvered by the appellant. I find that indeed the complainant was defiled as he alleged.

The second crucial question is that of identification. Was there proper and positive identification of the appellant as the perpetrator of this offence?

The incident occurred at 9.00am. It was broad daylight and therefore visibility was good. The complainant spent a fair amount of time in the company of the appellant. The appellant had stopped the boy on his way home and spoken to him face to face. They walked together for some distance ostensibly to find grass. The complainant had ample time and opportunity to see the appellant well.

The complainant met **PW2** immediately after he had been defiled. He described his defiler as a **'short black man'** and indicated that he would be able to identify him. **PW2** in turn alerted the complainant's father and another villager **PETER KAGO MUCHIRI PW3**. They all began to scour the area looking for the man.

PW3 told the court that they found the accused hiding in a maize plantation. The complainant positively identified him as the man who had earlier defiled him. It is telling that the appellant was found hiding in a maize plantation. He obviously was trying to avoid detection. The appellant was apprehended and taken to the police station but not before an angry mob gave him a thrashing.

Further corroborative evidence on identification is derived from the medical examination performed on the appellant that same day. **PW5** who was the medical officer testified that upon being examined the appellant was found to have bruises all over his body. This was most likely due to the thrashing he received from the mob after his arrest.

Of significance **PW5** told the court that the doctor examined the appellant's private parts. On his penis was noted the following

> ***"Penile – faecal matter, inflammation on the penis – swollen, soiled around the private area, features suggestive of anal intercourse"***

The finding of a swollen penis with faecal matter on it is proof that the appellant had shortly before engaged in anal intercourse. It could not be a mere coincidence that the complainant identifies the appellant as the man who defiled him and the same day the appellant is examined by a doctor and found

to have faecal matter on his penis.

From the evidence available I am satisfied that the appellant was properly identified as the man who defiled/sodomised the complainant. I find no possibility of a mistaken identity.

The complainant gave his age at the time as 15 years. **PW6 CORPORAL JOSEPH MOSES** who was the investigating officer obtained and produced in court the complainant's birth certificate **P. Exb 4**. The document indicates that the boy was born on 15th October 1997. Therefore in June 2013 when this incident occurred, he was about 15 years old as he said.

I have considered the defence raised by the appellant and find that it amounted to a **'mere denial'**. The same was properly dismissed by the trial court.

I therefore find that the prosecution did indeed prove the charge of Defilement against the appellant beyond reasonable doubt. His conviction for this offence was sound and I hereby confirm the same.

The appellant challenged his conviction on the ground that it was harsh and excessive. Section 8(3) of the Sexual Offences Act provides for a minimum mandatory sentence of **"not less than twenty years".** After conviction the learned prosecutor informed the court that the appellant had one previous record. The appellant readily admitted this in mitigation when he stated

"I am sick; I was sentenced to 14 years"

The appellant was not a first offender – he was a serial law breaker. It was for this reason that the trial court sentenced him to serve 28 years imprisonment.

The appellant had clearly not learnt any lesson from his previous incarceration. However, the **nature** of that previous offence was not revealed to the court. Undoubtedly he must have been convicted of a serious offence – likely a felony to merit 14 years imprisonment. However since there is no indication as to whether that previous offence was a sexual offence and therefore similar in nature to the present one, I find that a sentence above the mandatory minimum was not called for. Therefore I will allow the appellant's appeal against sentence. I set aside the 28 year term imposed by the trial court and substitute a sentence of twenty (20) years imprisonment as mandated by the law. This sentence will run from the time of conviction by the trial court. It is so ordered.

Dated in Nakuru this 30th day of September, 2016

M. A. Odero

Judge

30/9/2016