



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 50 OF 2013

MOHAMED JUMA APPELLANT

VERSUS

REPUBLIC RESPONDENT

**(From the Original Conviction and Sentence in Criminal Case No. 13 of
2012 of the Chief Magistrate's Court at Malindi – N. Shiundu, Ag. SPM)**

JUDGEMENT

The appellant was charged with the offence of defilement of a boy contrary to section 8 (2) of the sexual Offences Act number 3 of 2006. The particulars of the offence were that the appellant, on the 13th day of February, 2012 in Malindi District within Kilifi County intentionally and unlawfully caused penetration of his male genital organ namely penis into the anus of F.L. a boy aged seven years.

The appellant also faced an alternative count of indecent act contrary to section 11 (a) of the Sexual Offences Act number 3 of 2006. The trial court convicted the appellant on the main count of defilement and sentenced him to serve thirty (30) years in prison.

The grounds of appeal as per the amended grounds of appeal are that: -

- 1. The charge sheet was null and void.***
- 2. The evidence of PW1 and that of his mother contradicted each other.***
- 3. The appellant was a victim of mistaken identity and the identification was poor.***
- 4. The P3 form produced as medical report does not support the charge.***
- 5. The appellant's defence was reliable and raised doubt on the prosecution case.***

The appellant submitted that the charge sheet did not contain sufficient information as required under section 134 of the Criminal Procedure Act. It is also submitted that the charge refers to section 8 (2) of the Sexual Offences Act whereas the proper section is 8 (1). Section 8 (2) deals with the punishment. The omission of section 8 (1) is a serious defect on the charge sheet. It was misleading contrary to the requirements of Article 35 (2) of the Constitution. The prosecution did not amend the charge sheet.

The appellant further submitted that the prosecution evidence was contradictory. PW1 allegedly informed his mother. Her mother asked him to take her to the house. The mother did not know the appellant's house and the complainant did not show his mother the house yet the two ended at the appellant's house. PW2 mistook him with another person. PW1 had not described the appellant's appearance to his mother. The appellant further contends that members of public allegedly went to his house yet none was called to testify. The P3 form does not indicate the type of object used. It also describes that the person who was examined was a female yet the complainant was male. The prosecution did not prove its case beyond reasonable doubt.

Mr. Fedha, prosecution counsel, opposed the appeal. Counsel submitted that the appellant was properly identified by the victim. the victim testified how the appellant took him by force using a knife. PW1's evidence was corroborated by that of PW2 who knew the appellant's house. The complainant's age was assessed to be seven (7) years.

Being a first appeal, it is the duty of this court to evaluate the evidence afresh and come up with its own independent opinion. Before the trial court PW1 was the complainant. He testified that he was going for tuition on a weekend when someone called him. The person held him by the neck and pulled him to a home while holding a knife on his neck. He was defiled. He was then pushed outside and went home. He narrated the incident to his mother. It was the first time for that person to defile him. The person alledged that he had stolen his containers. That person was the appellant.

PW2 JK is PW1's mother. On 13th February, 2012 PW1 came home from school at around 4.00 pm. He took lunch and left for tuition. He returned after one hour and informed her that someone had sodomised him. She asked PW1 to take her to the scene. She went with PW1 who showed her the place. She knew the house belonged to the appellant. The appellant was not in the house. They went round and returned to the house. The appellant was there and alledged that PW1 had stolen his containers. She raised her voice and members of the public went to the scene. She took PW1 to Malindi District hospital. The matter was later reported to the police. She used to see the appellant hawking in the area. The appellant was staying alone in the homestead.

PW3 IBRAHIM ABDULLAHI was based at the Malindi District hospital as a clinical officer. He filled the P3 form. PW1's age was about 7 years. PW1 had post sodomy disorder. The P3 form was filled 4 days after the incident. He observed PW1 and noted a small tear on his anal orifice. He concluded that there was sodomy.

PW4 P.C ROBERT KAMANDE was attached to the Malindi police station. On 14th February, 2012 at around 5.00 pm he was in the office. The OCS called and instructed him to go where a suspect was about to be lynched by some people. He went to the District Children Office and found the appellant was locked inside. They arrested the appellant. It was alledged that the appellant had sodomised a small boy.

PW5 Corporal MWAWACHANGONI SALIM was attached to Malindi police station. She investigated the case. The case was reported at the station on 14th February, 2012. She got PW1's birth clinic card which showed that he was born in 2004. She caused the appellant to be charged with the offence.

In his sworn defence, the appellant testified that he is a businessman. On 12th February, 2012 he had a disagreement with his neighbor and she said she would fix him. He went to work and came back at 6.00 pm. The neighbor took people who confronted him. He was rescued by someone and he reported the matter to the police. He was later arrested and taken back to the police station.

The issues coming out of the evidence is whether PW1 was sodomised and whether it was the appellant who sodomised him. The appellant submitted that the P3 form is defective. It refers to a female complainant. I have noted that the clinical officer, PW3 used the portion meant for female complainants on the P3 instead of part (3) of section C. The clinical officer also filled all the other relevant sections of the P3 form. He testified in court and stated that he examined a boy aged about 7 years. The fact that the clinical officer filled the wrong portion of the P3 does not make the P3 defective. The P3 form has to be tested together with the other evidence on record. The P3 form did not cause any injustice.

It was the evidence of PW1 that while on his way to attend tuition, he was pulled inside a house and sodomised. He immediately went back home and informed his mother. The clinical officer testified that PW1 had a small tear on his anus. The clinical officer concluded that PW1 was defiled.

It is clear from the evidence on record that PW1 was defiled. Medical evidence proved that fact. The incident was immediately reported to PW1's mother who took quick action. I do find that PW1 was indeed sodomised.

According to PW2, PW1 narrated to her what had happened. PW1 took her to the house where the incident took place. PW2 knew that the appellant was living in that house. The appellant used to live in that house with his brother but was now living alone. According to PW2, her son had reached home at about 4.00 pm. He took lunch and went for tuition. PW4 P.C Robert Kamande testified that he was called at around 5.00 pm and went to take the appellant who was locked inside an office. The evidence confirms that the incident took place between 4.00 pm to 5.00 pm. It was during the day. During cross-examination, PW1 testified that the appellant took him into the house. PW1 could not scream as the appellant held a knife on his neck.

There is the evidence of PW2. Soon after the incident was narrated to her, she asked PW1 to take her to the house where the sodomy had taken place. PW1 took her there. She knew the house. The appellant was not in. She went round and returned and found the appellant. PW1 told the court that the appellant alledged that he had stolen his containers. According to PW2, when the appellant opened the door, he alledged that PW1 was a thief as he had stolen his containers.

The appellant contends that it was a case of mistaken identity. The evidence shows that PW1 knew the house where he was sodomised. PW2 was taken to the house. The appellant was the occupier of the house and was found in the house. This was during the day. I do find that there is no mistaken identity. PW2 knew that the appellant was living in the house alone. It is clear that PW2 was a neighbor to the appellant.

The charge sheet refers to section 8 (2) of the Sexual Offences Act. According to the appellant, the proper section is 8 (1). Ordinarily, the charge sheet would refer to both sections as section 8 (1) defines the offence of defilement while section 8 (2) states the punishment. However, the appellant was not prejudiced. In his sworn defence, he stated that he was aware of the charges he was facing. The appellant knew he was facing charges of sodomy. There was no miscarriage of justice. The charge sheet is proper.

The appellant testified that he quarreled with his female neighbor who promised to fix him. I believe the neighbor being referred to in the defence evidence is PW2. There is evidence that PW1 was defiled. That cannot be fixing. PW2 could not have caused her son to be sodomised by someone else and then fix the appellant. That line of evidence is not believable. The appellant's defence does not raise any doubt on the prosecution case.

From the evidence on record, I do find that the prosecution proved its case beyond reasonable doubt. PW1 was sodomised by the appellant. The appeal lacks merit and is hereby disallowed.

Dated and delivered in Malindi this 22nd day of September, 2016.

S.J. CHITEMBWE

JUDGE