



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

H.C.CR.A 303 OF 2013

SAMUEL ING'ATI APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and Sentence of the Chief Magistrate's Court at Machakos by Hon. M.K. Mwangi (Ag. SPM)) in Criminal Case No. 1356 of 2011 dated 4th September 2013)

(Before E. Ogola J)

JUDGMENT OF THE COURT

1. The Appellant was charged with the offence of **Defilement** contrary to **Section 8 (1) and (2)** of the **Sexual Offences Act No. 3 of 2006**. The alternative charge was **Indecent Act** with a child contrary to **Section 11 (1)** of the said **Act**. He was tried and convicted on the alternative charge and sentenced to 13 years in jail.

2. Not being satisfied with the conviction and sentence the Appellant has filed this appeal and premised on the following grounds:-

- i. That, the single evidence item of Appellant's purported identification by the Complainant PW2 was not corroborated/supported by any details and/or description of the alleged perpetrator.**
- ii. That, the trial court neglected to factor the Complainant's post incident psychological condition following the traumatizing event and hence relied on conjecture instead of concrete evidence of identification.**
- iii. That, the Appellant's prerogative of innocent until proved guilty was severely compromised by the court's admission of extraneous and malicious character/reputation evidence that was unfounded and contrary to legal precept.**
- iv. That, the adverse extraneous and malicious character/reputation evidence depicted the Appellant as a depraved manic pedophile and this conjecture and vilification ultimately resulted in the conviction.**
- v. That, the prosecution's case was not proved beyond a reasonable doubt.**

vi. That, the Appellant's plausible defence was ignored without pertinent reasons in vindication.

3. Parties filed submissions to the appeal. The State opposed the appeal and submitted that the prosecution had proved its case beyond reasonable doubt, and that the Appellant was properly identified and recognized and the victim, a boy of 11 years was able to understand what the Appellant did to him.

4. I have carefully considered the appeal and the grounds it is premised upon together with the submissions of the parties. This being the first appeal I have also reviewed and re-evaluated the evidence on record. The issues I raise for determination is whether the prosecution case was proved beyond reasonable doubt and whether the Appellant was properly identified.

5. The prosecution called six (6) witnesses whose evidence corroborated one another. PW1 the mother to the Complainant stated that she had sent him to buy onions, however, he took long coming back and therefore she went in search of him. On the way, she met one Sam who had been sent to get her by the village elder who had received information as to where his son was. She headed to the railway line and found the child and took him to the hospital. He was treated and discharged. The Complainant was able to tell the mother what had happened to him. PW2, the Complainant, corroborated all this in his testimony. He stated that he met the Appellant who asked him to show him the way to **Kanaani School**, and as he lead him to that road, the Appellant slapped him on the face and he fell down. The Appellant, pounced on him and forced him to drink some substance, and carried him to the railway line. The substance made the Complainant dizzy but he was able to fathom what the Appellant did to him. Just after he was finished with the defilement, PW3 and other people approached the scene and rescued him. The Appellant ran away. The Complainant was able to identify the Appellant due to the fact that they met at some shops where there was sufficient light.

6. PW5 the Investigating Officer stated that she took over investigations after the matter was reported on the 7/9/11. She stated that upon receiving the treatment notes referred the Complainant to hospital with a P3 which was filled by PW6. PW6 confirmed the sodomy through the observations he made.

7. The court duly analyzed the evidence led by the prosecution and defence and was satisfied and reached the irresistible conclusion that the Appellant committed the offence. The prosecution submitted that the decision of the court is well reasoned and supported by the evidence. The conviction should be upheld and sentence confirmed.

8. In his defence the Appellant gave unsworn evidence. He testified that he was a construction worker in **Athi River**. On 9th September 2011, he testified that he had left his house to go to the shop when he met four people who alleged that he had committed a crime. He was taken to the village elder and arrested. He said he never committed the offence.

9. I have considered the testimony of the victim who was P2. The learned trial magistrate had considered the dangers of relying on the evidence of a single witness and identification by a single witness who is a minor. The court warned itself on relying on such evidence but was satisfied that PW2 was telling the truth. The Appellant and PW2 had a conversation for a while when PW2 had enough time to get to know the features of the Appellant which he used to identify him. He was able to identify him among other three persons 3 days later when the Accused was apprehended. The injuries sustained by the victim also corroborated his claim that he was slapped and sodomised.

10. The trial court found that the first count could not apply, but found the Accused guilty as charged in the alternative count as his penis touched the buttocks and anus of PW2 intentionally without cause.

11. It is the finding of this court that the appeal herein lacks merit and the same is herewith dismissed.

12. The Accused shall serve the entire term of his imprisonment.

That is the judgment of the court.

Dated and delivered at Machakos this 13th day of October 2016.

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E. OGOLA

JUDGE

In the presence of;

Mr. Sijenje for State

Accused – present

Court Assistant – Mr. Munyao