



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CRIMINAL APPEAL NO. 67 OF 2014

DANIEL KISILU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(From the conviction and sentence in Mwingi SRM Criminal Case No. 303 of 2014 dated 17/07/2014
G. W. KIRUGUMI RM)*

JUDGMENT

The appellant was charged in the subordinate court with defilement contrary to section 8 (1) (2) of the Sexual Offences Act of 2006. The particulars of the offence were that on 4th May 2014 at about 10am in [particulars withheld] in Mwingi East District within Kitui County intentionally and unlawfully caused his penis to penetrate the anus of M M a boy child aged 9 years.

In the alternative, he was charged with committing an indecent act with a child contrary to section 11 (1) of the same Act. The particulars of the offence were that on the same day, time and place intentionally touched the anus of M M a child aged 9 years with his penis. He denied the charges. After a full trial, he was convicted on the main count of defilement and sentenced to serve life imprisonment.

Aggrieved by the decision of the trial court, the appellant has now appealed to this court through his counsel Mulinga Mbaluka advocates on the following grounds:-

1. The learned magistrate erred in fact and law by failing to acknowledge that the appellant did not commit the offence of defilement and indecent act with a child as framed in the charge sheet.
2. The learned trial magistrate erred in fact and law by failing to appreciate the appellant's defence.
3. The sentence imposed on the appellant is harsh and excessive.
4. The learned trial magistrate erred in fact and law when she failed to appreciate that the complainant was intimidated to complain against the appellant.
5. The learned trial magistrate misdirected herself and erred both in fact and law when she failed to make a finding that the prosecution evidence was contradictory and could not have sustained the charge against the appellant.
6. The learned trial magistrate erred in law and fact when she sentenced the appellant without giving reasons for the sentence.

The appellant's counsel also filed written submissions, Counsel who appeared for the appellant Mr. Ngala Malonza relied on the written submissions filed.

Learned Prosecuting Counsel Mr. Orwa opposed the appeal. Counsel contended that the evidence of PW1 the complainant was clear. He was taken to the hospital after the incident and treated, though it was not

possible to treat him immediately at [particulars withheld] Trading Centre as stated by PW2.

Counsel submitted that the medical evidence contained in the P3 form was not shaken and that the evidence of PW2 was not hearsay. Counsel urged this court to take judicial notice of the fact that Sexual Offences were usually committed in secrecy. In the present case, according to counsel, the complainant PW1 was threatened by the appellant and had to comply and keep the matter secret. Counsel relied on section 124 of the Evidence Act (Cap. 80)

With regard to production of the P3 form by a different doctor, counsel relied on section 77 of the Evidence Act and stated that the reasons for such production were explained in the evidence tendered before the trial court. In counsel's view penetration was proved.

Counsel also submitted that the defence of the appellant was considered, and that the sentence was not harsh and excessive.

At the trial, the prosecution called six (6) witnesses. Pw1 was the complainant. It was his evidence that on 4/05/2014 his grand father sent him to [particulars withheld] to buy sugar and he proceeded to auntie K's shop. At the shop she brought the sugar in the presence of K and the appellant Kisilu. The appellant then called him outside the shop, held him by the waist removed his trousers and inserted his penis in his anus. He gagged his mouth and applied saliva to the victim's (PW1) anus and his penis and penetrated PW1 twice and then released him and instructed him not to tell anyone. PW1 thus did not tell anyone at home. On the next day, he felt pain and informed her aunt who told her mother in law who informed PW1's mother who worked at Garissa who came and took him to hospital.

PW2 was the mother of the victim. PW1 It was her evidence that on 5/05/2014 at 8pm she was phoned by her sister and informed that her son M (PW1) had been defiled by the appellant. On 6/05/2014 she went home and found PW1 who narrated to her the story. She inspected the child and found a crack in the anus area. They initially went to [particulars withheld] Health Centre but were referred to Mwingi District Hospital. The complainant PW1 was treated and a P3 form filed.

PW3 K M was the grandmother of the complainant (PW1). It was her evidence that she lived with the complainant and sent him to buy sugar on 4/05/2014. The complainant took long to return but she did not enquire why. She was however informed on 5/05/2014 by M that PW1 had been defiled by K relative. However, the suspect (K) denied the allegation.

PW4 was M M. It was her evidence that on 4/05/14 at 6am she was at home when the PW1 was sent to buy sugar. She went on her business and when she came back at 3pm, she met PW1 sleeping. The next day, she enquired about the unusual sleeping habit of PW1, who disclosed that he was defiled on Sunday by the appellant. She reported the incident to her husband. The child's grandmother informed the child's mother who came the next day.

PW5 Dr. Bulimu produced the P3 form which was filled by her colleague Dr. Mustach. It was her evidence that the complainant had been treated before the P3 form was filled. She stated that the complainant was brought to hospital on 7/05/2014.

PW6 PC Keinas Kimutai received the report at Nguni Police Station. He assisted in taking the victim PW1 to hospital. The appellant was arrested and charged.

When put on his defence, the appellant gave sworn testimony. He was a Pastor. It was a long defence. He denied that offence. He stated that on 4/05/2014 there was a church meeting and he was not at [particulars withheld]. He stated that on 5th, 6th, 7th, 8th and 9th May, 2014, he was with his children. He stated that on 10/05/2014, he was called by someone to inform him that there was a fund raising. Somewhat seven people came and arrested him, took him to the police station and charged for an offence he did not commit. According to him the child PW1 was threatened to implicate him because of a land dispute.

This is a first appeal. As a first appellate court, I am duty bound to re-evaluate all the evidence on record

and come to my own conclusions and inferences.

The Prosecuting Counsel strongly opposes the appeal. In counsel's view, the prosecution proved its case against the appellant beyond any reasonable doubt. Having re-evaluated the evidence on record, I find some gaps which create some doubt, whose benefit, I am duty bound to give to the appellant.

Firstly, the complainant clearly stated that the appellant was present at the shop and called him from therefrom. The sugar was bought from the complainant's aunt. One would expect that from such an incident happening in broad daylight among relatives, the said aunt would have come to court mentioned the presence of the appellant in the vicinity of the shop. That was not done. In effect the defence of the appellant that he was not in the place of the incident, was not shaken. Since an accused is not required to prove such a defence of alibi the benefit has to be given to the appellant, which I hereby do.

The second important matter is with regard to the medical evidence. The P3 form clearly stated that nothing unusual was found on the anus of the complainant. The doctor PW2 produced the P3 form filled by another Doctor she knew. She did not state that she knew the identity of the person who treated the complainant and made the treatment notes that indicated that the complainant had injuries. In my view, the person who treated the complainant should have come to tender evidence as to the contents of those treatment notes, since the same were not included in the P3 form, nor were they even acknowledged therein. The same cannot just be dumped in court together with the P3 form as happened herein. We do not even know the identity of the person who made those notes.

In my view, the above two considerations show that the conviction cannot be sustained. As such the appeal has to succeed. The conviction will have to be quashed and the sentence set aside.

To conclude, I find merits in the appeal. I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Garissa this 20th April, 2015

GEORGE DULU

JUDGE