



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL CASE NO. 30 OF 2012

[Being an appeal from the judgment of the Webuye SRM'S court [B. OMBEWA) delivered on 3rd August 2010 in SRM's criminal case no. 2026 of 2009]

PATRICK WEKESA MUNYASIA ...APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. **PATRICK WEKESA MUNYASIA** the appellant herein was arraigned in court to face the charge of defilement contrary to section 8 (1) (2) of the Sexual offences Act no. 3 of 2006. The case was heard and judgment delivered, the appellant was convicted of the offence and sentenced to life imprisonment. Being aggrieved by the judgment the appellant preferred this appeal on the following grounds;
 - I. **THAT the learned magistrate erred in law and facts by basing conviction and sentence on the evidence of PW1 and PW5 which had not water tight to implicate me.**
 - II. **THAT the learned magistrate erred in law and facts by not putting into consideration that PW5 did not comply with Section 122 A.D of the evidence act for test of DNA as provision require.**
 - III. **THAT the learned magistrate did not exercise his constitutional right to convict me since the result of spermatozoa examination was never produced for verification to prove the preferred charge.**
 - IV. **THAT the learned magistrate erred in law and facts when he failed to re-evaluate the whole evidence vis avis the investigation officer report, thereby failing to make any finding on my defence.**
 - V. **THAT, other grounds to be adduced during the hearing of this appeal.**
2. At the hearing of the appeal the appellant briefly argued that the offence and the sentence meted out to him was excessive.

On the other hand Mr. Kamau for the State vehemently opposed the appeal on the grounds that the prosecution had proved that indeed the applicant called the child. P3 form proved that the child

complainant had been sodomized. Further he agreed with the trial court that the evidence of the complainant did not require corroboration. He argued that the conviction was safe and ought not to be set aside.

3. This being the first appellate court it has to consider the evidence, evaluate and analyze the same in order to arrive at an independent opinion bearing in mind that the trial court saw and heard the witness.

PW1 – a clinical officer at Webuye District Hospital filled the P3 form. He examined the child who was 10 years and found bruises and lacerations around the anal area but no active bleeding. He found mucoid and sanguineous discharge approximately 1 day old. He produced the P3 form and the treatment notes in evidence. He equally produced as exhibit treatment card of the appellant.

PW2 A A, the complainant aged 10 and attends [particulars withheld] school. He recalled that on 7.12.09 as he played with friends the appellant who manned a house near where they were called him. The appellant opened the gate, locked it with a padlock and led him to a store that had a bed. The appellant then laid the complainant on the bed, removed the complainant's pants and trouser, he removed his as well and inserted his penis in the complainant's anus and warned the complainant against screaming. He later smeared the complainant with oil. The complainant left and found his friend waiting by the gate. He shared with his friend what happened. He then saw his uncle and told him the same. His uncle called the owner of the house who arrived and thereafter the matter was reported to the police.

PW3 C O aged 8, recalled that on 7.12.09 at 2.30 p.m. as he played with his friends the appellant summoned PW1 and said he wanted to send him. PW2 entered the compound and the complainant locked the gate. The witness ran to alert PW2's uncle. On returning he found PW2 sweating and screaming and PW1 told him that the appellant had put ***“his thing for urinating in his buttocks”***

PW4 E O aged 8 years and a sister to PW2 stated that as they played on 7.12.09 at 2.30 p.m. the appellant called PW2 saying he wanted to send him. He opened the gate to allow PW2 in and thereafter locked when PW1 entered. On seeing this the witness and others rushed home to inform their uncle who then went to the scene leaving the witness at home.

PW5 H N an uncle of PW1, recalled that on 7.12.09 after lunch PW3,4 and 2 other children went to him and informed him that a watchman had locked PW1 in a home. He headed to the homestead and saw PW2 coming from the gate of an Asian walking next to the perimeter wall. PW3 ran towards him and told him that PW2 had been sodomized. He talked to PW2 who was sweating and crying and he confirmed what his friend had said. The witness knocked at the gate 3 times and the appellant came and on asking him why he had defiled PW2, the appellant who was drunk challenged him. The witness then called his wife and asked her to report the matter to the police and owner of the house. The police and the owner arrived. They then proceeded to the police where statements were recorded and PW1 taken to hospital.

PW6 – PC Zephania kenyangi attached to Webuye police and the investigating officer recalled that on 7.12.09 the complainant was taken to the station by his uncle and the accused in toe where the witness booked a report of defilement. He issued the complainant with a P3 form after treatment, he recorded the statement of the complainant and charged the appellant with the offence facing him.

4. From the evidence on record there is no doubt that the complainant was sodomised on the 7th of December, 2009. The complainant testifies to that effect and the medical record and examination by PW1 who prepared the P3form corroborated this.

The issue for determination is whether or not the appellant did the act.

PW2 in his evidence categorically stated that the appellant called him giving an indication that he

wanted to send him. On entering the gate the appellant locked the same and took him to a store with a bed, lay him on the bed, removed his pant and trouser and inserted his penis in the his anus. The appellant warned him not to scream. He later smeared oil on him. On cross examination by the appellant, PW1 confirmed that he found oil on the affected area. The evidence of PW3 and 4 corroborates PW1's in that they witnessed the appellant calling the complainant and taking him to the store. PW3 and 5 saw PW1 coming from the gate crying and sweating. He was thereafter taken to the police and the hospital where his allegations were confirmed.

5. The evidence of PW2 cannot be faulted it is clear and cogent. Circumstantial evidence surrounding the case corroborates the evidence of PW2.

In view of the analysis state above I concur with the trial court's finding and the sentence meted out. In this regard therefore the appeal is dismissed.

Dated at Bungoma this 21st day of May 2015.

ALI-ARONI

JUDGE.