



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO.45 OF 2013

S W W.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the judgment of the Hon. Mwangi Principal Magistrate) in

Kibera Chief Magistrate’s Criminal Case No.4641 of 2010

delivered on 11/10/2012)

JUDGMENT

In Count I the appellant was charged with House Breaking and Stealing contrary to Section 304(1)(b) of the Penal Code. It was alleged that on the 13th October, 2010 at **[particulars withheld]** in Riruta within Nairobi area Province broke and entered into a building used as a dwelling house by M K and stole a mobile phone make Nokia 110 worth Kshs.2,500.00, five sufurias worth Kshs.1,000.00, assorted clothes worth Kshs.2,000.00 and other assorted kitchen items all valued at Kshs.6,000.00 the property of the said M K.

In count II he was charged with defilement of a child contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No.3 of 2006. Particulars of the offence were that on 13th October, 2010 at **[particulars withheld]** in Riruta within Nairobi area Province intentionally and unlawfully committed an act by inserting his genital organ (penis) into the genital organ (anus) of I M a child aged 9 years against the order of nature.

In the alternative, he was charged with indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No.3 of 2006 in that on the 13th day of October, 2010 at **[particulars withheld]** in Riruta within Nairobi area Province intentionally touched the buttocks of I M a child aged 9 years with his penis.

The appellant was acquitted in Count I under Section 215 of the Criminal Procedure Code. He was found guilty in Count II and was sentenced to life imprisonment.

By Amended Grounds of Appeal filed on 27th May, 2015 he was dissatisfied that he was convicted based on evidence that did not prove that he was positively identified by the complainant. He was also dissatisfied that the prosecution did not prove the existence of penetration which is a key element for the offence of defilement. Finally, he was dissatisfied that the learned trial magistrate did not consider his defence.

The appeal was opposed. Learned State Counsel Miss Ndombi for the prosecution submitted that the complainant who testified as PW1 identified the appellant who entered into the house through the window. She stated that the house was a single room and inside it there was a lantern lamp which was lit by which PW1 was able to identify his attacker. Moreso, the appellant increased the light of the lamp so that he could clearly see what he was doing. Further, PW3 under whose care PW1 had been under was able to clearly see the appellant while he was inside the house as he shouted demanding that the door to the house be opened. At the time the appellant entered into the house, he thought that PW3 was inside and that is why he was demanding that the door to the house be opened. At that hour, PW3 was coming from escorting a friend. She hid in a toilet outside the house and was able to see the appellant through a gap in the door of the toilet. According to PW3 she knew the appellant and was able to identify him by his voice as well as his physical appearance through the security light that was outside the house. Miss Ndombi submitted that the appellant took a cool 45 minutes in the house during which time he committed the heinous act against the complainant. She submitted that when PW3 entered into the house, PW1 narrated to her what had happened and she noted that he (PW1) was not able to stand properly and feces was coming from his anal area.

According to Miss. Ndombi, the evidence of PW8 Dr. Demeke of Nairobi Women's Hospital confirmed that PW1 had been defiled. She also submitted that the age of the victim was demonstrated by PW5 Dr. Kamau who estimated it at 9 years. Finally, Miss Ndombi submitted that the police conducted proper investigations which dispelled the appellant's assertion that he was implicated because there existed a grudge between himself and PW3. She urged the court to dismiss the appeal.

In rejoinder to the submissions the appellant submitted that he was not given witness statements during the trial which negated his right to a fair trial.

This being the 1st appellate court, demands that the evidence on record be reevaluated and the court arrives at its own findings but bear in mind that it has neither seen nor heard the witnesses.

The prosecution called a total of eight witnesses. **PW1** I M was the complainant. He testified that he was aged ten years and was a pupil at *[particulars withheld]* Primary School in standard four. He testified that he knew the appellant although he did not know his name. His first encounter with him was the day he defiled him while he was in a house of his mother's friend by the name M (PW3). He recalled that on 13th October, 2010 at about 8.00 p.m. while he was alone in the house he heard somebody shout "***M open this door or I break it.***" The voice came from a man who sounded drunk. Since the door was locked from outside with a padlock, the man broke the house window to gain access into the house. The lantern lamp although lit had its light greatly reduced. The man increased the light of the lamp and that is when PW1 clearly saw him. He started ransacking the clothes all over the house. Thereafter he turned onto PW1. He removed his jeans shorts, a boxer and a shirt. He then removed his own shorts and boxer shorts, he held his throat tightly as well as his stomach. He then defiled him.

According to PW1 the incident took place when the lamp was still on and he was therefore able to see the person who defiled him. He testified that M came back in the morning and found that the assailant had left. He narrated to her what had happened. His mother returned later in the day and was also informed what had happened. He was taken to hospital for treatment. The matter was thereafter reported to the police station. PW1 identified his attacker in court as the appellant.

PW2, S S was PW1's mother. She had gone to work when the offence took place and had left PW1 under the care of PW3. On the material day between 10.00 and 11.00 p.m. she received a call from PW3 informing her that her child had been defiled by one '**Ras**'. By the time she arrived in the house PW1 had already been treated. She also received information that the suspect had been arrested. She examined PW1 and noted that his anus was tender and swollen. He had bruises on his neck. He was traumatized and she took him for counseling.

PW3, M K testified that on the fateful night she had gone to escort her boyfriend E leaving behind PW1 who had been left under her care. As she was returning, she noticed somebody standing near the door to the house holding a panga. She hid in a nearby toilet as she feared for her life. She was able to identify

the man through security lights as she lived near a road. The man was knocking on the door violently and was using abusive words directed at her. She remained in the toilet for about one hour. She testified that PW1 was a son of her friend called S who was on a night duty where she worked. She noticed the man break the window to the house which was wooden and enter inside. He was calling her name prior to entering her house and he remained in the house between 45 minutes and one hour. PW3 left the toilet after the man had left. She saw him carrying a green paper bag. On entering the house, PW3 noted that the man had carried away some flour, sugar, cooking fat, her mobile phone Nokia 1110, a pair of trousers, a pair of shoes and eight sufurias of assorted sizes. She also found PW1 lying on a seat whereas she had left him on a bed. PW1 told her that uncle K had been in the house and had warned that she would face dire consequences and she should look for him in Kayole. He also revealed to her how uncle K had defiled him through the anus. She noted that PW1 was not able to stand up and that feaces was coming from his anus and his anus was also swollen and sore. She took him to Mary Mission Hospital where he was treated and referred to Nairobi Women's Hospital. The matter was also reported at satellite Police Station.

PW3 further testified that when she left hospital she found that the appellant had been arrested by members of the public who had also beaten him and escorted him to the police station. She stated that K was the appellant's girlfriend and that is how she knew who PW1 was referring to as Uncle K. According to PW3 the appellant was rescued from the wrath of the public by the police. She also informed PW1's mother on the same night upon learning about the incident.

PW4, A K A testified that the complainant and his mother were a nephew and sister respectively. On the morning of 14th October, 2010 at about 6.00 a.m. he was informed by one C who was a neighbour to M that a child had been sodomized. He then proceeded to the house of M and upon confirming that the victim was his nephew, he participated in taking him to Nairobi Women's Hospital. He identified the treatment sheet they were given at the hospital.

PW5, Dr. Zephania Kamau examined PW1 on 21st October, 2010 and filled his P3 form which was produced into evidence. He observed that there were no abnormalities or injuries on PW1's anal region.

PW6, Police Corporal Woman Judith Muthoni investigated the case and summarized the evidence of the prosecution witnesses.

PW7, Corporal Bernard Wathome confirmed that on 14th October, 2010 in the company of Police Constable Wachira arrested the appellant along Wanyee Road in Riruta on allegations of house breaking and stealing and defilement. He testified that at the time of arrest, members of public wanted to lynch him.

PW8, Dr. Demeke of Nairobi Women's Hospital produced a medical report from the hospital that had been prepared by Dr. Liku who was formerly working at the hospital. She testified that PW1 was seen at the facility on 15th October, 2010 on allegations of sexual assault against him on 13th October, 2010 by a man known to him as Ras. The Medical Report issued to PW1 showed that he had lacerations on his anal region which was tender upon touch. Diagnosis given was that of sodomy. The child was treated and counseled. According to the witness the existence of the lacerations was a sign of penetration into the child's anal area. He produced the Medical Report accordingly.

The appellant gave an unsworn statement of defence. He denied committing the offence. His defence was that he was implicated by the complainant's mother because she held a grudge against him because his camel had hit the complainant while grazing in a field near their home. He stated that a reconciliation meeting had been called at the chief's office and the matter was settled. Sometime on 16th October, 2010 which was two weeks after the incident residents of Corner area spotted him with his camel while ferrying children for a fee and started beating him. He jumped off the camel and escaped. On 17th October, 2010 he returned at the scene where he was beaten by the complainant's father and his friends and when the members of public spotted him they called police who arrested him.

From the evaluation of the evidence above, I consider four issues for determination:-

- a. **Whether the appellant was identified.**
- b. **Whether the offence of defilement was proved.**
- c. **Whether the age of the complainant was proved.**
- d. **Whether the trial magistrate considered the appellant's defence.**

On the issue of identification, the appellant submitted that he was not properly identified by the complainant as well as PW3. He challenged the quality and intensity of lighting obtaining at the material time that would have enabled PW1 to identify him. According to him, the lighting from the lantern lamp was not sufficient for PW1 to see in darkness who was defiling him. Back to the evidence on record, PW1 noted that he was awoken by a stranger who broke into the house through the window. Before the stranger commenced defiling him, he increased the lighting of the lamp to the maximum. That is how he was able to recognize the appellant who was his neighbour as his assailant. He was candid that his attacker was uncle K and he referred to him severally in his evidence in chief as such. When he reported the incident to PW3, he told her that he had been sodomized by uncle K. PW3 on the other hand also testified that PW1 told her that his defiler was uncle K. She then automatically knew that uncle K was the appellant who was her neighbour and who had a girlfriend by the name K and that is how she knew who had accosted PW1. As such, the identification of the appellant by PW1 was by recognition which is more assuring and convincing. See the case of Ajononi & Another –Vs- Republic (1980) KLR 59, in which it was held thus:-

“The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.”

PW3 also testified that she was able to know that the person who was inside her house was the appellant as she recognized his voice when he was calling out to her to open the door while inside the house. She also testified that before the appellant broke the window, he had shouted abusive words directed at her while outside the house. That way, she had no doubt that the person who defiled PW1 and who was inside her house was the appellant.

The court would then be called upon to admit PW3's evidence of the voice identification of the appellant. In the case of Disho Litwaka Libambula –Vs- Republic the court had the following to say on voice identification:-

“Normally, evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure that it was the accused person's voice, the witness was familiar with it and recognized it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who had said it. See Choge –Vs- Republic 985 KLR.1. In the instant case, it was not in dispute that the appellant was the complainant's first cousin. They were, in fact, very close. It was therefore safe to say that the complainant's identification of the appellant's voice was free from any possibility of error.”

In respect of the instant case, PW3 while giving her evidence did not state how she was able to recognize that indeed the person who was calling out in the night was the appellant's voice. For instance, she ought to have candidly stated for how long and how frequent she had interacted with the appellant to enable her recognize his voice whenever he spoke. Secondly, when she first heard the voice of the appellant while he was still outside her house, she did not tell the court the intensity of the security lighting that would have enabled her to recognize the appellant. It is therefore not convincing that the voice she heard automatically matched that of the appellant. Moreover, and for the foregoing reasons, her identification of

the appellant through a crack in the pit latrine's wall cannot be without an error as she did not state how wide that crack was and how far the pit latrine was from the house to have enabled her to recognize the person standing outside her house. In that respect, it is my view that the watertight identification of the appellant was only by PW1.

I am also convinced without a shred of doubt that PW1 gave a candid account of what transpired on the material night. And under Section 124 of the Evidence Act, the evidence of PW1 needed not be corroborated as long as the court was convinced that he spoke the truth. This court holds the view of the learned trial magistrate that PW1 spoke the truth.

Be that as it may, his evidence was corroborated by that of PW8 who produced the Medical Examination Report from Nairobi Women's Hospital that stated that PW1 was indeed defiled. Under Section 8(1) of the Sexual Offences Act a key element to the offence of defilement is penetration. Penetration on the other hand is defined in Section 2 of the Act as "***the partial or complete insertion of the genital organs of a person into the genital organs of another person.***" PW8 in his evidence in chief testified as follows:-

"The existence of lacerations is a sign of penetration on the child's anal area."

Earlier he had testified that the diagnosis made was sodomy. That evidence then leaves no doubt that PW1 was defiled and that the person who defiled him was the appellant.

On the age of the complainant, the same may be proved either by documentary evidence or oral evidence or by observation. None of the witnesses in court had documentation on the dates PW1 was born. On his part he said that he was ten years old. His mother (PW2) testified that he was born in the year 2002 placing his age at ten years as at the time of his testimony. PW5 Dr. Kamau indicated in the P3 form that PW1 was aged nine years. Whichever the age of the complainant, whether nine or ten years placed him under the age of 11 years. Therefore, it was proper for the investigators to draft the charge under Section 8(2) of the Sexual Offences Act.

The appellant submitted that the learned trial magistrate did not consider his defence. However, part of the judgment reads as follows:-

"I further find that the accused person's defence is an afterthought. The accused person had a chance to cross-examine all the prosecution witnesses and at no time did he raise the issue of bad blood or differences between him and PW1's family. The accused person's defence does not cast any doubt in the prosecution's case. I dismiss it as a sham."

The foregoing is a demonstration that the learned trial magistrate adequately considered the defence offered by the appellant. His assertion cannot therefore bail him out.

On the whole, the prosecution discharged its burden in proving Count II against the appellant beyond all reasonable doubt. His appeal has no merit and I dismiss it in its entirety unless he is otherwise lawfully set free.

It is so ordered.

DATED and DELIVERED at NAIROBI this 22nd day of JULY, 2015.

G. W. NGENYE – MACHARIA

JUDGE

In the presence:-

1. Appellant in person.

2.M/S Ndombi for the respondent.