



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 248 OF 2011

ANTHONY ANDREW KAMAU APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original Conviction and Sentence in Criminal Case No. 1779 of 2010 of the Chief Magistrate's Court at Mombasa – Hon.Kirui - PM)

JUDGMENT

ANTHONY ANDREW KAMAU hereinafter referred to as the appellant was Convicted and Sentenced to ten (10) years imprisonment in the alternative Count of indecent act on a boy contrary to section 11(1) of the Sexual offences Act No. 3 of 2006.

The particulars being that:-

“On diverse dates between 28th May and 30th May, 2010 within Mombasa County, he unlawfully and intentionally caused his penis to touch the anus of B N a boy aged thirteen (13) years”.

Being dissatisfied and aggrieved by both the Conviction and Sentence, the appellant lodged this appeal whose grounds are;

1. His fundamental rights to representation were violated.
2. There was no corroboration as Medical evidence was un-reasonably excluded.
3. Learned trial magistrate did not consider his defence prior to convicting him.

Brief facts.

The Complainant was a boy aged thirteen (13) years at the time of the alleged incident.

He was residing at [particulars withheld] – Mombasa under the Guardianship of one S W (PW 2) who is his Aunt. He was an orphan and a class three (3) pupil at [particulars withheld] Academy.

On 4th June, 2010 PW 2 arrived home and was informed by a sister of the Complainant that some two pupils in complainants school were found in the schools toilets committing sodomy and when they were interrogated by their teachers they mentioned the complainantas the one who had introduced them to that habit.

The following Monday she sent complainant's elder brother to go to the said school and find out what was happening.

The complainant was later taken home by his teachers and he disclosed that its the Accused who was sodomizing him after giving him money and he extended this behaviour to his fellow students. The appellant who was a neighbour was later arrested and charged with this offence.

O N (PW 4) a teacher at [particulars withheld] Academy testified to the effect that on 4th June, 2010, the complainant and his brother D went to the staffroom and reported that, he was being sodomised by a neighbour. In the company of other teachers they proceeded to the home of the complainant where PW 2 said that she had information that the complaint was being sodomised by the appellant.

After the close of the prosecution case, the learned trial magistrate noted and observed that, none of the Witnesses sufficiently implicated the Accused in the commission of the offence in respect to the main charge. He also stated that though the complainant claimed to have been sodomised no medical evidence was tendered to confirm that and he proceeded to acquit the Accused on the main charge of defilement under section 210 of the Criminal Procedure Code and placed him on his defence in respect of the alternative Count of indecent act.

PW 2 testified to the effect that it is the sister of the complainant who reported to her that the Complainant was mentioned in school by two boys who were found committing the acts of sodomy and said that its the complainant who had taught them these bad manners. Those two boys were not called as Witnesses nor was the complainants sister.

It was alleged that the boys were interrogated by their teacher before mentioning the complainant.

The teacher who was called to testify, O N (PW 4) told the Court that its the complainant and his brother D who went to the staff room and reported that Complainant was being sodomised by a man in the neighbourhood.

It is clear that there is contradiction between the evidence of PW 2 who is the complainants guardian and PW 4 who is Complainants teacher.

The appellant did mount a defence to the effect that he was a hawker dealing in second hand clothes. Had sold PW 2 clothes worth Ksh. 2,500/= and she had paid Kshs. 1,500/= leaving a balance of Ksh. 1,000/=/. She issued him with threats when he demanded to be paid the balance.

Its apparent from the evidence on record that its PW 2 who engineered the arrest of the appellant. The allegations of defilement appear to emanate from her family but not from the Complainants school as she had told the Court in her evidence in chief.

I find the case against the appellant was one riddled with contradictions and the conviction was not safe.

The appeal has merit and its allowed.

The Conviction is quashed and Sentence set aside.

The appellant is set at liberty unless otherwise lawfully held.

Judgment, delivered dated and signed in open Court this *21st* day of *September, 2015*.

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M. MU YA

JUDGE

21ST SEPTEMBER, 2015

In the presence of:-

Learned Counsel for the prosecution Mr. Wagila

The appellant present

Court Assistant Mr. Musundi

M. MUYA - JUDGE