



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 88 OF 2012

KAZUNGU YAA MWERI APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original Conviction and Sentence in Criminal Case No. 77 of 2011 of the Senior Resident Magistrate's Court at Kaloleni – **Hon. S. Wewa - SRM**)

JUDGMENT

KAZUNGU YAA MWERI was Convicted and Sentenced to life imprisonment for the offence of defilement of a child contrary to section 8(1) as read with section 8(2) of the Sexual offences Act No. 3 of 2006.

The particulars are that:-

“On the 15th day of March, 2011 in Kaloleni Kilifi County he committed an act which caused penetration of a male genital organ namely anus of T J a child aged Six (6) years”.

The grounds of appeal are that;

- (1) The evidence of the minor was not corroborated.
- (2) That the evidence adduced by the prosecution Witnesses was contradictory in nature.
- (3) The learned trial magistrate did not consider the evidence adduced by the defence.

This is the first appellate Court and its duty bound and obligated to consider and re-evaluate the evidence on record so as to arrive at its own conclusions and also to bear in mind that unlike the trial Court it did not have the opportunity to see the Witnesses and observe their demeanour. **Republic -Vs- Okeno 1972 EALR page 36.**

In the lower Court the prosecution availed six (6) Witnesses. The Accused/Appellant tendered a sworn statement and did not call any other Witness.

The essential ingredients in the offence of defilement are;

- (1) Age assessment

- (2) Penetration
- (3) Corroboration in certain circumstances and
- (4) Voire dire examination in cases of children of tender years.

Age assessment

An age assessment report was produced by PW 3 Patrick Bashishi of St. Lukes Hospital as prosecution exhibit No. 3. The age of the Complainant was assessed as six (6) years by one Wekesa medical Officer St. Lukes Hospital. I find no reason to fault this assessment and same is not denied by the appellant.

Penetration.

The Complainant knew the Appellant before this incident. He even told the Court that it was not the first time that the appellant penetrated his anus. He was taken to St. Lukes Hospital the same day. The Doctor who examined him found that he had bruises on the anus. An underwear was presented to him which was stained with semen. However, there is no indication whether it was subjected to forensic examination.

Corroboration

The Complainant testified to the effect that the incident took place in the morning hours at around 10:00 a.m.

PW 1 M N testified in Court to have seen Kazungu Yaa (the appellant) in the bushes at around 10:00 a.m. When she had gone to draw water.

He was lying on top of the complainant after removing their shirts half way. When he shouted his name, the appellant took to his heels but he was prevailed upon to stop. The matter was reported to the village elders and the assistant chief. It was decided that the appellant be taken to police station. The complainant was taken to Hospital for treatment.

The incident took place in broad daylight (10:00 a.m.).

The appellant was well known in the neighbourhood. He was caught red handed by M N (PW 1) who is the Complainants grandmother.

When the Complainant was taken for examination four (4) hours after the incident, bruises were found in his anal region.

I am satisfied that there was sufficient corroboration in this case.

Voire dire Examination

The minor was assessed to be six (6) years old. He was a child of tender years. It was therefore necessary to carry out a voire dire examination of the Witness before admitting his evidence so as to ascertain whether the child understands the nature of an oath and whether he is possessed of sufficient intelligence and understands the duty of speaking the truth.

In the Court of Appeal Case of **Johnson Muiruri -Vs- Republic 1983 KLR.**

It was held,

“Where in any proceedings before any Court, a child of tender years is called as a witness,

the Court is required to form an opinion on a Voire dire examination, whether the child understands the nature of an oath

(2) It is important to set out the question and answers when deciding whether a child of tender years understands the nature of an oath

It is in the contention by the appellant that the learned trial magistrate did not set out questions and answers as required and therefore this omission was fatal to the prosecution case.

I have gone through the records of proceedings and its noted that some form of Voire dire examination was conducted though not in the form outlined above (which is that of question and answer form). It is my considered view that the Court ought to place substance above form.

By reason of the foregoing I find that this appeal has no merit. The Court, however, notes that the learned trial magistrate had acquitted the appellant on the alternative count of indecent act. This was irregular and the correct procedure was to leave it in abeyance, However, this does not affect the main appeal which is found to be without merit and is disallowed.

Judgment delivered dated and signed this *18th* day of *September, 2015*.

.....

M. MUYA

JUDGE

18TH SEPTEMBER, 2015

In the presence of:-

Learned Counsel for the Director of Public Prosecution Mr. Masila

The appellant present

Court Assistant Mr. Musundi

M. MUYA- JUDGE