



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 385 OF 2010

IDD MOHAMMED MWAKIO APPELLANT

VERSUS

REPUBLICRESPONDENT

(From Original Conviction and Sentence in Criminal Case No. 2152 of 2009 of the Chief Magistrate's Court at Mombasa – Hon. Mwangi - SRM)

JUDGMENT

IDD MOHAMED MWAKIO hereinafter referred to as the Appellant was Convicted and Sentenced to twenty (20) years imprisonment for the offence of defilement of a boy contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006.

The particulars being that:-

“On the 22nd day of June, 2009 at Miriritni Vikombani Village in Mombasa County he unlawfully and intentionally caused his penis to penetrate the anus of M I a boy aged eleven (11) years”.

Being dissatisfied with both the Conviction and Sentence the appellant lodged this appeal.

The grounds are that there was no proper age assessment of the Complainant.

Secondly, the Conviction was against the weight of evidence adduced in Court.

Thirdly, that no DNA examination was conducted on the appellant so as to establish whether he was the one who had committed the offence alleged.

Fourthly, that alibi evidence adduced by the appellant was not considered by the trial Court.

This appeal is opposed.

The prosecution in the lower Court called six(6) witnesses in support of their case. The appellant gave a sworn statement and called one witness to buttress his defence.

This is a first appeal and its incumbent upon this Court to reconsider the evidence, evaluate it itself and arrive at its own conclusions. ***Okeno – Vs- Republic EALR 1972 page 32.***

The uncontested facts are that the complainant is the son of the Appellant. The appellant and his wife are separated. They were blessed with six(6) children including the complainant.

On the 23rd day of June, 2009 Binti Saidi Mwangolo

(PW 1) who is the assistant chief of Miritini Sub location acting on information received proceeded to the home of the appellant and found the complainant in the homestead, he appeared unhealthy and she decided to take him to Miritini Health Centre for examination. It was later confirmed that the child had been sexually assaulted. The child was later taken to Coast General Hospital where he was treated and a P 3 form filled.

The Appellant was later arrested that night by Administration police officers and was later charged with defiling his child.

The complainant in his unsworn evidence testified that on the night of 22nd June, 2009 the appellant who is his father had sexual intercourse with him twice by inserting his penis into his anus. Later policemen went and arrested his father. The Complainant was taken for treatment at Port Reitz Hospital. His body was swollen all over.

The complainant was examined by Dr. Ngone (PW 6) on 25th June, 2009. Upon examination he found that he had bruises on the anal region and a Whitish discharge.

Age assessment

The mother of the Complainant (PW 4) did not testify as to the age of the Complainant. PC Andrew Songo (PW 5) produced what he called an age assessment report as exhibit No. 2 for the prosecution. A perusal of the same shows that it bears the heading - "**Laboratory request**" Nowhere does it show that it is an age assessment report.

It shows diagnosis as that of sodomy but not age assessment.

The P3 form which was produced in Court as exhibit No. 1 merely shows the estimated age of the complainant as eleven(11) years which is a reflection of part I. Which is completed by a police officer requesting examination.

Penetration

The defilement is said to have taken place on 22nd June, 2009. The report did not emanate from the complainant. The area assistant chief (PW 1) did not disclose the source of her information when she decided to visit the home of the appellant. However, the defence case is that the complainants mother was an employee of the assistant chief and she had severally caused the arrest of the appellant on account of marital disputes.

In her evidence in Chief she told the Court that its the area assistant chief who called her and informed her that her son had been sodomized by the appellant who was her former husband.

When she saw the child at the chiefs office he was swollen all over. His penis, stomach and hands were swollen but she did not check his anus.

PW 1 had testified to have found the complainant in bad health his anal region was disintended and the penis was swollen.

PW 2 M H also testified that the Complainants body would be swollen and other times it would be normal. They had information that the child was sick but the appellant had threatened to beat his wife. The appellant himself did testify in his sworn statement to the effect that the complainant was a sick child and he used to take him to Hospital for medication but police officers who arrested him confiscated the

treatment notes.

DW 2 the sister of the appellant in her evidence in chief told the court that the complainant had renal complications and swollen body. The appellant had gone to her to borrow money for taking the child to hospital and she was surprised when she heard that he had been arrested. The appellants former wife had remarried and was under the employment of the assistant chief who caused the arrest of the appellant.

Upon a careful evaluation of the evidence on record its clear both from the prosecution witnesses and the defence that the complainant used to suffer from swelling complications all over his body. His mother did testify that when she saw him after the appellant was arrested he had a swollen stomach, penis and hands. The chief who found him at the appellants house found that he had a swollen penis and disintended anal opening. The same thread of evidence runs through the defence case.

There is no evidence nor has there been any suggestion that those swellings were caused by beatings from the appellant. However, its rather surprising that those swellings were not captured in the P 3 form which was filled by Dr. Ngone.

Its apparent that proper investigations were not carried out in this case. There existed a strained relationship between the appellant and his former wife now remarried and who was allegedly a house help for the area chief who arrested the appellant. Its instructive to note that the assistant chief did not disclose the source of information which led her to cause the arrest of the appellant.

Section 8 (2) of the Sexual Offences Act provides for imprisonment for life for a person who defiles a child aged eleven (11) years or less.

Section 8(3) provides for an imprisonment term of not less than fifteen (15) years for a person who defiles a child of between the age of twelve (12) years and fifteen (15) years.

Section 8(4) an imprisonment term of not less than fifteen (15) years for defilement of a child of between sixteen (16) and eighteenth (18) years of age.

Its trite law that because of this stipulated regime of punishment premised on the age of the complainant its incumbent upon the prosecution to endeavour to prove the age of the complainant either by way of a birth certificate, age assessment reports, other documentary evidence or through the evidence of the complainants parents and or guardians.

In the present case evidence as to the age of the complainant is wanting.

On the issue of penetration I find there is contradiction between the evidence of the Doctor who examined the complainant and the evidence of the other prosecution witnesses as well as the defence.

The Conviction was not safe. It is hereby quashed and the Sentence set aside.

The appellant is set at liberty unless otherwise lawfully held.

Judgment delivered dated and signed this **17th** day of **September, 2015**.

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M. MUYA

JUDGE

17TH SEPTEMBER, 2015

In open court in the presence of:-

Counsel for the prosecution Mr. Masila

Counsel for the appellant Miss Angawa holding brief Otwor

Court Assistant Musundi

M. MUYA – JUDGE

Court:

Certified copies of the Judgment to be furnished to the Defence and Director of Public Prosecution

M. MUYA -JUDGE