



REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRA NO.15 OF 2014

(Appeal originating from the conviction and sentence by J. M. Munguti in Lamu Cr. No.357 of 2012)

PATRICK MUTWIRI.....APPELLANT

VRS

REPUBLIC..... RESPONDENT

JUDGEMENT

The appellant was charged with the offence of defilement contrary to section 8 (1) (3) of the Sexual Offences Act Number 3 of 2006. The particulars of the offence were that on the 21/11/2012 at around 0005 hours in Lamu District within Lamu County, intentionally caused his penis to penetrate the anus of H K K, a child aged 15 years.

He was also charged with an alternative count of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act Number 3 of 2006. The particulars of the offence were that the appellant on 21/11/2012 at around 0005 hrs in Lamu District within Lamu County, intentionally touched the anus of H K K a child aged 15 years with his penis.

The appellant was convicted of the alternative count and sentenced to serve 10 years imprisonment. The grounds of appeal are that the case was not proved beyond reasonable doubt, credible witnesses were not called to testify, the case was a fabrication and that the appellant's reliable defence was not considered.

The appellant filed written submissions in support of his appeal. He contends that there are two types of indecent acts. One is indecent act to a child and the other is indecent act to an adult. The age of the child was not ascertained. The complainant's parents did not testify and his age was alleged to be 15 years. He further submits that the witnesses who allegedly saw him sodomizing the complainant were robbers whom he had reported to the police.

The appellant further contends that he had requested to have the case start *de novo* and his prayers were granted. However, the witnesses who had testified were not recalled. This was contrary to the provisions of section 150 of the Criminal Procedure Code. Lastly, the appellant submitted that his defence was quite strong but the trial magistrate dismissed it.

The State proposed to file written submissions but none were filed. Before the trial court, PW1 was the complainant. He testified that he was a standard seven pupil but had repeated the class. On 21/11/2012, he was coming from Costarica video shop at midnight where he was watching football and on his way home, the appellant stopped him. PW1 knew the appellant as a boda boda operator and he had his motor bike. The appellant held him and pushed him to the bush. He then showed him ksh.50/- note and removed his clothes. PW1 screamed but the appellant blocked his mouth. The appellant then started to

insert his penis into PW1's anus. Fortunately, passersby saw the appellant's motor bike parked. They checked and found the appellant sodomizing PW1. The appellant was arrested and while being taken to the police, he ran away. PW1 and members of the public went to the police station that night and found the appellant reporting that he had been robbed of ksh.9,500/- plus his phone. The appellant was arrested. PW1 was taken to a hospital at Mpeketoni and a P3 form filled.

PW2, Hamisi Suleiman had left the same Costarica video shop on 21/11/2012 at midnight. He saw a motor bike parked opposite a workshop. He was with two colleagues. They heard someone screaming quietly. They found PW1 with his trouser on his knees while holding a 50/- note. The appellant's clothes were also halfway down. They decided to take the appellant to the police station. On the way, the appellant tricked them and disappeared only to find him at the police station reporting that he had been robbed. It is PW2's evidence that the incidence was taking place in a bush.

PW3, Alex Mwasambu was with PW2. They saw the motor bike parked at a bushy place. He saw the appellant sodomizing PW1. They arrested the appellant. As they were taking him to the police station, the appellant escaped. When they reached the police station they found the appellant reporting that he had been robbed. They handed PW1 and the ksh.50/- note to the police.

PW4, Stephen Ewoi Ekale was a clinical officer based at Mpeketoni Hospital. He attended to PW1 who was 15 years old on 21/11/2012. He examined PW1's anus and saw bruises on the anus. Lab tests were conducted but no sperms were seen. PW4 also attended to the appellant on 21/11/2012. He was sent to the hospital by police officers on allegations that he had been attacked by a mob. There were no visible injuries on his sexual organ or evidence of discharge.

PW5, P C Stanley Kiplangat was stationed at Mpeketoni Police Station. He investigated the case. He went to the scene and saw the grass had been stepped on. The complainant was found to be 15 years. The appellant had reported at the station that he had been robbed of his ksh.9,500/- and an alcatel phone.

In his sworn defence, the appellant testified that he was a motor bike rider and a broker for water melons. He used to work with PW2. On 20/11/2012 he worked with PW2 up to 7.00 p.m. He went to sleep but at night he was sent by his wife to buy medicine. He passed through a drinking den, he met PW3 and other people. He also met Pw2 who demanded his money. They robbed him of his ksh.9,500/- and his phone. PW2 was demanding ksh.150/-. He decided to report to the police. He went back to his wife who gave him ksh.200/- and went back to buy the medicine while reporting at the police station, the robbers went there and the appellant was put in custody. He was surprised to be charged with the offence.

DW2, Anna Wamucii is the appellant's wife. They have two children aged 5 years and 1 ½ years respectively. She informed the court that the appellant is a good person.

The main issue for determination is whether the prosecution proved its case beyond reasonable doubt. The trial magistrate made a ruling and indicated that the evidence established the alternative count and acquitted the appellant of the main count of defilement. The best practice would have been to put the appellant on his defence on both counts and thereafter determine the case on the entire evidence. The trial court could have then concluded that what was proved was the offence of indecent act and not defilement.

Turning to the appeal, it is established that PW1 came out of a video case on 21/11/2012 at midnight. PW2 and PW3 saw a motor bike parked near a bush area. They heard someone screaming quietly. That person turned out to be PW1. The ksh.50/- note they found PW1 holding was produced in court. It is the evidence of PW1 that the appellant was caught red handed. PW2 and PW3 saw the appellant with his trousers on the knees. They also saw PW1's trouser on the knees.

The prosecution evidence has to be analysed in comparison with the defence evidence. The trial court evaluated the defence evidence. The trial court evaluated the defence evidence and dismissed it. According to the appellant, he had gone out at night to buy medicine. If he was robbed by PW2 and PW3 among other robbers, there is no connection between that robbery and the case of defilement. The appellant did not claim that PW1 was one of the robbers. I am equally satisfied that there was no

robbery. The prosecution evidence is that the appellant tricked the witnesses and went to the police station ahead of them. There was no robbery.

On the issue of defilement, PW1 testified that the appellant did not use a condom. The evidence of PW4, the clinical officer, does not that, there was penetration. PW1 had bruises on the anus. No sperms were detected on both PW and the appellant. Both parties were examined the same night of the offence. It is clear from the evidence on record that since the appellant was caught by PW2 and PW3 mid way to the act, he had not completed the act. There was no penetration and therefore no defilement. I do agree with the findings of the trial court that what was proved was indecent act with a child.

There was an order to have PW1, PW2 and PW3 recalled. That order seems not to have been pursued. The appellant did not re-visit the issue. The record of the trial court is quite clear. There was no prejudice on the part of the appellant. Similarly, the fact that PW1's parents did not testify cannot be an issue. The incident occurred past midnight and PW1's parents were not at the scene.

Given the evidence on record, I do find that the prosecution proved the alternative count of indecent act with a child beyond reasonable doubt. The defence evidence did not raise doubt on the prosecution case. I do find that the appeal lacks merit and is disallowed.

Dated, signed and delivered at Malindi this 27th day of October, 2015.

SAID J. CHITEMBWE

JUDGE