REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO. 110 OF 2015

E M M ..... APPELLANT

VERSUS

REPUBLIC ..... STATE COUNSEL/DDP

(An appeal against the conviction and sentence by Hon. D.M. Machage, Resident Magistrate in Criminal Case No. 198 of 2013, Principal Magistrate's Court at Mariakani dated on 26th September, 2013)

JUDGEMENT

E M M (herein referred to as the Appellant) filed a petition of appeal in this court seeking to have the conviction and sentence of the Learned Resident Magistrate delivered on 26th September, 2013 in criminal case No.198 of 2013 Mariakani quashed.

In the said case, the appellant was charged, tried and convicted upon trial 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 diverse date between the 17th day of March, 2013 and 23rd day of May, 2010 at [Particulars Withheld] village in Kaloleni district of Kilifi County within the Coast Region the appellant intentionally caused his penis to penetrate the ANUS of K.M. a child aged 11 years.

The appellant also face an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006.

The fact being that on the diverse dates between 17th day of March, 2013 and 23rd day of May, 2013 at [Particulars Withheld] village of Kilifi County within the Coast Region, the appellant intentionally touched the ANUS of K.M. a child aged 11 years with his penis.

The Appellant was found not guilty for the offence defilement in the main court and acquitted thereof.

He was however found guilty for the alternative charge of indecent Act on a child contrary to section 11(1) of the sexual Offences Act and was convicted accordingly under section 215 of the Criminal Procedure Code.

SUMMARY OF EVIDENCE

To determine this appeal, the court will briefly consider the evidence which was tendered by the prosecution and defence

PROSECUTION EVIDENCE

PW1, K.M. was a minor and a voire dire examination was conducted before he testified to establish whether he understands the meaning of an oath and importance of telling the truth. He testified that he schools at Mariakani in class two (2) and that he was 12 years old, though would not tell when he was born. (The court observed that he could be that age from his physical feature).

PW1 told the court that the accused was his father and used to stay with him in a three-roomed house where they shared one bed. He also told court that his mother passed on but could not remember when she died. He said that his father used to cook for him.

PW1 went on to testify that in March 2010, the father defiled him by putting his penis into his anal opening. He said that he placed it on him removed it and he was hurt. He did not tell anyone for he feared for his life. Later, PW1 said that he informed his teacher, Mrs. Gitonga and was taken to hospital where he was examined. Then a report was made to the police at Mariakani.

According to PW1, it was the first time the father did this to him.

In cross examination by the accused, PW1 said that he was the one who defiled and caressed him he denied that he had been instructed by his mum or anyone else (it was however observed that the boy looked away)

In re-examination PW1 said that the accused did not penetrate him (it was noted that he broke down again and was allowed to settle down)

He was examined by the court and PW1 said that his father, the accused did not penetrate nor caress him with a view of wanting to penetrate him. He said that nobody told him to lie before the police or anywhere else.

PW2, PETER GITONGA, told court that he was a teacher at C.C. Primary school Mariakani, and that he has taught for about 15 years. He said he knew the complainant who was in standard 2 and the accused as a parent in the school. He however did not know the complainant's mother and indicated that most students have paternal difficulties.

PW2 went on to state that on 15. 5. 2013 he was in the said school when he received a report from Simba Mutoka, a Board member, who told me that this child (referring to the complainant) had been defiled by the parent. The Mutoka did not specify the date of the incident.

PW2 informed the authorities being the D.C.I.O, D.E.O where the young man was taken. He indicated that the boy had fear appeared stricken and was given a guardian to be taken to Ukambani area.

When cross-examined by the accused person, PW2 told him that he had known him for sometime and oer this issue. He also said that there was a similar instance again mentioned to him but did not know what happened again but it was with heavy heart.

PW3, HUSSEIN KOMBO introduced himself as the Deputy Head Teacher, C.C. Primary School. He confirmed that the complainant was a student in his school.

He told court that on 31. 5. 2013, a Friday he was in school when he was instructed to file the complaint with the children's officer and he did it. He said he took the complaint to the chief, then to the police station and was taken to hospital for examination and treatment at the District Hospital when the doctor said that he had been defiled. He told the court that he did not know about the incident.

In cross examination PW1 said that he was informed and did not see it happen.

PW4, MWANGOLO CHIGULU, a clinical officer at Mariakani District Hospital told court that he knew Bildad Bargoge for he had been working with him for 4 years and was therefore conversant with his handwriting and signature. He also said that he had a P3 for a 10 year old male minor who had been sent by the OCS on 31. 5. 13 at 10.00 a.m. for filling of P3. He said that the charge was of Sodom by father and the victim was sober. He also said that he had a normal external with loose anal stinct. He further said that he had a healed anal scar. He noted that it was a confirmed case of sodomy and prepared the P3 form which he said was filled on the same day. Exhibit 1.

PW4 was cross-examined by the accused and he said that the young man was examined by his colleague who confirmed sodomy. He also said that it was a repeat offence for the history taken from the victim that he had been done many times.

PW5 No. 52949 CORPORAL ISAAC WALIMBWA told court that he was attached to the Gender and Children Department at Mariakani police station. He said on 31. 5. 13, he was on duty when the complainant, child was escorted by children officer and his teacher for offence of defilement. That he observed the child was walking with difficulties. He interrogated the child and he told me that the father sodomized him. He escorted the child to Mariakani District Hospital where the allegations were established. He recorded the statement and charged the accused with offence.

In cross-examination, he realized that the child was walking with difficulties. He also said that he interrogated the accused but he denied the allegations.

DEFENCE EVIDENCE:

The appellant E M M, was placed on defence and he opted to give an unsworn statement defence. He called no witness.

The appellant told court that he is a driver. He said that the complainant is his son and had been taken to his uncle's place. He said that the offence was not true.

The accused explained that the complainant's mother had died and was with him. That he had been to work having left the complainant at home. He then met the children's officer who informed him that an offence had been committed. He was taken to police station where he was charged with the offence herein. He said that he did not commit the offence. He also said that the complainant's uncle wanted to take him away but he had declined. This is when they told him that they will ensure he is taken away. He denied the offence.

In convicting the appellant the learned trial Magistrate, Hon. D.M. Machage in his judgement at page 3 line 8 – 18 stated that:

"His testimony was that he was caressed and defiled by his father was corroborated by the testimony of the clinical officer who examined him and filled P3 form, concluding that he had loose anal opening and that there was the presence of healing scar. Tied with that is the testimony of his former teacher that had told her early and repeated the same in court. I proceed to find the accused person guilty of the offence of indecent Act on a child contrary to section 11 (1) of the Sexual Offences Act and proceed to convict him accordingly under section 215 of the Criminal Procedure Code. The main charge fails for reason that 24 hours had elapsed between the date of the offence and the date of reporting of the incident.

I therefore acquit him on that but find him guilty of the offence of indecent Act proceed therefore to convict him and trial".

Upon being convicted, the appellant was aggrieved and he filed an appeal against the conviction in respect of the alternative charge.

GROUNDS OF APPEAL:

The appellant filed a petition of appeal on 8. 5. 2014 and amended grounds of appeal (undated) in which he faulted the trial Magistrate for convicting and sentencing him. He advanced the following grounds:

1. THAT the learned trial Magistrate erred in law and fact in a admitting the evidence of the victim without seeing the victim's evidence was unreliable as he contradicted himself.
2. THAT, the learned trial Magistrate erred in law and fact in failing to consider that the minors's age was not proved within the law requirements.
3. THAT the learned trial Magistrate erred in law and fact in failing to consider that one Simba Mutoka, a board member, who informed PW2 about the alleged incident was unreasonably left out of the prosecution's case thus the was a serious blow to the prosecution.
4. THAT the learned trial Magistrate erred in law and fact in failing to consider that the doctor's report was shoddy thus unreliable to sustain conviction and sentence.
5. THAT, the learned trial Magistrate erred in law and fact in failing to see that there was no fair trial in this case thus prejudice to me (appellant).
6. THAT the learned trial Magistrate erred in law and fact in failing to consider that his defence was reliable to award him the benefit of doubt.

He prays that the appeal be allowed conviction quashed and sentence set aside.

APPELLANT'S SUBMISSIONS

During the hearing on 28th September, 2015 the appellant was led through his grounds of appeal and written submissions filed in court.

He submitted that the complainant's evidence was what he had been told to say in court. That he said that he had been defiled by him but in re-examination by the prosecution at page 4 line 4 of the proceedings said

"He did not penetrate me. My father, the Accused did not penetrate me he did not caressed me With a view of penetrating me."

He stated that the complainant contradicted himself in his evidence, hence he was a witness of doubtful integrity.

The appellant, to support his second ground, submitted that the victim's age which is an important ingredient that requires to be proved in a case of defilement was not assessed by the prosecution.

For ground three (3) the appellant submitted that Mr. SIMBA MUTOKA, a board member is alleged to have reported the alleged incident to PETER GITONGAA, PW2, but was not called to testify in court so he could tell the court what he knew about the incident. He stated that PW2's evidence could not be awarded any weight as he relied on information from another source; which source was not put in a witness box.

The appellant also submitted that he did not agree with the doctor's evidence of PW4 who testified and produced the P3 form is not the doctor who examined the complainant. In his written submission the appellant stated that the doctor's findings were inaccurate and could not be relied on. He referred the court to page 7 line 14 where it was indicated

"He had normal external, he had loose anal Stinct."

To this he submitted that the doctor did not state what caused the said anal stinct to be loose. He also state that evidence was contrary to what the complainant stated.

The appellant further submitted that his case was not conducted well in that all the witnesses testified on

hearsay evidence, which evidence was relied on by the trial Magistrate in convicting him. He singled out PW2, the teacher in the school where the complainant was attending. He also submitted that he was taken to court without investigations being carried out.

Finally, the appellant submitted that the trial Magistrate had no confidence in what he said in his defence where he explained what had happened until he was arraignment in court.

SUBMISSIONS BY RESPONDENT

M/S Ogweno, learned counsel for the state opposed the appeal.

She submitted that the appellant was convicted and sentenced for the alternative charge of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act. She stated that the section does not categorize in terms of age as long as it is established that two different persons touched one another. Then an indecent act will have been committed.

She also submitted that for the evidence on record, PW1 said that the appellant used his penis to touch his anus and it had happened on several occasions.

M/S Ogweno submitted that the P3 form produced indicated that there were injuries. She cited the entries at page 3 of the form:

> "loose anal sphincters and there were holes and healed scars at the scrotal……"

She further submitted that there was evidence that the victim had difficulty in walking at the time he reported to PW5.

M/S Ogweno for the state disputed the claim by the appellant that there was bad blood or grudge between the appellant and the victim since the two had been living together in the same house since his mother died. She also said that there was no act of a grudge between the appellant and the victim's uncle as he was living with him.

Finally, M/S Ogweno submitted that section 11 (1) of the Sexual Offences Act provides for a minimum sentence of 10 years imprisonment hence the sentence meted out against the appellant as safe.

ANALYSIS AND DETERMINATION

Since it is my duty to re-evaluate the evidence recorded by the trial court and come to my own conclusions and findings (see OBENO V. REPUBLIC). I have considered the grounds of appeal, submissions by both parties and the evidence that was recorded by the trial court and find the following issues have emerged for determination in this appeal:

1. Whether the trial magistrate admitted the evidence of the minor without seeing that the same was unreliable as he contradicted himself.
2. Whether the trial magistrate failed to consider that the minor's age was not proved.
3. Whether by failing to call one Simba Mutoka, a board member who framed PW II after the alleged incident caused a blow to the prosecution's case.
4. Whether the doctor's report was shoddy and un-reliable hence could not sustain the appellant's conviction and sentence.
5. Whether the trial magistrate failed to see that the trial was unfair and prejudicial to the appellant.
6. Whether the trial magistrate failed to consider the appellant's defence as to award him the benefit of doubt.

I will deal with the issue directly.

With regard to the first issue, I read through the record of proceedings in respect of the minor's (PW1's)

evidence at page 3 to 4.

In PW's evidence in chief at page 3 line 13 of the proceedings, testified that:

"March, 2013 he defiled me, his penis into my Anal opening. He placed it on me. He removed it. I was hurt. I did not tell anybody. I feared for my life. I later informed my teacher – Mrs. Gitonga is the person I informed."

In cross-examination by the appellant at page 3 line 21 through page 4 line 1 of the proceedings, PW1 stated:

"It was you who defiled me. Yes, you caressed Me."

Also on being re-examined by the prosecution, PW1 at page 4 line 4 of the proceedings said:

"He did not penetrate me……."

The court also examined the complainant and he said at page 4 line 6 to 7 of the proceedings:

"My father the accused did not penetrate me. He did not caress me with a view of wanting To penetrate me……"

From the submissions of PW1's evidence which I have highlighted, it is clear that his evidence in chief and cross examination is at variance with the evidence during re-examination by the prosecution and court. In his judgement the trial magistrate failed to take note of these variances or inconsistence in the evidence of PW1. In fact he admitted that he ignored what the witness said when being cross-examined by his father. At page 2 line 19 to page 3 line of the judgement, the trial magistrate stated:

"The turning point was when he was cross-examined by the accused person upon asking him "if indeed he, (the complainant) wanted to jail him for life" the young boy changed his mind therein wavered a little. I choose to ignore that part of proceeding and laid emphasis on what he said during examinations in chief and cross examination by the accused person."

It appears to me that the magistrate was bent on finding the appellant guilty that he ignored glaring in consistencies in the complainant's (PW1's) evidence even on the face of allegations/claims by the appellant that he had been told to lie against him. On page 3 line 21 through to page 4 line 1, PW1 had this to say when he was cross-examined by the appellant.

"……..I have not been instructed by my mum or anybody else for the matter" It should be noted that the trial magistrate, who was privy to his demeanour during the hearing noted that he looked away at the time.

And when re-examined by the court, PW1 at page 4 line 8 of the proceedings said:

"Nobody told me to lie before the police or anywhere else."

It is also worth noting that during the trial, the trial magistrate observed that the complainant (P.W.1) was tearful at the onset of giving his testimony. He also observed that when responding to his father, the appellant during cross examination, "the boy looked away "when he was saying that he had not been instructed by anyone. Further, the trial magistrate observed that the complainant looked down when he was being re-examined by the prosecution and he said that his father, the accused did not penetrate him and neither did he caress him with a view of penetrating him.

From this evidence, it is clear that the trial magistrate observed the complainant's demeanour during the trial but he failed to address or interrogate the reason why the complainant was breaking down or looking away when testifying or being cross-examined by the appellant.

From the evidence of PW1 and even the submissions of M/S Ogweno, it came out that the court the complainant was staying with his father, the appellant since the demise of his mother until the arrest of the appellant; hence the overwhelming emotions on treating me.

A judgement is supposed to be based on the facts and the law, under section 169 (1) of the Criminal Procedure Code.

"Every judgement shall, except as otherwise expressly provided by this court, be written by under the direction of the presiding officer of the court in the language of the court, and shall contain point in point for determination the decision thereon and the reason for the decision, and shall be……."

In the instant case, the trial magistrate based his judgement mostly his own opinion according to what he wanted to believe had happened between the complainant and Appellant that he failed to consider the inconsistence in the evidence of the complainant. His judgement depicts one who had clearly been prejudiced against the appellant.

For ground two (2), from the proceedings, I established that the appellant was charged, tried, convicted and sentenced to serve ten (10) years imprisonment for the offence of indecent act on a child contrary to section 1 (1) of the Sexual Offences Act, where upon conviction, one is liable to imprisonment for a term of not less than 10 years.

Section 11 (1) of the Sexual Offences Act states that :

"Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child."

I agree with M/S Ogweno, Counsel for the state's submission that from the definition it is clear that the age of the victim is not required to be proved as in the case of defilement under section 8 of the same act.

In fact it will be noted that according to PW1, although he did not know when he was born, he said he was 12 years old. The P3 form (EXHIBIT 1) Which was produced by PW4 a clinical officer indicates that the complainant was 10 years, which is the age the trial magistrate based his findings.

With regard to the 3rd issue it is the evidence of the PW2, Peter Gitonga the victim teacher that the report that this child had been defiled by his parent was given to him by one simba Mutoka, a board member. This witness was never called to give evidence.

According to the provision of section 143 of the EVIDENCE ACT,

"No particular number of witness shall in the absence of any provision of the law to the contrary be required for the proof of any fact."

But in Bukenya and Ruth vs Uganda (1972) E.A 549, the rule which has been applied by the court of appeal was set out as follows:

i. ……the prosecution must make available all witnesses necessary to establish the truth even though their evidence may be inconsistent.
ii. ……..the court has the right and duty to call a person where evidence appears asential to the just decision of the case."
iii. ……..when the evidence called is barely adequate the court may infer that the evidence of the uncalled witness would have tended to be adverse to the prosecution

In this case, with the inconsistencies the evidence of the complainant, Simba Mutoka was a vital witness as he was the one who gave information to PW2 that caused the arrest of the appellant and initiation of this case. From the evidence of PW2, it was this Simba who seemed to know what was happening between PW1 and the complainant hence raised the flag. He was not called as a witness and there was no

explanation for this; Leading to my concluding that simbas's evidence would have been unfavourable to the prosecution's case.

For ground or issue number four (4), I find that the P3 form (exhibit 1) was produced by PW1 Mwangolo Chigulu who was not the person who filled it. However, PW4 informed court that he was not a maker of the P3 form but that he had known to maker, one Bildad Bergogi for a period of 4 years and was therefore conversant with his handwriting and signature. Despite this the basis for him producing was not laid by the prosecution as required under section 72 of the Evidence Act. It was not shown why Bargoge himself could not come and produce the P3 form he filled after examining the complainant. It will be noted from a perusal of PW4 and the P3 form (Exhibit 2) that the findings were unclear and needed to be elaborated which could only have been done by the one who examined the complainant.

For the judgement, the trial magistrate appeared to confirm that the complainant had been defiled.

"His testimony was that he was caressed and defiled by his father was corroborated by the testimony of the clinical officer who examined him and filled the P3 form concluding that he had a loose anal opening and that there was the presence of healing scar. Tied with that is the testimony of the former teacher that had told her early and reported in the same court. I proceed to find the accused person guilty of the offence of indecent Act on a child contrary to section 11 (1) of the Sexual Offences Act and proceed to convict him accordingly under section 215 of the Criminal Procedure Code.

The main charge fails for the reason that 24 hours had elapsed within the date of the offence and the date of reporting of the incident.

But then he goes on to convict him for the offence of indecent act of a child in the alternative charge and the reason he gives for case is unsubstantial as even the clinical officer did not offer such explanation. Infact, just like in other instances in to judgement, the trial magistrate again came up with his own theory as to why he could not find the appellant guilty for the offence of defilement despite the clinical evidence.

Lastly there was the issue of the trial magistrate having failed to consider the appellant's defence. In his defence, the appellant denied the offence(s) he was charged and explained how he was arrested. He said that he had declined to allow the complainant's uncle take him away when his mother, who was his wife died and they said that they will ensure he is taken away. Indeed, I read through the judgement and confirmed that the appellant's defence was not considered by the trial magistrate. I find there was need to do this since as in his defence, the appellant raised the issue of having been implicatd by the complainant's uncle. The trial magistrate ought to have weighed this evidence against the prosecution's evidence.

In the final analysis, I find that the prosecution's evidence riddled with inconsistencies, also anomalies and gaps, which raised doubts whose benefit should have gone to the appellant.

In the result, I allow the appeal, quash the conviction and set aside the sentence.

The appellant shall be released forthwith unless otherwise lawfully held.

Judgement delivered, dated and signed the 17th day of November, 2015.

D. CHEPKWONY

JUDGE

In the presence of:

Mr. Muteti for the state

Appellant in person

Court Assistant Mr. Kiarie