REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 85 OF 2012

DAVID ANZAYA …….... APPELLANT

V E R S U S

REPUBLIC …….... RESPONDENT

(Appeal against conviction and sentence from the judgment of [C.KENDAGOR, R.M.] dated 27.3.12 in the Chief Magistrate's Court at Kakamega in Criminal Case No. 63 of 2012)

J U D G M E N T

The appellant was charged with two counts of committing an indecent act with a child contrary to **section 11(1)** of the Sexual Offences Act No. 3 of 2006. The particulars of the offence for the first count were that the appellant *on the 5.1.2012 at [particulars withheld] in Kakamega Central district within Western Province intentionally and unlawfully touched the buttocks of **M N** a child aged 17 years with his penis. The particulars of the offence for the second count were that the appellant on the 16.12.2011 at [particulars withheld] in Kakamega Central district within Western Province intentionally touched the buttocks of **A O** a child aged 16 years with his penis.*

The appellant was convicted of the offence and sentenced to serve 10 years imprisonment. The grounds of appeal are that he pleaded not guilty to the charges, the evidence on record was not sufficient to sustain the conviction, the case was not proved beyond reasonable doubt, the court was used to settle scores between the complainants' parents and the appellant, the sentence is harsh, no alarm was raised when the offence was being committed and the incidents were not reported to anyone. The appellant further filed supplementary grounds of appeal and it is indicated in those grounds that the doctor who testified exonerated him from the offence as he examined the boys and found that they had not been defiled and that his sworn defence was not considered. During the hearing of the appeal the appellant submitted that he was charged because he demolished a kiosk that belonged to the complainant's auntie and that although he was arrested by members of the public, none was called to testify.

Miss Opiyo, State Counsel, opposed the appeal. Counsel submitted that the appellant had a habit of defiling minors near his kiosk and the evidence was corroborated by PW2, PW3 and PW4.

PW1 before the trial court was A O who was aged 15 years old. His evidence is that he knew the accused and on the 6.12.2011 he was heading home when the accused called him to his shop. It was about 5.00 p.m. At about 6.00 p.m. the appellant told him to assist to ferry firewood to his kiosk. At about 7.00 p.m. PW1 wanted to leave but the appellant told him it was not safe and offered him to stay at his place. The appellant started talking about a boy called **O** with whom he used to put his penis in his buttocks and the boy would do the same to him but O's mother took him to Uganda. In the evening the appellant cooked food and they ate. At night the appellant went and removed his clothes and tried to sodomise him. The appellant tried to rub his penis on his buttocks. PW1 told him to stop and the appellant told him not to inform anybody or he would injure him. The appellant gave him underwear in the morning and he went home. His mother enquired where he was. His uncle nicknamed p (PW2) had seen PW1 at the appellant's home and he informed his mother. PW1 was taken to the police station and later taken to Kakamega hospital where his P3 form was filled.

PW2 L I M is PW1's uncle and works as a photographer. He saw PW1 coming out of the appellant's kiosk and told him to go home. He had heard that the appellant used to sodomise young boys and decided to notify the assistant chief. The appellant was called before the assistant chief while PW1

and another boy (PW3) were taken to Kakamega hospital for examination.

PW3 M N was a boy aged 16 years old. His evidence was that on the 4.1.2012 at about 4.00 p.m. he was heading home when the appellant called him to his kiosk. He asked him to assist in selling in his kiosk which he did. PW3 wanted to leave but the appellant told him that the road was not safe and would sleep at his place. The appellant cooked food while PW3 was selling at the kiosk. In the evening the appellant told him about how he used to have sex with O, a boy and they would alternate. The appellant told him that he does not like girls as they are sick. They slept and at about 11.00 p.m. PW3 felt pain in his ass as something was pressing him down. He found the appellant who held him by the mouth and told him not to scream. The appellant stopped and in the morning PW3 went home. He was called to the village elder and met PW1 with his father and the chief. He was later taken to hospital and treated.

PW4 KENNEDY NJAYA is a registered clinical officer who was based at the Kakamega Provincial General Hospital. He filled the P3 forms for PW1 and PW3. He classified the injuries as harm. The complainants were not taken for lab tests as they had long calls of nature. **PW5 APC ELPHAS BET** was attached to the Matioli AP camp. On the 6.1.2012 he was at the camp at about 12.00 p.m. when the appellant was taken there on the allegations that he had sodomised two boys. He escorted him to Bukura police station. **PW6 PC DAVID NTHIGA** was based at the Bukura police patrol/station. He received the appellant from PW5. He recorded the statements of the two complainants and took them to Bukura health centre. The boys were later referred to Kakamega Provincial General Hospital and the appellant was taken to Kakamega police station. PW6 investigated the case and had the appellant charged.

The appellant was put on his defence and he gave sworn evidence. He testified that on the 6.1.2012 at around 9.00 a.m. he was at his shop drying some firewood when the village elder told him that he was wanted by the assistant chief. He went there and he was accused of sodomising the boys. He was slapped by the assistant chief twice and told to admit the offence. His face was swollen and he was taken to Bukura. He further testified that PW3 helped him one day to sell at his shop and he slept there.

The main issue for determination is whether the prosecution proved its case beyond reasonable doubt. The prosecution evidence is to the effect that the two complainants slept at the appellant's home and he tried to sodomise them. The evidence of PW1 and PW3 is that on different dates they slept at the appellant's house. The appellant talked to them about how he used to have sex with a boy by the name O. At night the appellant tried to sodomise them. The medical evidence does not categorically indicate that the boys were sodomised. PW1 testified that he stopped the appellant from entering him. Section 2 of the Sexual Offences Act defines an indecent act to include any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act of penetration. The same section defines genital organs to include the whole or part of male or female genital organs including the anus.

The appellant denied committing the offence. He admitted that at one time PW3 slept at his place. He contends that he was forced to admit the offence. The trial court found that the two complainants were trustworthy and I do find that the prosecution evidence was quite direct and was corroborated by the evidence of PW2. The narration by the two boys that the appellant talked of one O does make believe that the appellant tried to sodomise the two boys. For an act of indecent act to be established it has to be shown that the genital organ of the accused touched the breasts or buttocks of the complainant. Both complainants testified that as they were asleep they found the appellant on top of them and he had removed their clothes.

Given the evidence on record, I do agree with the conclusion of the trial magistrate that the appellant committed the offence. The prosecution proved its case beyond reasonable doubt. The appeal lacks merit and the same is disallowed.

Delivered, dated and signed at Kakamega this 17th day of February 2014

SAID J. CHITEMBWE

J U D G E