REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 116 OF 2012

(An appeal against both conviction and sentence of the Chief Magistrate's court at Kakamega in Criminal Case No. 2360 of 2009

[S. M. SHITUBI, CM] dated 25th May, 2012)

RONALD REAGAN LUBASO …..... APPELLANT

VERSUS

REPUBLIC …..... RESPONDENT

JUDGMENT

The appellant was charged in the subordinate court with un natural offence contrary to Section 162 (a) of the Penal Code. The particulars of charge were that on 12th December 2009 in East Kakamega District within Western Province had carnal knowledge of E S N against the order of nature. He was also charged with an alternative count of indecent act to a child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006. The particulars were that on the same day and place intentionally and unlawfully contacted the private parts namely buttocks of E S N, a boy aged 12 years with his penis. He denied both charges. After a full trial, he was found guilty of the main count, convicted, and sentenced to serve 10 years imprisonment.

Being aggrieved by the decision of the trial court, he has now brought this appeal against both conviction and sentence. The appeal was filed on his behalf by his counsel. The grounds of appeal are as follows -

1. The trial magistrate erred in law in convicting the appellant in total disregard to the law.
2. The trial magistrate erred in convicting the appellant on a defective charge sheet.
3. The trial magistrate erred in law in convicting the appellant when the facts of the charge did not support the charge.
4. The trial magistrate grossly erred in relying on contradictory, uncorroborative and unreliable evidence by the prosecution witnesses.
5. The trial magistrate erred in fact by completely disregarding the appellants case and evidence thereby occasioning miscarriage of justice.
6. The trial magistrate erred in law in imposing a sentence that was not only manifestly excessive but illegal.

At the hearing of the appeal, Mr. Vadanga for the appellant relied on written submissions filed. The learned Prosectuting Counsel Ms Opiyo opposed the appeal. Counsel submitted that the charge sheet was not difective. The complainant knew the appellant before the incident and recognized him. Counsel emphasized that the medical professional PW4 confirmed that there was penetration to the anus. In counsel's view, the sentence was proper. Counsel urged the court to dismiss the appeal.

In response to the submissions of the Prosecuting Counsel, Mr. Vadanga, learned counsel for the appellant stated that the doctor who actually examined the appellant did not testify in court. He was merely represented by a different medical practitioner. In counsel's view it was possible from the evidence that the appellant was not the culprit, even if penetration was actually proved.

The facts of the prosecution case are in brief, that on the 12th December 2009 at about 3 a.m., the complainant E a boy aged 14 years was proceeding home from a funeral vigil. He was together with others. The appellant who was a neighbour, emerged from behind, and threw soil at them causing the other children to run away. The complainant tried to run away but slipped on a piece of wood and fell down. The appellant then removed the complainant's pair of shorts and inserted his penis in his anus. The complainant screamed and members of the public came to his aid. The matter was reported to the mother of the complainant PW2 C N by S, one of those people who was with the complainant when the appellant attacked them. The complainant was later taken to hospital for treatment and a P3 form was filled. The appellant was consequently arrested and charged in court with the offence.

When put on his defence, the appellant gave sworn testimony. He stated that he was at the funeral vigil. That one of the people who was said to be with the complainant, PW3 S, had started creating trouble at the function. When the appellant left to go to his home, he found two young men attempting to defile a girl who was about 9 years of age. He rescued the girl and returned her to her home (the funeral homestead). He left again to go to his home which was nearby. The young men he met started attacking him and he called the village elder. He stated that he had an existing land dispute with the mother of the complainant. He called a witness DW2 Cleopard Minishi Mbasu who was his brother. The witness also stated that he was at the funeral vigil function. That he also was aware of the rescue of a girl who was being molested by the two boys. That it was S and A who attacked the appellant. He also stated that there was an existing land boundary dispute between the families.

I need to observe here that part of the evidence herein was taken J. M. Githaiga, PM. That was the prosecution case. One witness, that is the appellant, was heard by J. K. Ngeno, CM. His defence witness was heard yet by another magistrate, S. M. Shitubi, CM, who ultimately delivered the judgment.

On the basis of the evidence on record, the second succeeding magistrate found that the prosecution had proved their case against the appellant on the main count of committing an unnatural act. The learned magistrate consequently convicted and sentenced the appellant. Therefrom arose the present appeal.

This being a first appeal, I have to start by reminding myself that I am duty bound to re-evaluate all the evidence on record and come to my own conclusions and inferences taking into account that I did have an opportunity not see the witnesses testify, to determine their demeanour and give allowance for that. See the case of **Okeno -vs- Republic [1972] EA 32.**

I have re-evaluated the evidence on record. I certainly did not see the witnesses testify to determine their demeanour. The learned magistrate who wrote and delivered the judgment also did not see most of the witnesses testify, including the appellant. She only saw the last witness who was the defence witness testify. In effect, she could not determine the demeanour of all the prosecution witnesses and the appellant. She could only determine the demeanour of DW2 Cleopord Minishi Mubasu.

This is a case grounded on credibility of the evidence of the complainant and that of the appellant. The appellant admitted that he was at the funeral vigil where the complainant claimed he was assaulted sexually while going home. The appellant stated that he was the one who was attacked by boys, who were annoyed that he had rescued a young girl they wanted to sexually molest. He also claimed that there was a land dispute between him and the complainant's mother.

It is curious that the complainant did not report the incident to his mother. It was S PW3, who was said to be one of the boys from whom a girl was rescued who reported the incident to the complainant's father and mother. The appellant gave a detailed evidence on oath, and the prosecution did not challenge the contents of that defence. The defence was that it was his action of rescuing a girl, which infuriated the boys including S who attacked him with stones.

Weighing the evidence of the prosecution and defence, and being mindful of the fact that it was the duty of the prosecution to prove the guilt of an accused person beyond reasonable doubt, I am of the view that the evidence of the appellant was more believable than that of the prosecution. In my view, the appellant was more credible. If the learned magistrate had weighed the defence against the prosecution case in my view, she would not have come to the conclusion that the prosecution had proved its case against the appellant beyond reasonable doubt. There were two sticking issues to be considered. Firstly, his snatching of a girl from the boys and secondly, the existing land grudge. The benefit of doubt should have been given to the appellant.

The second reason why this appeal will succeed is because of the medical evidence. The P3 form merely says that there was a swelling on the complainant's anus. There was no injury to the rectum. In my view, the fact of having a swelling on the anus is not evidence of a sexual assault. The swelling could have been caused by other factors including an infection or hard stool. The witness who testified as a Clinical Officer, that is PW5 Kennedy Njanga was also not the person who filled the P3 form or treated the complainant. He could not therefore be asked serious questions in cross-examination on the observations made in the report. Consequently, the prosecution did not prove penetration. It therefore means that the alleged offence was not proved.

In the result, I find merits in the appeal. Same is allowed. I quash the conviction, set aside the sentence. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Kakamega this 29th day of May 2014

George Dulu

JUDGE