REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 121 OF 2011

JOHN ONZERE KAMBI:: APPELLANT

VERSUS

REPUBLIC:: RESPONDENT

JUDGEMENT

The appellant, JOHN ONZERE KAMBI, was convicted for the offence of Defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act.

The particulars of the charge were that the appellant;

***"Unlawfully and Intentionally caused penetration of his genial organ (penis) into the genital organ* (anus) of"** the complainant.

When canvassing the appeal, Mr. Miyienda, the learned advocate for the appellant submitted that the medical evidence tendered by the prosecution pointed at the offence of Sodomy, not defilement.

The appellant drew the attention of this court to the contents of the P3 form, in which the doctor used the word "Sodomy".

In the said P3 form, the doctor also indicated that the complainant had superficial erosion on his perianal region, with associated tenderness. Therefore, the appellant submitted that the doctor did not testify that there had been any penetration.

As far as the appellant was concerned, the erosion of the perimeter of the anus did not prove any penetration.

Furthermore, because no spermatozoa or pus cells were seen in the specimens obtained from the complainant, the appellant submitted that that was also evidence that there had been no penetration.

Another issue that was raised by the appellant was about the failure of B K to testify. The said B K was alleged to have been an eye-witness to the sexual molestation of the complainant.

As the eye-witness did not testify, the appellant submitted that if he had done so, his evidence would have mitigated against the prosecution.

In answer to the appeal, Mr. Mulati, learned state counsel, submitted that the prosecution had proved that there had been penetration. It was the contention of the Respondent that the erosion and bruising of the complainant's anal region, was proof of partial penetration.

The use of the word **"Sodomy"** was also said to be proof of the offence of defilement.

As regards B K, the Respondent submitted that his absence did not diminish the sufficient evidence which had already been tendered by the prosecution.

Mr. Miyienda advocate then replied to the Respondent by submitting that Section 11(1) of the Sexual Offences Act did not mention partial penetration.

Finally, the failure to call the alleged eye-witness is said to have deprived the prosecution case of the necessary corroboration.

This is the first appellate court. I have therefore re-evaluated all the evidence on record, and have drawn my own conclusions. PW1 is the complainant. He was a boy, aged 11 years, at the material time.

He testified that even prior to the day when the incident took place, he had known the appellant.

PW1 used to herd their cattle within the same area where he appellant was herding the cattle belonging to his employer. His said employer was known as M E.

Whilst PW1 and the appellant were herding the cattle, the appellant took PW1 next to the river. He told P.W.1 to strip naked, and the complainant complied.

PW1 slept on the ground, facing downwards.

It was the testimony of PW1 that the appellant smeared some oil on his penis, which he then pushed into the anus of PW1. After penetrating PW1, the appellant gave him Kshs. 20/-and warned him against reporting the incident. The appellant threatened to beat up PW1 if he should report the incident.

On the next day, the appellant repeated the sequence of events.

"B K" reported the incident to PW1's mother.

When his mother asked him about it, PW1 told her about what had transpired.

PW1 handed over to his mother (PW5), the sum of Kshs. 40/- (in coins), which the appellant had given him during the 2 days.

During cross-examination, PW1 said that B K had seen the appellant when he (the appellant) was **"compromising"** PW1.

PW2 examined PW1 at the Moi Teaching and Referral Hospital. She found that the anus of PW1 had a bruise/superficial erosion, with tenderness on the region. However, there was no discharge or spermatozoa. PW3 and PW4 testified about a count that had no bearing on the appeal before me. The appellant was acquitted in relation to that other count.

The complainant's mother (PW5) exhibited a Health Clinic Card which showed that the complainant was born on 9th September, 1999.

According to PW5, she questioned her son after she found Kshs. 40/- in his school shorts. It is then that PW1 informed PW5 that the money had been given to him by the appellant, after the said appellant had sodomised him.

PW5 escorted PW1 to the hospital, where PW2 examined him.

PW6 testified about a count which is not related to this appeal.

PW7 is a police officer. He was the Officer-in-charge at the Turbo Police Post, at the material time. He re-arrested the appellant at the police post, where he had been escorted to by some Administration Police Officers from Kipkaren.

When the appellant was taken to the Police Post, he was accompanied by the complainant.

PW7 got PW1 to be taken to the hospital, for examination. He later got the P3 Form for PW1.

PW7 also testified that PW5 gave him the money which PW1 had been given by the appellant.

As the P3 form showed that the appellant had committed an offence, the police officer charged him.

When the appellant was put to his defence, he denied committing the alleged offence. He said that he was incriminated by two (2) ladies after they had refused to pay him for the work he had done for them.

In effect, there is no doubt that the appellant was not a stranger to either the complainant or the mother.

Secondly, the incident took place in broad daylight. There was thus no room for any mistaken identification. Indeed, this was a case of recognition.

Thirdly, the medical examination revealed that the complainant had been the victim of some physical interaction with somebody. That person was identified by the complainant, as being the appellant.

The fact that the medical officer of health found superficial erosion on the complainant's perianal region is consistent with the complainant's testimony. In fact, the medical evidence corroborates the evidence of the complainant.

The assailant had applied some oil to his penis, before he inserted it into the complainant's anus. The “tool” which caused the complainant to suffer erosion in his peri-anal region, with associated tenderness, was the appellant's penis.

There is no legal requirement that the perpetrator of the offence of defilement should discharge his seminal fluids onto his victim.

Pursuant to Section 8(1) of the Sexual Offences Act, the offence of Defilement is committed when a person commits an act which causes penetration. Therefore, whether or not there was ejaculation or any other form of discharge from the assailant, would not be of any consequence.

As soon as there was proof that the assailant used his genital organ to penetrate the genital organ of his victim, the offence of defilement would have been committed.

Section 2 of the Sexual Offences Act defines the word “Penetration” as follows:-

“Penetration means the partial or complete insertion of the genital organs of a person into the genital organs of another person.”

In this case, the complainant testified that the appellant inserted his penis into the complainant's anus.

In the light of the appellant's submissions, it is important to ask ourselves whether or not that act constituted the offence of defilement.

That question is important because the appellant has suggested that the act complained about was one of sodomy, but not defilement.

First, it is to be noted that under the Sexual Offences Act, there is no offence known as **"Sodomy".**

In my understanding, Section 5 of the Act, which defines the offence known as **"Sexual Assault"**, is broad enough to incorporate such offences as Sodomy, rape and defilement. That section reads as follows:-

"5(1) ***Any person who unlawfully -***

(a) Penetrates the genital organs of another person with

i. ***Any part of the body of another or that person; or***
ii. ***an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;***

(b) Manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed as sexual assault."

In the Penal Code, the offence known as "***Unnatural Offence***" was defined at Section 162, as follows:-

"162. ***Any person who:***

(a) Has carnal knowledge of any person against the order of nature; or

(b) has carnal knowledge of an animal; or

(c) permits a male person to have carnal knowledge of him or her against the order of nature, is guilty of a felony....."

It is under that section that the offence of sodomy was previously brought.

To the extent that the offence is deemed to have been committed when a person had **"carnal knowledge"** of another person against the order of nature, I find that it required penetration.

However, even that offence did not require the perpetrator to ejaculate onto his victim.

Therefore, when the medical officer described the offence as "Sodomy", that, of itself, could not imply that the offence of Defilement had not been committed.

I find that there was, at least, partial penetration of the complainant's anal orifice. The said penetration was by way of the appellant's penis. Therefore, I find that the ingredients of the offence of defilement were proved beyond any reasonable doubt.

The conviction was sound, and I uphold it.

I also uphold the sentence.

The appeal is dismissed.

DATED SIGNED AND DELIVERED AT ELDORET

THIS 12TH DAY OF NOVEMBER, 2013

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FRED A. OCHIENG

JUDGE.