REPUBLIC OF KENYA

High Court at Kitale

Criminal Appeal 49 of 2011

THOMAS MARIERA :: APPELLANT.

VERSUS

REPUBLIC :: RESPONDENT.

(*Being an appeal from the original conviction and sentence of R.M. Washika– RM. in Criminal Case No. 434 of 2010 delivered on 12th April, 2011 at Kapenguria.***)**

J U D G M E N T.

The appellant, **Thomas Mariera**, appeared before the Resident Magistrate at Kapenguria charged with defilement contrary to section 8 (1) read with section 8 (3) of the Sexual Offences Act, in that during the night of 29th/30th August, 2010 at Makutano Township West Pokot, caused his genital organ to penetrate the anus of E W, a boy aged 12 years.

After trial, the appellant was convicted and sentenced to serve twenty (20) years imprisonment. Being dissatisfied with the conviction and sentence, the appellant preferred the present appeal on the basis of the grounds contained in the petition of appeal dated 26th April, 2011 filed on his behalf by the firm of **Ann Kibe & Co. Advocates.**

At the hearing of the appeal, learned counsel, **Mr. Ingosi**, argued on behalf of the appellant that there was no evidence to prove the fact of penetration which is defined in the Sexual Offences Act, that the entire proceedings did not mention penetration save the witnesses PW1, 2, 3 & 4 only saying that the appellant's sexual organ was put on the complainant's buttocks meaning that there was no penetration.

Learned counsel argued that buttocks are not defined as sexual organs under the Sexual Offences Act but if penetration was on the anus, that would amount to something else but that was not the position in this case.

Further, the clinical officer (PW3) stated that the anus was normal. Indeed, everything was normal and if the complainant was sodomized as alleged then his annal area would not have been found normal.

Learned counsel went on to argue that the age of the minor complainant was not proved and that the trial court ought not have relied on a P3 form to determine the age of the complainant as this is only determined by a birth notification or birth certificate which were not produced herein.

Learned counsel argued that the prosecution evidence was laden with contradictions which created doubt as to whether the offence occurred. In the circumstances, the contradictions ought to have been resolved in favour of the appellant who denied the offence and testified under oath without any challenge to his

testimony.

Learned counsel contended that the trial's court decision was against the weight of the evidence and urged this court to allow the appeal.

The learned prosecution counsel, **Mr. Chelashow,** opposing the appeal on behalf of the state responded by arguing that the fact of penetration was established by the evidence of the clinical officer (PW3) whose finding that the complainant was sodomized was never challenged by the appellant.

Learned prosecution counsel asked this court to take judicial notice of the fact that the complainant was at the time a minor in class five (5) who could not tell the difference between the buttocks and anus which are part of the same thing.

Learned prosecution counsel argued that the definitions of buttocks and anus are matters of technicalities and therefore, Article 159 of the Constitution should be applied. As to the age of the complainant, learned prosecution counsel argued that the same was estimated by the clinical officer (PW3) to be about 12 years.

Learned prosecution counsel contended that there was no contradictions in the prosecution case as alleged by the appellant and that the issue of dates was immaterial as the complainant had seen the appellant and was indeed sexually offended by him after being abducted for three days thereby prompting a report to the police.

Learned prosecution counsel argued that the appellant was arrested by PW4 after his house was pointed out by the complainant. Learned prosecution counsel urged this court to dismiss the appeal while arguing that the appellant's defence did not create any doubt in the prosecution evidence and entire case.

Having considered the foregoing rival submissions, the duty of this court is to revisit the evidence and draw its own conclusion bearing in mind that the trial court had the opportunity of seeing and hearing the witness.

In that regard, the prosecution case was briefly that at the material time, the complainant, **E W (PW1)** was a standard five (5) pupil at M Primary School. He lived with his mother, **B K(PW2)** and on the 28th April, 2010 at about 2.00 p.m., his mother sent him to the market to buy fish. He was given Ksh. 20/= for the fish but lost Ksh. 10/=. Because of the loss Ksh. 10/=, he was afraid to return home. He therefore went to sit at a chemist where the appellant who was a stranger to him arrived and offered to give him accommodation after he (complainant) had explained to him his predicament.

The complainant proceeded to the house of the appellant and all was well on the first day but on the second day and third day, the appellant sexually molested him. He (appellant) on those two occasions placed his sexual organ on the complainant's buttocks and eventually had sex with him.

After being released on the third day, the complainant went home and thereafter the matter was reported to the police by his mother who had already reported that the complainant had gone missing.

Cpl. Richard Maina (PW4) , confirmed that a missing person report was made at Makutano police post before the complainant was traced. He (PW4) interrogated the complainant and learnt that he may have been sexually offended. He (PW4) arrested the appellant after his house was pointed at by the complainant. The appellant was eventually charged with the present offence.

Douglas Koech (PW3), a clinical officer at Kapenguria district hospital examined the complainant and confirmed that he had been sodomised. The clinical officer produced the necessary medical examination report. (P3 form).

In his defence, the appellant said that he was a farmer at Makutano and that the evidence against him was false. He contended that he did not know the complainant and did not stay with him.

After considering the evidence in its totality, the learned trial magistrate concluded that the prosecution case had been proved beyond reasonable doubt against the appellant. In the opinion of this court, an offence under section 8 (1) of the Sexual Offences Act was established by the evidence of the complainant (PW1) and the clinical officer (PW3).

The complainant was specific that he was raped for two days and felt pain in the process. He said that the male sexual organ of the offender was placed on his buttocks ending up in sexual molestation against himself. He said that the offender had sex with him which clearly meant that his anus was penetrated by a male sexual organ. As it were, it was sex against the order of nature. Under the Sexual Offences Act, genital organs includes the anus which is located in the buttocks and is part and parcel of the buttocks. It is an opening which starts or ends at the buttocks depending on which way it may be looked at.

Although the clinical officer (PW3) indicated in his report that a general examination of the complainant revealed that the anal spinctus was normal, the complainant fell pain as there were bruises in that area.

The clinical officer was not in any doubt that the complainant was sodomised.

Indeed, penetration was established. It did not have to be full penetration. Even the slightest of penetration was sufficient to establish the fact. With regard to the complainant's age, the evidence by the clinical officer through his report showed that the complainant was at the time aged about twelve (12) years. His mother (PW2) confirmed as much when she stated that the complainant was born in November, 1998 and produced a document to prove the fact. The document according to the judgment of the trial court was a birth certificate. There was undoubtedly ample evidence to prove that the complainant was aged approximately 12 years at the time of the offence.

With regard to the identification of the offender, the complainant's evidence was sufficient and credible to prove that the appellant was the culprit. It was shown that the appellant “capitalized” on the predicament facing the complainant after the loss of Ksh. 10/= part of the money handed to him by his mother to buy fish. The appellant offered to assist the complainant by accommodating him in his house but as it were, the appellant had ill motives against the complainant. Instead of assisting the complainant to return home safely, the appellant played “good-Samaritan” and sexually offended him.

This court fully agrees with the trial court that the prosecution's case against the appellant was proved beyond reasonable doubt. The appellant's conviction by the learned trial magistrate was therefore safe and sound and the sentence imposed was lawful.

In sum, this appeal is devoid of merit and is hereby dismissed.

[Delivered and signed this 30th day of October, 2012.]

J.R. KARANJA.

JUDGE.