



REPUBLIC OF KENYA

High Court at Nakuru

Criminal Appeal 12 of 2011

ISSA HUSSEIN HASSAN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(From original conviction and sentence in Criminal Case No. 1122 of 2010 of the Principal Magistrate's Court at Nyahururu, C. K. Obara, R. M.)*

### JUDGMENT

The Appellant was charged with the principal offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act 2006 (*No. 3 of 2006*). He was also charged with the alternative charge of Indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act 2006. He was found guilty of the principal charge, convicted and sentenced to twenty years imprisonment.

Aggrieved with both his conviction and sentence he appealed to this court initially on sentence, but by an Amended Petition of Appeal submitted to the court on the hearing date raised five grounds which may be summarized: -

- (a) that the trial court erred in convicting him on the evidence of identification without making a finding that the identification was not free from error, considering the fact that the observation was made at night by a minor (grounds 1 & 2),**
- (b) there was no medical evidence to convict the appellant of the offence.**

In addition to the amended grounds of appeal, the appellant also made written submissions. The appeal was opposed by the State Counsel and both the appellant's and State Counsel's arguments will appear in the paragraphs following.

The Appellant's basic argument is two-fold. **Firstly**, that the alleged offence was committed at night, and the complainant could not have identified him with certainty. **Secondly**, the complainant referred to and met several watchmen of somali origin (*woria*). None of these alleged witnesses were called to testify. **Thirdly**, the spermatozoa found on the victims anal region could not be said to be his without medical evidence. For those reasons the Appellant contended, his appeal be allowed and he be set free.

On its part the State contended that the complainant identified the appellant, and even if there was any impediment to recognition, any such impediment was subsumed by the length of the time the appellant and the complainant were together.

Besides, the complainant led the good Samaritans - motor bike cyclists to the residence of the Appellant, and that this was enough evidence. Upon the inquiry by the good Samaritans lead by PW3, the Appellant's mother lied to them that the Appellant had travelled to a place called Loswaga, and was away. PW3, not being satisfied, lit a match and searched the house and found the Appellant under the bed and brought him out. That too raised suspicion there was no reason for the mother to lie to PW3 and his colleagues, that he was not at home when he was actually right there. Along the way, the Appellant wanted to give the arresting motorbike people shs 4,000/= to leave him and silence the complainant.

There was medical evidence that the complainant had been defiled. The State Counsel therefore urged the court to find no merit on the appeal and dismiss the same.

In response to the State Counsel's arguments, the appellant denied that he was the person referred to in the evidence, he never walked with or saw the complainant.

Those were the respective arguments by the Appellant and the State Counsel. It is the statutory duty of this court as the first appellate to examine the evidence before the lower court, re-evaluate it, and come to its own findings and conclusions.

The complainant in this case was a twelve years old boy in Standard V at their local school called S Primary School. His mother (PW2), had bought her son some uniform, but it turned out it was oversized. A twelve year boy can walk alone to a short distance. So she sent the boy to return the clothes to the shop where she had bought them from. She herself could not go as she was nursing a small child. The date was 29.03.2010. The time was about 3.00 p.m. Her son never returned that evening. She was surprised the next morning when she heard a knock on her door at 7.00 a.m., only to find that it was her son.

Her son, the complainant informed her of his ordeal at the hands of another young man who had defiled him. He had lead him along N site in a shamba and told him to remove his clothes and was then defiled. The mother, PW2, escorted the boy to the Police Station where she found the person arrested by the motor cycle men, that her son was walking with pain and difficulty, he had been taken to Hospital and treated.

According to the evidence of PW3, a motorbike operator (*Boda Boda*) the date was 30.04.2010 and the time was about 3.00 a.m. He had gone to collect a customer at the market. He however met another man called Reuben with a boy whom Reuben said had been sodomised, and had taken him to Hospital. PW3 interviewed the boy, who informed him that he was feeling pain his anus, and that the person who had sodomised him looked like a somali (*woria*) that had met him a maize plantation and told him to remove his trousers and had sodomized and abandoned the body on the road.

PW3 testified further they took the boy to N corner where there were watchmen of somali origin, but the young man informed them that none of them had assaulted him. They returned with boy and stayed with him till early morning and they went back to N corner where the watchmen directed him and his colleagues to a field where there was a lonely home.

They went to that home where they met a lady who came out to meet them, and upon their inquiry of the whereabouts of her son, she informed them that he had gone to Losogwa. However one Reuben insisted and asked whether indeed the son was not present, and one of them Mwangi, entered the house and found the appellant under the bed. When asked whether he knew the complainant, the Appellant denied knowledge of the complainant, but the boy confirmed to them that it was the Appellant who feigned to be a Policeman and took him to the field and sodomised him. When told that he was being taken to the Police, the Appellant offered PW3 and his colleagues shs 4,000/= but they refused. They denied a phone to call his "boss" and took him to the Police Station.

PW4 a Police Officer at Ol Jorook Police Station reiterated the evidence of PW3 as to circumstances of the Appellant's arrest and being taken to the Police Station. The boy was crying because of pain in the stomach and anus, he could not walk properly and he took the child to the Hospital for treatment. The boy was walking with legs apart when PW4 saw him.

When cross-examined by the Appellant, PW4 told the court that the Appellant had walked with child for nearly one kilometre while he was chewing miraa all the time.

PW5, the Doctor testified that there was whitish discharge in the anal region which showed that there was sexual intercourse.

The child being 12 years was subjected to a *voire dire*, and was found to possess sufficient intelligence to appreciate the importance of telling the truth. His testimony was clear. The Appellant subjected the complainant not merely to physical torture by eventually defiling him, but to veritable psychological torture before defiling him.

The Appellant found the complainant at a Kerosene Oil Selling Point at Starehe. The Appellant asked him "*where are you going young man?*", that it was the wrong time to be about out. The Appellant hit the boy on the forehead, and told the boy that he would take him to "*Site Police Station*".

In spite of being informed by the boy that he stayed at Starehe, the Appellant held the boy by the shoulder on his T-shirt and walked him through a field outside the road, through a fence where the Appellant was held and felled by a barbed wire, and he told the boy that he was an askari and as darkness fell, he took him behind some row of houses, and upon reaching a place called Busara led him through the bush again while enjoying chewing his miraa, and calling on a cell-phone. Feeling some feigned remorsefulness the Appellant asked the boy whether he would forgive him, and while the boy answered yes, the Appellant told the boy he would not forgive him, called someone on phone and told him "***nimeshika Kanyanga***" and he wanted him to sleep in cells, told the boy to stop, he removed a cigarette lit it and puffed the smoke on the boy's face-eyes, took the boy to another safer place, looked on both sides, and ensuring it was safe, had crossed with the boy to a nearby maize and peas plantation, which was also fenced – told the boy to enter the plantation and followed him there, took him to a soily place ordered him to remove his trouser and underwear and lie face downward. He then lay on him and "***entered something into my anus and I felt pain.***"

While defiling the body the accused in his ecstasy was asking the boy whether he too was feeling good like was but the boy warned the Appellant that he would report him to his people. After fulfilling himself fast he told the boy to dress up and go, led the boy out of the shamba and once near the road hit the boy on the forehead, held him, looked at his face, removed his cap, looked at him, and then slapped the boy and told him to run away.

As he ran away, he reached a co-site where he found some watchmen and he informed them that someone had defiled him, and that he stayed at Starehe. A good Samaritan who had a motorbike rescued him, and together with another person from Jogooo Area took him to the Police Station and after explaining to the Police what had happened the Police gave the people a note, to take him to the Hospital where he was treated, his anal region was washed, and he was given medicine.

The boy narrated further that the motorbike people came back took him from the Hospital, returned him to the Police and at around 3.00 a.m. took him to a hotel where motor cycle man ordered tea for him and then the next day the motor cycle man took him to search for the person who had defiled him.

They went to the site, found watchmen and reminded them of what he had told them, then went to N where they found a small iron sheet house, knocked and a lady opened the door and when asked where her son was, the lady informed them that she had gone to L, and would be back by 12.00 noon, that her son had gone the previous day.

However the cycle men were suspicious and thought she was lying, and entered inside the house,

and into another room, and as it as dark, they lit a match stick, and saw a bed and, someone hidden under the bed and covered with a bed cover. The motor cycle man then uncovered the man and when I saw the man, I said this is the man who had defiled me.

The Appellant asked to be given time to go and wear shoes as he was in sandals. He was asked whether he knew the boy, and was assaulted with a slap and asked again whether he knew the boy and then acknowledged he had seen the boy, when he went to show the boy a shamba, the boy also testified that on nearing the Police Station, the Appellant asked the cycle man to allow him to give them shs 4,000/= and let him go free but that they refused.

That was the evidence of the complainant. It was corroborated by the evidence of PW3, and by PW4 the Police Officer. The evidence was clear, and beyond reproach.

When put to his defence the Appellant gave an unsworn statement, but even in his statement, the Appellant unwittingly corroborated the evidence of PW1, (*the complainant*), and PW3 (*the cycle man*). He comes from L, but was in Nyahururu on the fateful night. He works at Nyahururu construction site as a night watchman, that he saw someone coming through the fence and he fell down, and woke up and followed the said person. (*This is what PW1 said – the Appellant fell down while crossing barbed wire fence*). He said that the persons who arrested demanded Ksh 4,000/= which he did not have! PW1 and PW4 testified that it was the Appellant who had offered them shs 4,000/= to be left free. Being a Muslim, he stated, he denied defiling the complainant, but asked the court to forgive him!

## **OPINION**

Those were the facts or the evidence. The Appellant contended that the evidence of the complainant (PW1) as to defilement was not corroborated. The evidence of the complainant, needed no corroboration. It is protected by the proviso to Section 124 of the Evidence Act (*Cap. 80, Laws of Kenya*), that -

***“where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings the court is satisfied that the alleged victim is telling the truth.”***

The trial court found that the incident took place at around 7.00 p.m. The Appellant and the complainant had ample time talking and even walking together at one stage, the Appellant smoked a cigarette and puffed smoke into the victim's face, and eyes, at another occasion the Appellant removed his cap, and looked the complainant in the eye, and yet on another occasion the Appellant fell down while crossing a fence, and another asking the complainant to look at him and asking the boy to forgive him, and yet proceeding to threaten the boy with arrest and detention at a Police Station. The boy was observant, heard the appellant boast on phone that *“nimeshika Kanyanga”* to be sleep in cells that night. This gave the complainant adequate time to identify the appellant. They were just the two of them. There was no mistake. There was no need for an identification parade. The time being about 7.00 p.m. It is still dusk, and darkness would not have set in. It is immediately after the sun set, and one can clearly see.

I am therefore satisfied that the learned magistrate came to a correct finding that the complainant had ample time to recognize and did recognize the Appellant, and being a sexual offence, there was no reason for corroboration as the evidence of the victim PW1 was entirely credible. It was in addition corroborated by the evidence of PW5, the doctor. The boy did not hesitate once the Appellant was fished from under the bed, to say ***“this is the man who defiled me.”***

In the circumstances the Appellant was properly recognized by the victim, and the circumstances are corroborated by the evidence of PW2, PW3 and PW4. There was no necessity of calling other witnesses who were companions of PW3. There would not have added anything more to the evidence of PW3.

For all those reasons, I find no merit in the Appellant's appeal. I confirm both the conviction and sentence, and dismiss the appeal herein.

It is so ordered.

**Dated, signed and delivered at Nakuru this 12<sup>th</sup> day of October, 2012**

**M. J. ANYARA EMUKULE**

**JUDGE**