REPUBLIC OF KENYA

High Court at Nakuru

Criminal Appeal 191 of 2011

PHILIP NJOROGE MACHARIA……..……APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

(From original conviction and sentence in Criminal Case No921 of 2011 of the Principal Magistrate's Court at Nyahururu – A.B. MONGARE, SRM)

JUDGMENT

Philip Njoroge Macharia, the appellant herein, was charged with the offence of defilement contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act No. 3 of 2006**. In the alternative, he was charged with the offence of committing an indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act**. After a full hearing he was convicted of the offence of defilement and sentenced to life imprisonment. Aggrieved by the said decision, he filed this appeal. The appeal is predicated on the amended grounds of appeal filed in court on 17/7/2012. They are as follows:-

1. **That the court relied on medical evidence that did not connect him to the offence;**

2. **That the prosecution failed to call essential witnesses;**

3. **That the court failed to consider the fact that a grudge existed between the accused and the complainant's family;**

4. **That the court erred by relying on the uncorroborated evidence of PW1;**

5. **That the prosecution evidence was full of contradictions;**

6. **That the magistrate failed to state under what section the appellant was convicted.**

The appellant therefore urged the court to quash the conviction and set aside the sentence. The appellant filed written submissions.

The appeal was opposed and Mr. Omutelema submitted that the appellant was properly identified by the complainant who knew him well and that the Doctor's evidence corroborated the minor's evidence. Before I consider the arguments of both parties on the appeal, it is important that I summarise the case before the trial court.

The complainant, PW1, J. G. M. was a child of tender age. The magistrate conducted a voire dire

examination and was satisfied that the witness was intelligent enough to follow the proceedings and understood the meaning of the oath. He therefore gave sworn evidence. PW1 recalled that on 8/4/2011 about 1.00 p.m., he had been sent to the shop to buy sugar when he met the appellant. The appellant asked him to go with him to the forest to get the hyrax for meat. When they reached the forest, the appellant made him lie down, removed his pant and shorts and inserted his male organ in his anus. He warned him not to tell the mother, and not give him the money he had promised. J. said that at home, he told his brother, J. K. and his mother. He felt pain and was not able to sit. PW2, P. N. K., is a village elder at {*particulars withheld*}. He recalled that the complainant's father phoned him and he went, was informed of what had happened to PW1. He examined J. and saw that he was injured. J. informed that it is the accused who committed the act. He confronted the accused with the complaint's parents and J. repeated to them what had happened to him and the appellant denied. Police were called and took both J. and the appellant to the Police Station.

J. was examined by Peter Nginyo of Ol'Kalou District Hospital on 26/4/2011, who found a linear leaning tear on the rectal muscle and at 12.00 o'clock tear, 2cms long.

Ag. IP Gilbert Loseno (PW4) was the Investigation Officer in this matter. He received a complaint on 26/4/2011, that somebody had been arrested in {*particulars withheld*}, he went to the scene, found people gathered and the appellant was injured. The minor took PW4 to the place where the incident occurred in a ditch in a small valley. PW4 also produced the report by Dr. Mukele on James's age – he was 9 years at the time (PEx.2).

When called upon to defend himself, he made an unsworn statement in which he stated that he was in his farm on 25/4/2011, when the neighbour screamed alleging he was defiling his child. He said that the complaint's mother is mentally sick and he told them to go to church. He said that the complaint's mother is a member of his church and he had stopped her from going to church and he believed that is why they alleged he is the one who defiled PW1.

The appeal was opposed. In reply to the allegation that the court relied on the uncorroborated evidence of a minor, Mr. Omutelema cited **Section 124** of the **Evidence Act** which no longer requires corroboration of a minor's evidence in sexual offences. **Section 124** of the **Evidence Act** provides as follows:-

"S.124. Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

Provided 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."

J. was the victim. The magistrate conducted a *voire dire* examination and was satisfied that he was intelligent enough and understood the meaning of the oath. He testified on oath and was cross examined by the appellant under **Section 124** and the court could rely on such evidence found a conviction on it once the magistrate was satisfied that the child was telling the truth. J. testified that the incident took place at 1.00 p.m., in broad daylight. He said that he knew the appellant very well as Philip. There was no dispute as to the identity of the appellant or that J. knew him. PW2 confirmed that the appellant's home is near that of the complainant. The trial court believed J.'s evidence and this court cannot make a different finding having not seen the child.

The appellant also complained that the prosecution failed to call crucial witnesses to the case. His complaint is that J. claimed to have reported the incident to the parents and brother but none of them were called as witnesses. Under **Section 143** of the **Evidence Act** the prosecution is not required to call any particular number of witnesses. **Section 143** states:-

S,143. No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

It follows that even a single witness is sufficient to prove a fact. However, it is incumbent upon the prosecution to summon all witnesses who have evidence relevant to the case irrespective of whether or not the evidence is adverse to their case. In the case of **Ahmed Ramson v Rep [1955] EA**, it was held that:-

"It is the burden of the prosecution to avail all the material evidence to the court to enable the court arrive at a fair and impartial decision. The prosecution must summon all the material witnesses and avail or furnish the court with all facts even those whose evidence may have been unfavourable for it."

Again in the case of **Bukenya v Rep [1972] EA 549**, the court said as follows:-

"(i) …;

(ii) the prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent;

(iii) the court has the right, and the duty, to call witnesses whose evidence appears essential to the just decision of the case;

(iv) where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."

In the above case the court went ahead to state that the prosecution is not required to call a **"superficially of witnesses"**. Witnesses must be relevant. In the instant case, what the parents and brother of J. would have come to testify to is like PW2, what J. told them because they did not witness the incident. They would have testified to what they observed on the boy. PW2 said that once he got the complainant he observed the him. The boy was also observed by the Doctor who found him to be injured on the anus where there was a tear. That is all that the parents and his brother may have said. It is all hearsay. In my view, the prosecution did not fail to call material witnesses such as to vitiate the conviction. The key witnesses to this case is the victim, PW2, and the Doctor. In my considered view, all the relevant witnesses to the case were called.

J. described vividly what happened to him. P. who was called by J.'s parents to hear what the child had to say said that James demonstrated to him what happened. Even when they confronted the appellant in his farm, the child repeated the same before all those gathered. PW1 also examined the child and saw the injury. Dr. Nginyo who examined the child found that the child had a linear tear of the rectal muscle and a 12 o'clock tear of about 2 cms long in the anus. That was a very big tear. The findings of the doctor upon examination of J. did corroborate J.'s evidence as to what happened to him. The court believed J.'s evidence that it is the appellant who committed the offence. The Doctor clearly explained that over 72 hours had lapsed since the act was committed on the child and there was no need to examine the appellant. The court was satisfied on the evidence before it that the appellant was satisfactorily linked to the offence.

In his defence, the appellant claimed that there had been a grudge between him and PW1's mother. He said that PW1's mother was his church member and he had stopped her from going to church and that is why she alleged that he defiled her child. There is no doubt that the complainant was sodomised. The medical evidence was clear. The appellant did not explain to the court the nature of the dispute between him and PW1's mother. Why did he stop PW1's mother from going to church? It is inconceivable that a child of PW1's age could make up such story to frame a person and not falter even in cross examination, even if he had been coached. Besides, at no stage during cross examination of PW1, PW2 and PW4, did the appellant raise such issue. I do not believe that any grudge existed. His evidence is not creditworthy.

According to PW1, the offence was committed on 8/4/2011. It is not until 26/4/2011, about 18 days later that PW2 was informed of the occurrence. It is unfortunate that PW1 was not asked when he told his parents about the incident. It seems the complainant did not disclose the ordeal till 26/4/2011, when the matter was taken up immediately. I find no contradiction in the evidence. PW1 is a child. He had been threatened not to disclose what happened to him and that may explain the delay in reporting the incident. The injuries are apparent and the delay in reporting the incident. The trial court noted how scared he looked as he testified. That may explain the delay.

The appellant faulted the magistrate for not specifying the law under which he was charged and convicted as required by **Section 169** of the **Criminal Procedure Code.** It reads as follows:-

"S.169.

(1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.

(2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.

(3) In the case of an acquittal, the judgment shall state the offence of which the accused person is acquitted, and shall direct that he be set at liberty."

The trial magistrate found the appellant guilty as charged, that is to say, he was found guilty under **Section 8(1)** and **8(2)** of the **Sexual Offences Act No. 3 of 2006** and convicted him under **Section 215** of the **Criminal Procedure Code**. The conviction was regular and proper. The magistrate complied with **Section 169** of the **Criminal Procedure Code**.

As the first appellate court, it is my duty to evaluate and analyse the evidence afresh and come to my own conclusion bearing in mind at all times that I did not have the opportunity to see the witnesses testify, which I have done. I am satisfied beyond any doubt that the complainant identified the appellant as the person who sodomised him. The prosecution proved their case beyond any doubt and I have no reason to fault the finding of the trial magistrate. I confirm the conviction. The complainant was examined by Dr. Mukere on 5/7/2011, as per medical report PEx.2. The Doctor estimated the age at 9 years old. Under **Section 8(2)** of the **Sexual Offences Act No. 3 of 2006**, a person convicted under the said provision is liable to life imprisonment. The sentence imposed by the trial court is therefore lawful and legal. The appeal is hereby dismissed.

DATED and DELIVERED this 20th day, November 2012.

R.P.V. WENDOH
JUDGE

PRESENT:
The appellant – in person
Mr. Marete for the State
Kennedy – Court Clerk