REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Criminal Appeal 186 of 2008

ABDULRAHAMAN KAKANA…….. APPELLANT

VERSUS

REPUBLIC ……..…… RESPONDENT

JUDGMENT

The Appellant **ABDULRAHMAN KAKANA KADOSA** has filed this appeal against his conviction and sentences by the learned Senior Resident Magistrate sitting at Voi Law Courts. The Appellant had been charged with three (3) counts of **INDECENT ACT WITH A CHILD CONTRARY TO SECTION 11 (1) OF THE SEXUAL OFFENCES ACT 2006**. The prosecution called a total of five (5) witnesses in support of their case. The brief facts were that on various dates in the month of March, 2006 at Voi , the Appellant would lure young boys to his house and sodomise them. These actions were later reported to the police and the Appellant was arrested and charged.

The learned trial magistrate delivered her judgment in the matter on 16/11/2007. She acquitted the Appellant on count No. 1 but found him guilty and convicted him on count Nos. 2 and 3 of the charge. After making his statement in mitigation, the Appellant was sentenced to serve ten (10) years imprisonment on each of the two counts he had been convicted for. The sentences were ordered to run concurrently. The Appellant being dissatisfied with both his conviction and sentence filed this present appeal.

Being a court of first appeal, I am guided by this ruling of the court of appeal in the case of **OKENO –VS- REPUBLIC [1972] EALR 32.**

"It is the duty of the first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld"

[see also **AJODE –VS- REPUBLIC [2004] 2 KLR 81]**

The Appellant who appeared in person at the hearing of this appeal chose to rely entirely upon his written submissions duly filed in court. **MR. MONDA** the learned state counsel gave oral submissions in opposition to the appeal.

I have perused the appellant's written submissions and note that he raised three main grounds of appeal

- Violation of his fundamental rights
- Identification

§ Insufficiency of evidence

On the first ground the Appellant claims that his trial is violated by the delay in bringing him to court. I have looked at the record. I note that the Appellant was arrested on 18/11/2006. he was not brought to court until 21/11/2006- that is three days after his arrest. Section 72(3) of the Constitution of Kenya clearly provides that a suspect arrested on suspicion of his having committed a non –capital offence shall be brought before a court within 24hours of his arrest. This clearly did not happen here, The question is whether this violation renders the Appellants trial a nullity. There have been several legal pronouncements on this aspect of law. The courts have had to draw delicate balance between the pre-trial rights of a suspect and the obligation to the public at large in ensuring that all reported crimes are tried and determined on the basis of evidence presented in court. In the case of **ELIUD NJERU NYAGA –VS- REPUBLIC CRIMINAL APPEAL 182 OF 2006**, the court of Appeal held as follows:-

> ***"While we would reiterate the position that under the fair-trial provisions of the Constitution, an accused person must be brought to court within twenty-four hours for non-capital offences and within fourteen days for capital offences, yet it would be unreasonable to hold that any delay must amount to a constitutional breach and must result in an automatic acquittal"***

Whilst it is true that the Appellant was not arraigned before a court within 24 hours period stipulated by section 72 (3) of the Constitution, it is also true that the delay amounted to a mere two days. This is my view and not amount to an inordinate delay such as would deprive the appellant of his fair trial rights. For this reason I do dismiss this ground of the appeal. If it is any consolation the Appellant may if he wishes exercise his right to claim damages in a civil suit.

The second and 3rd grounds of the Appellant's appeal insufficiency of evidence which I will now tackle jointly is that of identification. Two complainants namely **L.O <u>PW1</u>**, who was the complainant in count No. 2 and **B.O <u>PW5,</u>** (the complainant in count No. 3) testified that the Appellant lured them to his house and sodomised each boy. **<u>PW1</u>** told court that on a date which he does not recall in March, 2006, the Appellant called him to his house. He gave him 10/= and proceeded to sodomise him. **<u>PW1</u>** states at page 6 line 21

"He took me to his house at R Quarters. I used to know him before. He then gave me 10/=. He ordered [me] to undress and then lie on the bed. I did so and he also removed his clothes. He then sodomised me. (He put his penis in my anus). He threatened to bewitch me if I tell my parents. I did not tell anyone."

On his part **<u>PW5</u>** gave a haunting account of ordeal on page 17 line 31.

"The accused then locked his door. He removed my short. I struggled to pull up my shorts but he pulled them down. He did not remove it completely. I was not wearing an underwear. He told me to hold the bed and bend thereby exposing my anus. He removed his thing for urinating. He put it inside my anus. I felt a lot of pain. I tried to scream but accused held my mouth. After accused finished with me. I felt some liquid come out of my anus. I quickly wore my shorts. The accused ordered me not to tell anyone what had happened. Otherwise he could bewitch me".

Both **<u>PW1</u>** and **<u>PW5</u>** were young boys aged 13 years and 9 years respectively. It is highly unlikely that they and especially **<u>PW5</u>** would have been able to describe in such precise and graphic terms what happened to them if they did not actually endure such an ordeal. **<u>PW3</u> P.W** another boy aged 12 years also told the court that the Appellant called him to his house and told him in Kikamba ***"uka tukindane"*** which means "***come we play sex"*** **<u>PW3</u>** refused saying he was needed at home but promised to return, which promise he did not keep. The appellant's intentions were clear and it is clear that this was the Appellant's ***'modus operandi'*** luring young boys to his house for sex.

It is true that neither child made an immediate report to an adult or to any other authority about what had happened. However they were probably too fearful to report since the Appellant had threatened to bewitch them if they reported him. Regarding the evidence of these

minors, the trial magistrate noted at page J28 line 27

"I do not believe all the minors herein were coached to testify against the accused. All the children were truthful"

I am in agreement with these findings. I find that the children could not have fabricated what they told the court. ***PW1, PW3*** and ***PW5*** all gave evidence in a clear and consistent manner. They each remained unshaken under cross-examination by the Appellant. I too find their evidence to have been credible and believable.

Having established that events did occur as narrated by the complainants, the question of identification arises. ***PW1, PW3*** and ***PW5*** all identify the Appellant as the one who sodomised them {in the case of ***PW3***, he made an attempt to do so}. This is not visual identification alone. All three children knew the Appellant well before the incident. **PW1** states at page 6 line 31

'The accused used to sell ice (barafu) and fried potatoes so I knew him well."

PW3 states at page 13 line 14

"The accused has lived near our home for long. He sells potatoes and ice."

Whilst **PW5** stated at page 17 line 24.

"I know the accused. He is Kakana alias Kaka. I know where he stays. His house is not very far from my home. He sells ice (barafu) and fried potatoes. He sells them near our house."

It is quite evident that the three children knew the accused very well. They all knew him as a man who sells potatoes and ice in their locality. The incidents described occurred in the daytime. Conditions were favourable for a very positive identification. In the case of **ANJONONI -VS- REPUBLIC [1980] KLR 59**, the court of Appeal in holding recognition to be more reliable than mere visual identification stated:-

> ***"recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or another".***

Likewise, I do find there to be clear recognition of the Appellant by his victims and I am satisfied that this identification was clear, positive, reliable and free from error.

The Appellant was charged with the offences of Indecent Act on a child. Section 2 of the Sexual Offences Act defines an *'**Indecent Act**'* as

"Any intentional Act which causes -

(a) Any contact between the genital organs of a person his or her breasts and buttocks with that of another person"

For the Appellant to insert his penis (a genital organ) into the anus (buttocks) of **PW1** and **PW5** clearly amounted to an indecent act and I find that the ***'actus reus'*** of this offence has been proved by the evidence on record.

In his defence the Appellant claimed that he was being framed because of a grudge with the aunty of **PW5**, Firstly he did not bring up

this issue when cross –examining the prosecution witnesses. This is clearly but a mere after thought. Secondly, even if **PW5** and his family may have had a grudge against the Appellant, his defence does not explain why **PW1** and **PW3** or indeed any of the other prosecution witnesses who were in no way related to each other would come to court to testify against him. The learned trial magistrate declared the Appellant defence to be not believable and I do concur.

Taken in totality and having re-evaluated the same I am satisfied that the prosecution presented a water-tight case against the Appellant. His convictions on Counts 2 and 3 was sound both in law and in fact and I have no hesitation in upholding the same.

The trial magistrate imposed a ten (10) year sentence for each count to run concurrently. The Appellant is clearly a paedophile who is a danger to young children every where. In my view the sentences were merited and were appropriate. I will not interfere with either sentence but I uphold each ten (10) year sentence. Finally this appeal fails into entirety. The convictions and sentences imposed by the lower court are hereby confirmed and upheld.

Dated and Delivered in Mombasa this 2nd day of July 2010.

M. ODERO

JUDGE

Read in open court in the presence of:

Mr. Onserio for State

Appellant in person

M. ODERO

JUDGE

2nd July 2010