REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 346 OF 2008

(From Original Conviction and Sentence in Criminal Case No.380 of 2007 of the Senior Resident Magistrate's Court at Kaloleni: Andayi W.F. – S.R.M.)

JUMA MWAKAMPYA TSUWI ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGEMENT

The Appellant herein JUMA MWAKA MPYA TSUWI, had been charged before the lower court with INDECENT ACT WITH A CHILD CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT. The particulars of the offence were that

"On the 25th day of August 2007 at about 10.00 p.m. in Kaloleni District within Coast Province, intentionally and unlawfully committed an indecent act which caused penetration with finger to L. B, a boy aged 8 years by touching him in his private part namely anus"

The Appellant pleaded 'not guilty' to the charge. His trial commenced on 5th December 2007 at which trial the prosecution led by INSPECTOR NGOMO called a total of five (5) witnesses in support of their case. The brief facts of the case as narrated by the complainant a boy of 8 years, were that on 25th August 2007, he and friends spent most of the day at a neighbour's wedding ceremony. Later in the evening he went home and had supper. He then stepped out of the house to relieve himself. As he finished and pulled on his shorts the Appellant approached him and offered him Kshs.5/-. The Appellant then pulled down his shorts, lay him on the ground and inserted his finger into the complainant's anus. The complainant saw someone pass by and called out for help. The stranger came and rescued him and escorted him to his home. The child immediately reported to his mother what had happened to him. The next day PW2 M.R, the complainant's mother took him to hospital where he was examined by a doctor. The matter was reported to village elders who arrested the Appellant and handed him over to administration police at the chief's camp. Upon completion of police investigations the Appellant was arraigned in court and charged with the present offence.
At the close of the prosecution case the Appellant was ruled to have a case to answer and was placed on his defence in compliance with S.211 of the Criminal Procedure Code. He gave a sworn defence in which he denied the charges claiming that he had been framed by the complainant's family.
On 3rd October 2008 HON. ANDAYI S.R.M. the trial magistrate delivered his judgement in which he convicted the Appellant of Sexual Assault contrary to Section 5(1)(a) of the Sexual Offences Act. After listening to mitigation on behalf of the Appellant the trial magistrate sentenced him to serve ten (10) years imprisonment. Being dissatisfied with both his conviction and sentence the Appellant filed this present appeal.
MR. KHATIB, learned counsel appeared and argued this appeal on behalf of the Appellant whilst MR. ONSERIO learned State Counsel appeared for the Respondent State and made oral submissions urging the court to uphold both the conviction and sentence imposed by the lower court. As a court of first appeal I am mindful of my obligation to re-examine and re-evaluate the evidence adduced before the lower court and determine whether the prosecution did in actual fact prove their case beyond a reasonable doubt [see OKENO –VS- REPUBLIC [1975] E.A.L.R. 32]. Mr. Khatib counsel for the Appellant did file a Memorandum of Appeal which formed the basis of his arguments before the court. I will address each of the points raised by learned counsel in his oral submissions to court.

The Appellant was charged with the offence of Indecent Assault on a child. The first question needing determination is whether any indecent assault of a sexual nature was perpetrated against the complainant as he has alleged in his evidence. The complainant was a child of tender years. As the law required, the trial magistrate did conduct a 'voire dire' examination before commencing to hear the child's evidence. I must here commend the learned trial magistrate for conducting an exhaustive examination on the complainant and further for recording both the questions asked as well as the answers thereto. This is what is required of a 'voire dire' examination as specified by the Court of Appeal in the case of JOHNSON MUIRURI –VS- REPUBLIC [1983] KLR 445 where their lordships held as follows:-

"It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided."

In this case I am satisfied that the 'voire dire' examination was properly conducted and I am in total agreement with the finding of the learned trial magistrate on page 8 line 14

"Court – I am satisfied that the child witness is possessed of sufficient intelligence and capable of giving evidence. He understands the meaning of speaking the truth and what an oath is. He will give sworn evidence"

The complainant gave his age as 8 years. PW2 the complainant's mother did confirm his age by stating that her son was born on 15th June 1999. Therefore by the year 2007 when this trial commenced the complainant was indeed 8 years old.
The complainant's evidence was that as he went to answer a call of nature, a man approached him and offered him Kshs.5/- to do "bad manners" with him. In his own words at page 8 line 23

"I recall 25/08/2007, I was at a wedding at the home of Maragha. I was with others, like Baya Ndegwa, Amani, John, Emmanuel. While there, that one over there, pointing at accused, did bad to me. I had gone for a call when accused came, lay me down and inserted [his] finger in my bottom – [anus]"

It is highly unlikely that so young a child would dream up or fabricate such an occurrence if it did not actually occur. Further the complainant upon getting home immediately reported the incident to his mother, ruling out any possibility that this was fairytale. The complainant's mother PW2 took him for medical examination the very next day. The evidence of PW4 JOSHUA MWAKIO MWANYUMBA, a clinical officer at Mariakani District Hospital serves to corroborate the complainant's testimony on what happened to him. PW4 examined the child and produced his P3 form in court Pexb3. He found the complainant to have a swollen anus. This is consistent with the complainant's testimony that a finger had been inserted into his anus. I addressed my mind to the lack of an eyewitness to the incident and in my view it is not surprising that there was none. Such sexual offences are often committed in secret and it is unlikely that a sexual predator would perform his heinous acts in the presence of third parties. I am satisfied that the medical evidence and findings provide sufficient corroboration for the complainant's evidence. I therefore find as a fact that indeed the complainant was sodomized as he alleged on the material day.
The next crucial question is that of the identity of his assailant. The complainant himself tells the court that it was "Keya" who sexually assaulted him. The incident occurred during the night as he went out to relieve himself but he states that he was able to see and identify the Appellant because there was moonlight. Mr. Khatib for the Appellant argues that merely to indicate that there was moonlight is not sufficient as the quality of light is not described. In addressing this issue the learned trial magistrate in his judgement at page 36 line 4 states

"The complainant says he recognized the accused person that night. There was moonlight and even though the intensity of the light was not stated the time the accused took with the complainant from when he approached him offering him Kshs.5/- to when the complainant took off was sufficient for the complainant to see him well"

I am in agreement with the above findings. The complainant conversed with the Appellant and was able

to recognize him as somebody whom he knew. Children are notoriously afraid of the dark. It is unlikely that the complainant would have gone to answer a call of nature unless it was light enough to enable him see where he was going and what he was doing. The complainant mentioned certain landmarks at the scene. At page 10 line 30 he says

"It was at a place where there is a small (Dodo) mango tree"

The fact that he was able to identify the species of tree in the vicinity indicates that there was sufficient light to enable one see and identify persons as well. I do find that the visibility was sufficient to enable the complainant identify the Appellant.
This was not a case of visual identification alone. The complainant told the court that the Appellant was a fellow villager whom he knew very well and named him as 'Keya'. He named the Appellant in the report he made to his mother. This therefore is evidence of recognition which has been severally held to be more reliable than visual identification alone. In ANJONONI & OTHERS –VS- REPUBLIC [1980] KLR 59, the Court of Appeal held that

"….. 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 other"

Mr. Khatib submitted that the complainant referred to the Appellant as 'Keya' which is not one of his given names implying that this could be a case of mistaken identity. With respect I do not agree. The complainant severally identified the Appellant physically in court as the man who had assaulted him. Importantly at page 9 line 3 the complainant says

"The accused is known as Keya"

There is every possibility that this was a nickname by which the Appellant was commonly known in the community. It is a common practice in villages all over this country for persons to be known and referred to by their nicknames rather than their official names. The complainant goes on to state of the Appellant

"I know him. I know their home. I usually see him passing on the road … this home is far. I went home and explained to my mother. I told her Keya did bad things to me"

There can be no doubt that the complainant is absolutely sure about whom he is referring to. PW2 the complainant's mother also testified that she knows the Appellant very well and knows him as 'Keya'. She states at page 11 line 18

"I know Keya. His home is M.T. I have known him even before I got married."

It cannot be a mere coincidence that the complainant tells his mother of a man called 'Keya' and she immediately identifies him as the Appellant. It can also not be a mere coincidence that upon the report being made to the local chief's camp, it was the Appellant who was arrested. Both the complainant and PW2 as well as PW3 APC MUKSHIN SULEIMAN WATEMBO, did positively identify the Appellant before the lower court. I am satisfied that the man whom the complainant saw and recognized as 'Keya' was the Appellant before court. I find no possibility of mistaken identity.

Mr. Khatib submitted that the evidence adduced by the prosecution was less than reliable because the complainant had been coached on what to say in court. This allegation was put to both the complainant and PW2 by MR. ABDI, counsel who appeared for the Appellant at his trial before the lower court. Both strenuously denied the suggestion that the complainant had been coached by his parents. I have myself carefully and anxiously perused the evidence of the complainant. He was steadfast in his testimony. He remained unshaken under intense cross-examination by defence counsel. Indeed I found the complainant's evidence to have been disarming in its simplicity and honesty. At page 10 line 24 he states

"I can repeat what I have said (He is asked to and repeats) I deny that I was coached. Mum only told me not to forget what accused did to me. She did not remind me what to say. I know I have sworn to tell the

truth. I touched the Quran. My mother only said I should remember what the person did to me …"

He finally states with conviction

"Accused did the bad manners to me. He did it. He put fingers in me …"

What could be clearer than this? There is a difference between coaching a witness and merely telling him to recall the events of that day. The allegation that the complainant's father may have influenced him to testify against the Appellant by promising him a reward of new clothes also holds no water. To this the complainant says at page 10 line 31

"Father told me he will buy for me Idd clothings if I am a good child. He said that I will use them. He did not [my emphasis] say he will buy when I came from court. I am a good child."

The promise from the child's father was to buy him a gift of clothes for Idd. This is not unusual as it is a common practice amongst the Moslem community to exchange gifts during Idd celebrations. A court appearance would be an intimidating experience for any 8 year old child. There is nothing sinister in the complainant's father promising his son a gift if he goes through the experience bravely and tells the truth. I find no evidence at all that the complainant was coached by any person on what to say in court. In conclusion on this point I can only concur entirely with the findings of the learned trial magistrate in his judgement at page 34 line 24 (which I will here quote at length)

"It is apparent from the evidence on record that the only evidence linking the accused person to the offence is that of the complainant. The complainant is a child of tender years. He gave sworn evidence. As a matter of practice, the court has to caution itself of the danger of relying on the uncorroborated evidence of the child of tender years but where a court has appropriately cautioned itself [and] is satisfied that the child was telling the truth, then it may proceed to convict without corroboration. This rule of practice now finds expression in the proviso to Section 124 of the Evidence Act. The complainant in this case appeared before this court and upon a voire dire examination the Court was satisfied that he could give sworn evidence. Indeed, upon giving his evidence and even after being subjected to a thorough and searching cross-examination by the defence counsel the child remained steadfast …. I must say that I find the child to be a faithful and honest witness"

The trial magistrate in reaching these conclusions had the obvious advantage of seeing the child testify in court and observing his demeanour. I see no reason to dispute his findings.

The trial magistrate did give due consideration to the Appellant's defence which he properly dismissed as wanting. The contradictions referred to by Mr. Khatib in his submissions on whether the child was coming from the wedding or from his home at the time of the assault are in my view not material and do not in any way weaken the prosecution case.

The only outstanding issue is the question of the man (witness) who rescued the complainant from the hands of the Appellant and led him home. PW1 told the court that he did not know this man. The man led him home but did not enter thus his mother had no opportunity to see and/or talk to him. This was a good Samaritan who chose not to reveal his identity. The police cannot be blamed for failing to call such a witness since nobody knew who he was or where he could be found. He could well have been one of the revelers at the neighbouring wedding. There was no deliberate attempt to conceal evidence. In any event this rescuer's evidence would only have served to reiterate the complainant's evidence, but in my view was not crucial to prove the guilt of the Appellant. His evidence would merely have been the 'icing on the cake' so to speak.

Finally I am satisfied that the prosecution in the lower court did discharge its burden of proof. The Appellant was positively and reliably identified as the man who sexually assaulted the complainant. The trial magistrate did comply with the First Schedule of the Sexual Offences Act in convicting the Appellant of an offence under S. 5(1)(a)(1) of the said Act despite his having been charged with an offence under S. 11(1) of said Act. I do hereby uphold that conviction.

The Appellant was after mitigation sentenced to serve ten (10) years imprisonment. This is the minimum sentence provided for this offence under S. 5(2) of the Sexual Offences Act. The sentence is lawful. I do hereby confirm the same.
Finally this appeal fails in its entirety. The conviction and sentence imposed by the lower court as against the Appellant are hereby upheld and confirmed.

Dated and Delivered in Mombasa this 5th day of October 2010.

M. ODERO
JUDGE

Read in open court in the presence of:-

M. ODERO
JUDGE
5/10/2010