



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI Criminal Appeal 86 of 2008

JOTHAM MUGENDI APPELLANT

- Versus -

REPUBLIC..... RESPONDENT

J U D G M E N T

Jotham Mugendi (hereinafter referred to as the appellant) was convicted on a charge of sexual assault contrary to section 5(1) of the Sexual Offences Act No. 3 of 2006 on allegations that on 21st day of October 2006 in Malindi District, he unlawfully penetrated his genital organ to the anus of N.N.M a boy child aged 7 years.

Appellant had denied the charge, and after due trial in which four (4) witnesses testified in support of the prosecution case, he was convicted and sentenced to serve 7 1/2 years imprisonment with hard labour.

The complainant N.N.M told the trial court that on 21-10-06 at 5.00pm, he was left alone in his father's home when the appellant got there, took him away to his place and "did bad things to me. He sodomised me" the child described how the appellant removed his clothes, then sodomised him. His father found him at the appellant's home and took him away – he told his father what had happened PW1's father N.M.K (PW2) confirmed that he had left the child at their home at about 7.00pm and rushed to the shop briefly. Upon return at 7.30pm he did not find PW1 and traced him to their neighbour's (appellant's) house.

PW1 did not tell him anything upon interrogation but after a beating, he disclosed that appellant had sodomised him. He took PW1 to Malindi District Hospital. The child was examined by Dr. Tunje and a P3 form filled by him was produced by one Ibrahim (a clinical officer) as the doctor had resigned from government service – he testified as PW4. The P3 form showed the age of injury as 5 days and the nature of injury was a small tear around the anal surface 6 O'clock position.

On cross-examination PW4 confirmed as follows:

*"Injury caused by sodomy...
There is a tear at the anal oriphase. He could not have been beaten. The injury
was on the anus. It can only have been caused during sodomy."*

A report was made to police, and PW3 (Pc Keya) told the trial court that appellant was at large and was traced in Timboni area, which is far from Kwa-Hadija Village.

In his unsworn defence, the appellant said he was arrested at his aunt's house, kept in custody for five days, released under section 87(a) Criminal Procedure Code then charged afresh. His argument was that if indeed he had committed the offence then the neighbour should have been called to give evidence. He suggested that the child may have been assaulted by his father, or the child may have inserted something into his anus but as for him, he was innocent.

The trial magistrate considered the evidence especially the evidence by PW4 (the clinical officer) who confirmed that the tear could not have been caused by assault and she was satisfied that the complainant was sexually assaulted.

Further that appellant was well known to PW1 and pW2 and there was nothing to suggest why appellant would be framed up with the offence. She found corroboration of the child's evidence by the evidence of PW2 and pW4 and held that the charge had been proved beyond reasonable doubt.

Appellant appealed both on conviction and sentence stating that:

- a) The charge was not proved beyond reasonable doubt.
- b) He was not medically examined
- c) PW2's evidence was not corroborated
- d) The maker of the P3 form was not called to testify contrary to section 33 of the Evidence Act.
- e) The complainant's evidence did not tally with the medical report.
- f) His defence was not considered
- g) The sentence was harsh and excessive.

Appellant filed written submission saying the evidence adduced was contradictory and that PW2 contradicted himself on the issue of the date and findings in the P3 form were not supported by evidence of the witnesses.

He sought to rely on the provisions of section 124 of the Evidence Act, arguing that the evidence of PW1 ought to have been corroborated by other material evidence, and that *voire dire* examination was not carried out.

He further submits that there was contradiction in relation to the time the offence took place between what PW1 said and what PW2 said and so these contradictions should have been resolved in his favour.

Mr. Ogoti for the State conceded the appeal but asked for a retrial saying no *voire dire* examination was carried out for the victim who was aged 7 years and this was necessary so as to find out whether the child knew or understood the meaning of an oath or telling the truth, or even why he was in court.

He however argues that the evidence was water tight, appellant has served about one year in jail and no prejudice will be caused by ordering for a retrial. Further that for justice to be seen to be done, a retrial would be the best way to go because an acquittal will mean the innocent victim will not have received justice on a mistake not of his making.

From the charge sheet, the evidence on record, it is apparent that the complainant is a child and he is shown as having given unsworn evidence. However there is nothing on record as to what formed the basis for his unsworn testimony. Did the trial court examine him to determine whether he understood the meaning of an oath or duty of telling the truth and his level of intelligence.

Indeed the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap 15) as far as is relevant is to this effect.

“where, in any proceedings, before any court...any child of tender years called as witness does not, in the opinion of the court...understand the nature of an oath, his evidence may be received, though not given upon oath, if in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth”

This was considered in detail in the case of *Mohammed v R 2KLR (2005)* pg 138 which held that:-

“in conducting a voire dire, section 9(1) requires of the court to establish two matters, firstly, whether the child understands the nature of an oath. If the court comes to that conclusion, then it proceeds straight away to swear or affirm the child and to record the evidence. Secondly, if the court is not satisfied on the first test, it should express its opinion not only that the child is possessed of sufficient intelligence to justify reception of the evidence, but also understands the duty of telling the truth, before proceeding to record the child's evidence.”

I need not say more, this case adequately addresses what steps the trial magistrate ought to have taken before receiving the child's evidence and it was not done and the subsequent testimony must be viewed in that regard. In omitting this examination – both appellant and complainant were prejudiced and the conviction must be quashed and sentence set aside. I have taken into consideration the evidence on record – should this court then proceed to acquit appellant, or should a retrial be the way to go?

The legal principles relating to retrial have been laid down in Pascal Clement Braganza v R (1957) EA 152 where the Court of Appeal for Eastern Africa stated that:

“we accept the principle that re-trial should not be ordered unless the court is of the opinion that on a proper consideration of the admissible or potentially admissible, evidence a conviction might result.”

I will borrow from the words of my brother Ojwang J in Cr. Appeal No. 447 of 2006 Kelvin Otieno Ogutu v R and say that the test is easily satisfied in the instant case given the evidence led by the prosecution and this favours orders for retrial. I therefore make orders as follows;

- 1) The conviction is quashed and sentence set aside.
 - (b) the proceedings of the trial court are hereby annulled.
- 2) This matter be mentioned before the chief magistrate's courts in Malindi on 23rd of December 2009 for retrial directions. The retrial must be before a magistrate other than the one who heard and determined this matter.
- 3) Production order shall issue in respect of the appellant herein in connection with the 2nd order.

Delivered and dated this 17th day of December 2009 at Malindi.

H. A. OMONDI

JUDGE