



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI Criminal Appeal 57 of 2008
MUMINI ATHMAN MOHAMEDAPPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

JUDGEMENT

Mumini Athman Mohamed (appellant) as convicted on a charge of sexual assault contrary to section 5(1) (b) of the Sexual Offences Act No. 3 of 2006. The charge was based on particulars that on 24th day of September 2006 within Malindi District of the Coast Province, unlawfully manipulated the body of M.N.M, a boy aged 14 years so as to cause penetration of his genital organ into the anus of the said M. F.M. Appellant denies the charge and after his trial in which prosecution called six witnesses and appellant was the only defence witness, he was convicted and sentence to serve TEN (10) years imprisonment.

He had faced a second count of compelled or induced indecent act contrary to section 6 (a) of the Sexual Offences Act No. 3 of 2006 but he was acquitted.

PW1 (the complainant) told the trial court that he was a student at S.A Primary School being in Standard 3. On 24-9-06, he was passing near Habib Bank when the appellant (whom he had never seen before) summoned him and he obeyed. Appellant took him into a taxi and on to the M Park. They got off the taxi and went into a bush as the taxi drove away. While in the bush, the appellant inserted his penis into the complainant's anus and when complainant screamed appellant blocked his mouth with his palm. The appellant sodomised him from 4.00pm – 5.00pm thereafter the appellant summoned a tuktuk which they boarded and returned to Habib Bank. PW1 alighted and went home. PW1 was in pain, but had been warned by the appellant that he would kill him if he told anyone about the incident – appellant had given him kshs. 50/-. So PW1 did not tell his father about the incident. However later, his father became suspicious that he had been sodomised and pushed down his pant and confirmed the worst. His father beat him so as to disclose who had done it and PW1 said it was Mumini. So he was taken to hospital for treatment. The clinical officer (PW6) Samoe O. Ibrahim who produced the P3 forms gave PW1's age as 14 years and at the time of examination the injury was 27 days old so PW1 was given trauma counseling. On examination he noted a healing scar around the anus, there was inflammable anal mucus noted and PW1 complained of painful defecation. HIV test was not significant. He also produced a P3 form filled by Dr. Tonje whose findings were that there were no injuries on the complainant entire body and his genitalia was normal.

On cross-examination PW1 stated that he never told anyone about the incident, and one day appellant gave him ksh. 5/- and on another day he gave him ksh. 20/- but he never disclosed this to anyone – infact what aroused his father's suspicion was not his physical state but the fact that he had money and his father demanded to know the source as he

suspected that PW1 was up to no good things. PW1 states:-

“All this time round I was going to school. I had a lot of pain in my anus. I can’t recall the day I went to the police station. The accused used to seduce me and give me money”

On further cross-examination PW1 stated:

“In the bush, we were only 2 of us. Nobody saw us coming from the bush. I never told my brothers what had happened. I told my mother what had happened.”

PW1’s failure to disclose his ordeal to anyone stemmed from the fact that appellant had warned him not to tell anyone.

The complainant’s father F.M (Pw2) confirmed to the trial court that on 24-9-06, he did not have any suspicions about his son. However on 15-10-06, he saw PW1 riding a bicycle and demanded to know who had given him the same and PW1 said he had hired it. On further interrogation PW1 disclosed that he had been given some money by the appellant whom he mentioned by name. So PW3 became suspicious and further interrogation eventually led to PW1 physically pointing out the appellant to his father. PW2 noticed that appellant became uneasy upon seeing him and appellant denied giving PW1 any money. They went home where PW1 eventually confessed that appellant had sodomised him and had been sticking his finger into his anus. So PW2 informed his neighbour (an Imam) about the matter, then they looked for and found appellant and interrogated him and appellant admitted that he was giving PW1 some little money and that he had also inserted his fingers into PW1’s anus. So they took appellant to the police station.

He told the trial court that PW1 had some bruises around his anus. On cross-examination PW2 stated that on 24-9-06, PW1 arrived home late, but PW2 did not bother to find out why he was late.

Pw3 A.A a neighbour of PW2 confirms receiving information from the latter that his son had been sodomised so they went to see the Imam and told him what had happened – the appellant was implicated by the complainant so they traced appellant, took him to the mosque for “confessions” but he denied the offence and so he was handed over to police.

PW4: Athman, an Imam cum businessman in Malindi town confirms receiving PW2 and PW3 at his home, whereupon PW2 disclosed to him that his son had been sodomised by the appellant. They got appellant and took him to the mosque but he denied the offence or even knowing the complainant.

PW5 Pc Tom Mshiri received report about the sodomy from complainant’s father who had also brought in the appellant. Complainant told PW5 about the M Park incident and that the appellant had sodomised him on several occasions so appellant was arrested and charged.

Appellant’s unsworn testimony was based on events surrounding the day he was arrested saying he told PW2 and PW3 that he was not involved in the alleged offence.

The learned trial magistrate observed that after the initial encounter, appellant became the complainant’s friend and started giving him some money and other gifts. Later complainant disclosed to his father, their indulgences. The trial magistrate held that there was no evidence of bad blood between appellant and the complainant and regarded all that PW1 said as having been in good faith. He believed that PW1 was intelligent enough to speak the truth and that it was

safe to convict appellant on the uncorroborated evidence. He considered the appellant's demeanor as described by PW2 when they had the initial encounter and found that the only reason why appellant was uneasy upon seeing PW2 was because he had committed the offence and feared being arrested.

He held that appellant had confessed to PW2 and PW3 having sodomised the complainant and that appellant took advantage of complainant's age to sexually molest him by offering him money and gifts.

Appellant challenged the findings on the amended grounds of appeal that:

- 1) He was held in police custody longer than the stipulated period under section 72 (3) (b) of the Constitution.
- 2) The plea of Not Guilty in respect of count 1 and 2 initially ere that signed contrary to section 197 Criminal Procedure Code.
- 3) The learned trial magistrate erred by relying on uncorroborated evidence of the minor
- 4) The complainant's age was not assessed.
- 5) The provisions of section 19(1) of the Oaths and Statutory Declarations Act (Cap 15) regarding the evidence of children of tender age, was not adhered to.
- 6) The trial court did not comply with section 211 Criminal procedure Code.
- 7) The learned trial magistrate erred by admitting PW6 (a clinical officer) to produce P3 form Ex.2 in the absence of the maker without any reason being given for his absence.
- 8) Trial magistrate misdirected himself by holding that appellant confessed to P3 and PW4.
- 9) The prosecution failed to prove the case beyond any shadow of doubt.
- 10) The trial magistrate failed to note that the prosecution evidence was highly inconsistent and contradicting and the defence as not considered alongside the prosecution case.

The sentence is also contested as being harsh and excessive.

Appellant filed written submission in which he stated that he was arrested on 16th October 2006 and taken to court on 25-10-06 and there was no explanation for this delay – he cites the case of **Albanus Mutua Cr. App. 120 of 2004** in support of this.

Mr. Ogoti for the State did not respond to this aspect – it is correct that the appellant was held beyond 24 hours as is provided by the Constitution. He may pursue for damages against the State under section 72(6) of the Constitution.

On the typed copy, after plea was taken, the trial magistrate did not append his signature as anticipated by section 197 Criminal Procedure Code – was this fatal?

The issue to consider is whether any prejudice was occasioned to appellant. Plea of Not Guilty was entered and the matter proceeded to full trial with witnesses testifying, being cross-examined and appellant also giving his defence. My own view is that no prejudice was occasioned as to warrant interfering with the findings of the court on this account and the situation is well covered by section 382 of the Criminal Procedure Code

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error,

omission or irregularity in the compliant, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

Appellant also raised the issue of the trial magistrate relying on uncorroborated evidence and the fact that no *voire dire* examination was carried out.

Appellant submits that the trial magistrate did not consider that PW1 was a minor whose evidence should have been corroborated.

He makes reference to section 124 Evidence Act which provides that:-

“notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of a child of tender years is 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.”

Actually the provision under section 124 makes a special exception to uncorroborated evidence of minors in sexual offences being accepted in evidence so long as the trial magistrate records the reason for such attendance. Here all that the trial magistrate did was to say he noted that PW1 was intelligent and was truthful. However nothing was carried out by the trial magistrate or at least recorded to show that he tested the intelligence of Pw1 and his ability to tell the truth so as to come up with that conclusion.

It is on this point that Mr. Ogoti concedes to the appeal, saying that no *voire dire* examination was conducted. I agree – and that not only caused prejudice to the appellant, but it made the conviction which was as a result of heavy reliance on evidence of complainant, totally unsafe.

Another aspect which led to the State conceding to this appeal, is the fact that initially the matter was heard by Mr. Joshua Kiarie who took the evidence of PW1 and PW2 – then Mr. D. Ochenja took over and recorded the evidence of PW3 – PW6. The record does not show that the subsequent magistrate complied with the provisions of section 200 (3) Criminal Procedure Code – which reads as follows:-

“Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right”

Obviously this was prejudicial to the appellant and the subsequent proceedings were totally unfair to him in light of that non compliance which obviously impacts on the resultant conviction as being unsafe.

Another aspect which Mr. Ogoti concedes to is the fact that after the close of the prosecution, the trial magistrate did not record whether he had complied with the provisions of section 211 Criminal Procedure Code. Were the provisions

explained to the appellant? Probably, but on the face of the record, this is not manifested and all that the trial magistrate recorded was that appellant had a case to answer. The result is that appellant seems to have been left to his own devices much to his prejudice.

Then there is the clinical officer who presented the P3 form filled by Dr. Tonje. Mr. Ogoti points out that:-

- a) The findings of the clinical officer were not conclusive, as he said there were many possible causes for the anal scar including sheer trauma. I also note that there was no explanation whatsoever as to why Dr. Tonje could not attend court to give evidence. I think this is a situation where provisions of section 33 of the Evidence Act were misused.
- b) For some reason that is not clear, the trial magistrate decided that appellant had made a confession to PW2 and PW3 – yet from the evidence of PW3 and pW4 appellant denied the allegations, its only PW2 who claimed that appellant confessed to the sodomy. The Evidence Act is clear on how confessions are to be taken and what transpired here falls outside the legal provisions.

For whatever its worth, the purported confession did not meet the legal standards as recognized under section 25A of the Evidence Act and so was of no evidential value because as Mr. Ogoti puts it, the manner in which it was placed before the court was wanting. Indeed section 25A of the evidence Act reads as follows:

“(1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and third party of the person’s choice”

That being the case, then I find that the trial magistrate misdirected himself in accepting the purported confession. The upshot then is that there were too many flaws in the procedure adopted by the court, which was prejudicial to the appellant and the evidence did not meet the required standard of proof. In consequence thereof the conviction was unsafe and is quashed. The sentence is set aside.

The appellant shall be set at liberty forthwith, unless otherwise lawfully held.

Delivered and dated this 9th day of **December 2009** at Malindi.

H. A. OMONDI
JUDGE