REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO. 68 OF 2008

(From Original Conviction and Sentence in Criminal Case No. 2086 of 2005 of the Chief Magistrate's Court at Mombasa R.N. Makungu, RM)

AHMED ABDALLA MOHAMED …… APPELLANT

- Versus -

REPUBLIC ……..…… RESPONDENT

J U D G M E N T

The appellant, Ahmed Abdalla Mohamed, was convicted in the Chief Magistrate's Court at Mombasa of indecent assault on a boy contrary to section 164 of the Penal Code, and sentenced to serve 4 years imprisonment. He appealed to this court against conviction and sentence.

The particulars of the charge against the appellant were that on the 29th day of May, 2005 at Ziwani area within Mombasa District of the Coast Province, unlawfully and indecently assaulted MOHAMED SWALEH BWIKA a boy under the age of 16 years by removing his underpant and touching his penis with fingers. He pleaded not guilty and the matter went to full trial. The prosecution called four witnesses, and the appellant testified on oath and called two other witnesses. The appellant was found guilty, convicted and sentenced as indicated above, thereby precipitating this appeal.

During the hearing of the appeal, Mr. Magolo appeared for the appellant while Mr. Ondari appeared for the Republic. Mr. Magolo sought to impeach the conviction on the grounds that the charge and the evidence adduced did not tally; that the manner in which the evidence was taken was flawed; and that therefore there was no basis for conviction. He thereupon urged that the appellant be acquitted.

On his part, Mr. Ondari conceded the appeal on the grounds that the evidence of the witnesses was contradictory, and that it was also at variance with the charge.

It will be noted that the appellant was charged with indecently assaulting a boy by removing his underpant and touching his penis with fingers. However, nowhere in the evidence was it ever mentioned that the appellant touched the boy's penis with fingers as charged or at all. The complainant himself, who testified as P.W.1, said in his evidence in chief –

"… I know him … He put me on the stones and then he told me to undress. He is the one who undressed my shorts and underwear. He also removed his trousers and underwear. He started doing bad things to

me. He started inserting his penis to my anus. He then told me not to say."

Coming from the evidence of the complainant himself, this evidence tends to point at sodomy but rather than indecent assault. Indeed, the complainant's father, who testified as P.W.3, told the court in cross-examination –

"My son told me bad things were done to him. I made my report to the police. In my report, I reported that my son had been sodomised … The report did not seem to have been sodomised (sic) but there was a possibility of having been indecently assaulted …"

This statement is quite unequivocal that what the witness told the police was that the complainant had been sodomised. Although indecent assault was a possibility as he stated in court, the criminal justice system does not operate on the basis of theories and possibilities. It operates exclusively on certainties based on evidence.

The issue of touching the complainant's penis was introduced by P.W.4, NO. 75147 PC Royce Karue. She told the court that on 30th May, 2005, she was in the office at Makupa Police Station when the complainant was taken there by his mother. They had been there earlier in the day and reported that on 29th May, 2005, the boy had been sodomised. After narrating how the witness happened to go to the appellant's house, the witness continued –

"… he accompanied accused to balcony (sic) and when he went accused removed his shorts and underwear and he told the complainant to bend inserted his penis in his anus. He then touched his penis …"

However, in cross examination by Mr. Magolo for the appellant, the witness said –

"*The report made was that the complainant had been sodomised. Once report made it is booked in the OB … In the OB report, in initial report, no indication that the penis was touched. Based on this report victim referred to hospital on allegations of sodomy … by this time I had information that he had sodomised the boy … Doctor confirmed that there was no medical evidence of sodomy … Offence of sodomy not supported by evidence …*"

Whereas one can well understand that the appellant could not have been charged with sodomy due to lack of evidence, one can not equally understand why the appellant was charged with indecently assaulting the complainant by touching the latter's penis when there was no evidence in that direction either. Since there was no indication in the initial report in the OB that the penis was touched, where did it subsequently come from? I agree with both counsel that the charge and the evidence in this matter are at variance and, on that ground alone, the conviction of the appellant cannot be sustained.

The second major ground of appeal is that the manner in which the evidence of both P.W.1 and P.W.2 was taken was flawed, and that once that evidence is discredited, the conviction of the appellant cannot stand. The complainant herein, who testified as P.W.1, and his elder brother who testified as P.W.2, were aged 9 and 12 respectively. In KIBANGENY ARAP KOLIL v. REPUBLIC [1959] EA 92, a child of tender years, in the absence of special circumstances, was held to be any child of an age or apparent age of under 14 years. Both P.W.1 and P.W.2 were therefore children of tender years. Section 19(1) of the Oaths and Statutory Declarations Act, Cap 15 of the Laws of Kenya, states so far is relevant to this case-

"Where in any proceedings before any court … any child of tender years called as a 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; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code, shall be deemed to be a deposition within the meaning of that section."

In JOSEPH OPONDO v. REPUBLIC CR. APPEAL NO. 91/99, The Court of Appeal outlined the stages to be followed in determining whether a child of tender years may give sworn evidence. They said-

"There are two stages which must be followed and must appear on the record of the trial court. First, the examination must endeavour to ascertain whether the witness understands the meaning, nature and purpose of an oath. The question or questions by the court must be directed to that. If the court, from the answers it receives from the witness is satisfied that the witness understands the meaning, nature and purpose of an oath, the witness must then be allowed to give sworn evidence. Stage two of the matter does not then come into play.

Where, however, the witness does not understand the meaning, nature and purpose of an oath, stage two of the examination then follows. The witness is examined by the court to ascertain whether the witness is possessed of sufficient intelligence to justify reception of his or her evidence though not upon oath. This examination must, equally, appear on record. Simple elementary questions would normally be asked like the date, the day, the school the witness is attending and other matters. If the court is satisfied from the answers to such questions that the witness is possessed of sufficient intelligence, the court will allow the witness to give unsworn evidence."

The record in this matter reads as follows –

"P.W.1 MINOR AGED 9 YEARS

EXAMINATION OF MINOR

I go to St. Augustine's School Std.3, Tudor. I go for Madarassa. I know why I am in court. I know that if I lie, will be condemned. I will say the truth.

COURT

Satisfied the minor knows the difference between good and bad.

Minor now affirmed on oath states as follows-"

It is not clear from the examination of the minor whether he understands the meaning, nature and purpose of an oath.

The case of P.W.2 is even more telling. The record reads simply –

"a voil dire (sic) examination carried out.

Minor aged 12 years how affirmed states."

There is no indication as to what test the learned magistrate applied in the examination. I therefore agree with Mr. Magolo for the appellant that the evidence of both P.W.1 and P.W.2 was not properly taken, and without that evidence, no conviction would have followed.

In addition to the above flaws, which are in themselves fatal to the prosecution case, Mr. Ondari noted that the evidence of witnesses was contradictory. In his evidence in chief, P.W.1 testified that when he went to the house, "I found accused person Ahmed Mohamed alone." When cross examined by Mr. Magolo for the appellant, he said –

"When I went to accused's house, I found him with others watching video. I left his friends in the house. I don't remember how many …"

He confirmed the latter position in re-examination when he said –

“I found many people in the house.”

The statements in cross-examination and re-examination clearly contradict the witness’s statement in examination in chief wherein he had stated that he found the appellant alone. We have already seen the contradiction in the evidence of P.W.4, in which she said that P.W.1 had told her that the appellant touched his penis. Yet P.W.1 said no such thing in his own testimony in court. P.W.4 also said that in the initial report, there was no indication that the penis was touched. Instead, the report made was that the complainant had been sodomised. But the doctor confirmed that there was no medical evidence of sodomy. In those circumstances, there was no basis for charging the appellant with either sodomy or indecent assault. I agree with Mr. Magolo that it was not safe to convict the appellant of the offence as charged, and Mr. Ondari is right in conceding the appeal.

For the above reasons, this appeal is allowed. The conviction of the appellant is quashed and the sentence set aside. The appellant is consequently set free and released forthwith unless he is otherwise lawfully held. It is so ordered.

Dated and delivered at Mombasa this 20th day of May, 2008.

L. NJAGI

JUDGE