REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI

Criminal Appeal 55 of 2007

From Original conviction and sentence in criminal case no. 12 of 2007 of the SRM's Court at Lamu

MOHAMED ABBAS ATHMAN ……...……..APPELLANT

VERSUS

REPUBLIC ……..RESPONDENT

J U D G M E N T

The appellant, **Mohamed Abbas**, was charged and convicted on a charge of indecent assault contrary to Section 11(a) of the Sexual Offences Act No. 3 of 2006.

The particulars are that on the 22nd day of December 2006 at about 7.30pm at Faza village in Lamu District within the Coast Province unlawfully and indecently assaulted **Badi Salim** a boy under the age of eighteen years by touching his buttocks.

He was sentenced to serve 10 years imprisonment. He has appealed to this court against the conviction and sentence and listed 9 grounds of appeal. He was represented by Mr. Luganje.

At the hearing Mr. Luganje sought leave to withdraw ground 7 of the appeal which relates to sentence. Mr. Luganje equally sought for leave to argue grounds 1 and 2 jointly, and grounds 3, 4, 5 and 6 together, there being no objection for the state I granted Mr. Luganje leave to do so.

Badi Salim Muslim (PW1) was along the sea shore on 22nd December 2006 with Ali and Hashim and then went to aunt Shumi's. The appellant then called him and asked him to go with him so that he would defile him. At first he refused. The appellant then held his hands and took him along to the nearby bushes. It was now getting dark. Appellant started removing his clothes. First he removed complainant's shirt then his shorts. The appellant then slept on the ground facing upwards. He held the complainant's hands and asked him to sit on him (appellant). Suddenly his brother Abbas came with some torch and they went home. The complainant's further evidence is as follows;-

"***He never defiled me but he touched my buttocks with his penis."***

Yasir Abeidh Muslim (PW2), was at home at Faza Island on 22nd December 2006 in company of his friend Abdul Buni. On his way to the toilet in the house, he heard people speaking in low tones. He informed Abdul Buni and together they went to the direction where the voices were coming from. He switched a gas lighter and saw the appellant lying on the ground facing upwards and the complainant sitting on his crouch. Both had no trousers, the complainant ran away first, followed by the appellant. He reported the matter to the complainant's father whom, he said, was his uncle. He knew the appellant who

is a fellow villager.

Abdul Buni Said (PW3) was outside the house of Nassir (PW2) on 22nd December 2006. Yasir Abeidh Muslim (PW 2) informed him of voices behind the house. Together they went outside the house and found the appellant lying in the ground with the child on top of him. Both were naked. The complainant ran away and the appellant hurriedly dressed. They recognized the appellant with the assistance of the gas lighter.

No. 81746 Pc Said Baya (PW4), a police officer stationed at **Faza Police Post** received a report of sodomy. He took the victim to Faza District Hospital for medical examination. The P3 was filled the following day. Investigation led to the arrest of the appellant. He visited the scene which was about 500 metres from the house where the complainant lived. He took statements from the two eye witnesses.

The appellant in his defence testified that he is a resident of Faza Island and sells fish. That on 22nd December 2006 in the evening he was at a house at Timalimu. He was sending a message on his mobile. The complainant came and grabbed his mobile phone, a motorolla C113. He followed the complainant with a view to getting it back. He caught up with the complainant. The complainant's brothers heard the noise and came running. The complainant threw down the mobile and Yassir picked it up. The appellant did not pursue Yassir. He knew he would get Yassir at the night disco. However, he became unwell and instead went home. In the cause of his sleep he was arrested by the police on allegations of sodomy. He denied the charge.

At the end of the defence case the learned trial magistrate convicted the appellant and sentenced him to 10 years imprisonment and thus provoked this appeal.

Ground 1 and 2 of the appeal attacks the finding of the magistrate that the mobile phone No. C113 Motorola belonging to the appellant was not stolen by the complainant and that the magistrate erred in law in dismissing the applicant's defence as a mere sham.

Mr. Luganje for the appellant argued as relates to ground one that there are material contradictions which should have been resolved in favour of the appellant. That while PW1 says he did not hear people speaking outside the house, PW2 and PW3 testified that he heard voices outside the house. While PW1 says the bush he was led to was 30 metres from the house, PW2 says the incident occurred near the house behind the toilet. That he heard mummers and he rushed to the scene. PW3 on the other had testified that he went behind the house and found the accused lying on the ground. PW3 also confirmed that that night there was a disco in the neighbourhood. PW2 confirmed that evening he did not see the appellant's mobile when he saw the appellant at 6.00pm. He did not know where the mobile was.

Grounds 3, 4, 5 and 6 attacks the credibility and independence of PW2 and PW3 who were cousins to the complainant. That the charge against the appellant was a red herring to conceal the element of theft of the mobile. That there was no medical evidence in support of the allegation that the complainant was a minor. That the trial magistrate should not have believed the evidence of PW1 that the appellant had no mobile phone on the material day.

Mr. Luganje for the appellant argued severally that the defence of the appellant was that the complainant grabbed his (appellant's) mobile phone as he texted messages. That the complainant threw the mobile phone to PW2 and PW3 his cousins when being pursued by the appellant. That it was an error in law for the learned trial magistrate not to consider the plausibility of the complainant's defence. That the learned trial magistrate correctly framed the issues but fell in error when he weighed the prosecution's case in isolation of the defence case. Last but not least the learned trial magistrate did not give any reason for accepting certain evidence and rejecting the others. I was urged to re-evaluate the evidence as a whole and come with an independent finding. In this regard I was referred to the authority of **NGURU V. REPUBLIC KLR [1953] KLR 412.**

Mr. Ogoti for the state conceded the appeal. He argued that various prosecution witnesses were inconsistent in their testimony. They contradicted themselves in material particulars. For example, with

regard to the light: PW1 talks of a match, PW2 talks of a gas lighter while PW3 talks of a gas-lighter. The source of light is important having regard to the fact that the incident happened at night and visibility was not possible without a source of light. As regards the issue of mobile phone, PW2's testimony is that he did not see the mobile phone that evening. With regard to the actual act of sodomy, PW3's testimony is that the complainant was on top of the appellant. Both were naked. The appellant pulled up his trousers and PW2 switched on the gas lighter. That if the incident really took place, then PW3 could not have seen anything as the light was switched on after the incident. On cross-examination PW3 testified that PW2 told him that he heard some noises behind the house. The scene according to this evidence is not near the bushes but the house.

PW4 testified that the appellant had promised the complainant shs. 10/= after the act. Yet PW1 himself talked of the promise of shs. 10/= after or before the act. This aspect of evidence comes for the first time from a mere police officer who was not at the scene.

That the trial magistrate clearly violated the mandatory provisions of Section 169 of the Criminal Procedure Code. Had he complied therewith he would have discovered several material contradictions. In this regard I was referred to the authority of **SALIM JUMA DIMIRO V. REPUBLIC (C.A) CR. APPEAL NO. 114 OF 2004.**

Last but not least the state counsel took issue with the charge sheet. He opined that to the extent that the charge sheet reads Section 11(A) instead of Section 11(1), to that extent is the charge sheet defective. Moreover, the charge reads:-

"***Indecent assault on a boy under the age of eighteen years contrary to Section 11(a) of the Sexual Offences Act, 2006."***

That the charge should have been framed as: "**Unlawfully committing an indecent act with a child, then name the child and then say by touching his buttocks".**

That under the Children's Act a child is a person under the age of 18 years. That there is no medical evidence as regards to the age of the complainant.

On the evidence it is common ground that the complainant and the appellant knew each other before this incident. It is equally common ground that the appellant was known to PW2 and PW3. They are from the same neighbourhood. It is also common ground that the incident took place at night and the only source of light was a match or a gas lighter which ever version one accepts.

However, there are several contradictions in the prosecution case. The following are the material contradictions as I perceive them.

The complainant testified that his brothers Abbas (PW2) came with a match which he suddenly light and spoilt the party. Yassir (PW2) testified that he came with a gas lighter. Abdul (PW3) testified that he switched a gas lighter which he had and spoilt the party. The lighting system was important because the event took place at night. While the complainant talks of a match, PW2 and PW3 talk of a gas lighter. That is material contradiction.

While the complainant says the complainant touched his buttocks with the penis, PW2 and PW3 testified that they found appellant lying on the ground facing upwards with the complainant on top of him thereby suggesting penetration of the ass. No doubt the complainant on whom the act was performed testimony is the best evidence. The learned magistrate should have believed that the appellant merely touched the buttocks with the penis in which event there was no penetration.

Yassir (PW2) on his way to the toilet in the house heard some people speaking in low tones outside the house and informed Abdul (PW3). Abdul (PW3) confirms this. Yet the complainant testimony is that the appellant held his hands and took him to the nearest bushes 30 metres away. PW4 (Said Baya) testified that he visited the scene which was about 500 metres away from the house where the complainant lived.

That house is the same house where PW2 and PW3 were when they heard people talking in low voices. The distance of the house from the scene or bushes was important. It could lend evidence as to whether PW2 and PW3 were able to hear people speaking in low tones. In my view people talking in low tones cannot be heard by a person 500 metres away but could be heard by one 30 metres away. The magistrate was obliged to make a finding on this important aspect of the evidence.

The appellant in his defence testified that the complainant grabbed his mobile phone No. C113 motorolla as he was texting messages. The complainant then threw the said mobile phone to PW2 and PW3 who were his cousins with appellant in hot pursuit. The appellant then despaired. He knew that he was going to get the complainant at a disco the same evening. The learned trial magistrate did not consider this aspect of the evidence and make a finding as to the plausibility of the same. In doing so he fell into a grave error in rejecting this aspect of the appellant's defence. It is the duty of the trial court to evaluate the prosecution's case together with that of the defence. He fell in error in not doing so. This is discernible when he says at page 2 of the judgment thus:-

"*…**the parties knew each other well. The complainant denies having taken the accused persons phone. PW2 and PW3 also deny having colluded to steal the accused's phone. On my part I believe them. The scenario the accused would want this court to believe is highly unlikely…"***

It means that he believed the prosecution's case before weighing it with that of the defence. In doing so he evaluated the prosecution's case in isolation of the defence case.

When he said at page 2 that:-

"*…**the accused lured him to a bushy place outside the house, undressed him and indecently assaulted him."***

He is saying that the complainant was not sodomised but indecently assaulted. The two are different offences attracting different penalties. The evidence of complainant cannot be said to corroborate that of PW2 and PW3 who in a nutshell said the appellant was lying down facing upwards and the complainant sat on his crouch thereby suggesting penetration of the ass by the penis of the appellant.

In saying that "**the complainant's evidence is corroborated by evidence of two other independent witnesses PW2 and PW3"** the learned trial magistrate also fell into error. PW2 and PW3 are cousins to PW1. By reason of blood relations PW2 and PW3 cannot be said to be independent witnesses. His conclusion was thus erroneous.

On the 2nd issue he evaluated the evidence of the prosecution and at the end of it at page 2 says:

"*…**the accused persons defence, to the effect that PW2 and PW3 found him in order to cover up for the earlier theft of the mobile is a sham."***

In my view he accepted the prosecution's version of the evidence and then later considered the defence evidence. This was evaluating prosecution's case in absence of the defence case which is unacceptable. He had a duty of evaluating both and making finding on them.

In conclusion the trial magistrate says:

"***There is overwhelming evidence, direct and credible evidence showing that the accused lured the complainant undressed him and proceeded to indecently assault him."***

Then he proceeds to find him guilty as charged. Having made a finding that all that the appellant did was indecent assault he was obliged to amend the charge and convict the appellant of the offence of indecent assault as opposed to sodomy.

Last but not least there was no medical evidence regarding the age of the complainant. Age assessment

was important in view of the fact that charge specifically stated that the victim was under 18 years. Having failed to obtain the age assessment report, there was no evidence upon which the age of the complainant was based. Accordingly, the charge was not proved beyond reasonable doubt.

Moreover, the charge as framed could not stand. The charge should have been framed as follows:

"…***unlawfully committing an indecent act with Badi Salim a boy under the age of 18 by touching his buttocks with his penis".***

The learned trial magistrate also failed to comply with Section 169 of the Criminal Procedure Code.

For those reasons, I allow the appeal, set aside the conviction and quash the sentence. The appellant shall be set free unless lawfully held for some other unlawful reasons.

DATED and DELIVERED at Malindi this **7th** day of **November** 2007

N. R. O. Ombija

JUDGE

Mr. Ogoti} for Republic

Mr. Luganje} for Appellant