



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO.68 OF 2003

(From Original Conviction and Sentence in Criminal Case No.2613 of 2002 of the Senior Magistrate's Court at Mombasa of the Senior Resident Magistrate Miss B.N. Thurairaja of 7th March 2003)

HASSAN KIPROTICH APPELLANT

VERSUS

REPUBLIC RESPONDENT

J U D G M E N T

HASSAN KIPROTICH (the appellant) was convicted of the offence of attempted unnatural offence contrary to Section 163 of the penal Code and was sentenced to serve five years. He has now appealed against both conviction and sentence.

In his grounds of appeal and submissions the appellant has recorded that the trial magistrate was wrong in relying on the evidence of PW.1 and PW.2 which was contradictory, and that he also failed to consider the evidence of PW.3. He pointed out that the investigation officer did not give evidence.

Whereas it is desirable that an investigation officer of a particular criminal case ought to give evidence in court in support of his case, this is not, however, a mandatory legal requirement. A conviction will not be quashed on the grounds that an investigation officer failed to give evidence.

Particulars of the offence which the appellant was convicted of were that, on the 14th October 2002 at about 10.30 a.m. at Mkomani area in Kongowea location within Mombasa District of the Coast Province, he attempted to have carnal knowledge of CM, a child aged 2 years and 4 months, against the order of nature.

In support of this charge the prosecution called Lilian Said (PW.1). Her evidence is brief and I will reproduce it verbatim. This is what she told the court:

“PW.1: On 14/10/02 at about 10.30 a.m. I was sitting outside a kiosk where tomatoes and onions are sold. I was with Mama Linet. Mama Linet is the Kiosk owner. I then saw Shituka carrying a baby. Shituka is the accused (identified). The accused sells water in that area. He is also known as “BY ORDER” Those are the names the accused is known by in the estate. The accused was carrying a baby on his shoulders. It is a baby who is almost two years old. I knew the baby was from our neighbourhood. I used to see the baby and parents from neighbourhood. The accused was going with the baby towards the shop. I asked mama Linet where the accused was taking the baby. Mama Linet decided to call the accused. We asked the accused where he was taking the baby. He said the mother of the baby had sent him with 5/- to buy juice for the baby. We asked him why he had not bought the juice at the nearby kiosks. He said he was looking specifically for passion juice. We let him go. Mama Linet told me to follow the accused from a far. We were suspicious. I followed. The accused saw me and walked faster. He went round a corner towards his residence. I decided to go back. I met mama Linet who had decided to follow me. I explained to mama Linet what had happened. We followed the accused up to his house. The accused live there with his sisters and fathers. The accused was not in. We checked another house in the same compound where the accused used to stay also. I opened a curtain at the door. The door was not locked. I found the accused in. The accused and the baby in the house. It is a one roomed small house. The accused was fully undressed. The baby was also undressed. The baby was at the edge of the bed. The legs of the baby were on the edge of the bed. The accused was bending over the baby. I asked the accused what he was upto. The accused told me to keep quiet. I started screaming. Mama Linet came in. Some women who were at some nearby kioks also came in. They found the accused and baby still in the room. The accused and the baby were still naked.”

JSK (PW.2) is the mother of the child CM. She stated in her testimony that on 14/10/2002 she had not given the appellant any money to go and buy juice with for her child. Throughout the material time she believed the child was playing with the other children outside her house.

P.C. Eliud Wafula (PW.3) from Nyali Police Station testified that the child was taken for medical examination but was found not to have been defiled.

In his defence the appellant stated that he was arrested from his house and was taken to Nyali Police Station. He denied committing this offence. The trial magistrate accepted the evidence of PW.1 after holding that PW.1 was a credible evidence. After re-evaluating the above evidence I am satisfied that PW.1 gave credible witness and the trial magistrate was entitled to receive it.

Upon the evidence of PW.1 the prosecution proved that the appellant, intending to commit the unnatural act on the child CM, began to put his intentions into execution by means adapted to its fulfillment. He carried the child into a bedroom, undressed both himself and the child, and placed the child at the edge of the bed and even bent over him, ready to commit the unnatural act, but PW.1 and Mama Linet interrupted him. Appellant therefore did not fulfill his intention. He committed the offence of attempted unnatural offence contrary to Section 163 of the Penal Code and was properly convicted. He appeal against conviction is dismissed.

On sentence, any person who attempts to commit unnatural act shall be liable to imprisonment for seven years. The appellant was sentenced to five years imprisonment. This was not manifestly excessive. Appeal against sentence is also dismissed.

It is so ordered.

Dated, signed and delivered at Mombasa this 18th September 2003.

A.G.A. ETYANG

JUDGE