



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CRIMINAL DIVISION AT NAIROBI

CRIMINAL APPEAL NO. 52 OF 2019

RAPHAEL MUTISO NGEWA.....APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal from the conviction and sentence of Hon J Kibosia, Senior Resident Magistrate, in

Criminal S.O. No. 78 of 2016, at the Chief Magistrate's Court Makadara, dated 31st day 2018)

JUDGMENT

1. On 4th July 2016, the appellant was arraigned before the Chief Magistrate's Court at Makadara, charged vide criminal case No. S.O 78 of 2016, with the offences of; defilement of a boy contrary to; section 8(1) as read with 8(2) of the Sexual Offences Act No. 3 of 2006 (herein "the Act") and alternative charges of; indecent act with a boy contrary to section II (1) of the Act. The particulars of each count are as per the charge sheet.
2. He took a plea of not guilty on all charges and the case proceeded to full hearing. The prosecution called a total of eight (8) witnesses, while the appellant testified on his own and did not call any witness.
3. The prosecution's case in a nutshell, is that, the appellant owns a barber shop at [Particulars Withheld] estate in Nairobi, wherein, the complainants, herein (referred to as PW1; "BOJ" and PW2; "JM") aged six (6) and eleven (11) years respectively; were his customers.
4. That, on several occasions, the appellant would order the complainants to remove their clothes and lean on bench in the shop and he would defile them. That, he would then give them Kshs 10 and warn them not to tell anyone.
5. However, on 28th June 2016, PW6 MW, a teacher at [Particulars Withheld], where the complainants were schooling, received information of the alleged defilement of; school children in the appellant's barber shop.
6. She interrogated the boys and each gave a narrative of how, they the appellants would detain them in the shop and then order them to remove their clothes, put them on the bench, then oil their anal area, defile them and then give them Kshs 10, juice and chips.
7. Ms W, then sent the boys to call their parents. Upon receipt of the information, the irate parents and other members of the public ambushed the appellant and beat him up before he was rescued by Police officers and taken to the Police Station. In the meantime, the complainants were taken for treatment and after the investigation, the appellant was charged accordingly.
8. At the conclusion of the trial, the learned trial magistrate delivered a judgment on; 31st October 2018, and stated as follows:

"There was overwhelming evidence that, the accused person was involved in defiling the complainants. Prosecution has succeeded to prove the offence of defilement and I do hereby convict him under section 215 of Criminal Procedure Code. The alternative count is dispensed herewith"
9. Upon conviction, the prosecution indicated that, the appellant did not have any previous record of conviction and treated him as a first offender. The appellant in mitigation, stated that, his mother was aged eighty-three (83) years old and has no one to care for her. He prayed for leniency.
10. The trial court then ordered for a "social enquiry report" prior to sentencing. Upon receipt thereof; the court stated that, although it had

considered the mitigation and social enquiry report, its hands were tied since the offence attracts a mandatory sentence of life imprisonment and sentenced the appellant to “life imprisonment for each count”

11. Being aggrieved by the conviction and the sentence, the appellant filed undated petition of appeal on; 13th March 2019, together with “memorandum grounds of appeal” which states as follows:

- a) *That, the learned trial magistrate erred in law and in fact in holding that, the offence he was charged with of defilement was proved against him, beyond reasonable doubt whilst it was replete with inconsistencies;*
- b) *That, the learned trial magistrate erred in law and as enshrined under articles; 50(2), (h), (J) and 49 (a), (c) of the constitution which were contravened, hence a prejudice to his right of access in law and facts in basing his conviction on incurably defective charge contrary to Section 214 of the CPC and SOA Act, No. 3 of 2006 which was a serious dereliction of justice;*
- c) *That, the learned trial magistrate erred in law and facts in failing to give cogent reasons for the rejection of his alibi defense contrary to; section 169 of C.P.C;*
- d) *That, as he cannot remember all that transpired at trial, therefore, upon receipt of appeal, he intends be present in person at the hearing of his appeal;*
- e) *That, the Memorandum filed also be treated as his application and prayed to be supplied with a copy of the trial proceedings and judgment.*

12. At the hearing of the appeal, the appellant filed “amended grounds of appeal” albeit without leave of the court. These grounds states as follows: -

- a) *That, the trial magistrate erred in law and fact by failing to find that, the prosecution did not prove penetration and age beyond reasonable doubt;*
- b) *That, the trial magistrate erred in law and fact by relying on the incredible evidence of the prosecution witness;*
- c) *That, the trial magistrate erred in law and fact and misapplication of; Section 124 of the Evidence Act;*
- d) *That, the trial magistrate erred in law and fact by failing to find that the prosecution’s evidence was majorly on suspicion and it was dangerous to rely on the same for conviction.*

13. It is noteworthy that, the Respondent did not file any response to the appeal. Be that as it were, as a first appellate court, the court is guided by the holding in the decision of; ***Okeno vs. Republic (1972) E.A 32*** as to the role of the first appellate court.

14. The **Court of Appeal therein stated** as follows:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424.”

15. In the instant case the, appellant was convicted of an offence of defilement. The elements thereof are; proof of the age of the victim, penetration, identification and/or recognition of the perpetrator or offender.

16. I shall first deal with the age of the complainants. In that regard, the trial court stated as follows;

“Although the birth certificates were not produced, medical documents indicate that, PW1 was born on 20th October 2004 and PW2; on 3rd May 2010. Making them 12 and 6 during the time the offence was allegedly committed. I also had a chance to interact with the minors and from my observation, the ages tally. This settles the issue of age”

17. However, although the trial court indicates that no birth certificates were produced, I find that, the evidence reveals the contrary that, a birth certificate No. [Particulars Withheld], of JM was produced as Plaintiff exhibit 1. It shows that, he was born on 21st October 2004. The alleged offence, as indicated in the charge sheet, took place on diverse dates in the months of; April 2015 to 29th June 2016. As such, the complainant was about eleven (11) years old. In that regard, the age of the complainant “JM” was proved beyond reasonable doubt.

18. The appellant submitted that the age of the two complainants were not proved. That is not factually correct, as aforesaid, the birth certificate of; of JM, was produced. However, the birth certificate of “BOJ” was not produced. The mother, PW2 LA told the court that, she did not have the same. Unfortunately, neither the prosecution nor the court sought to establish from her as to when the complainant was born.

19. Be that as it were, his P3 form indicates that, he was 6 years' old. Similarly, the learned Trial Magistrate also indicated in the judgment that, by physical appearance, the complainant was aged about the 6 years. In the same vein, the lower court file shows that, PW2 – "BOJ" could not take an oath due to his "young age".

20. In my considered opinion, these were school going children in primary school. One can take judicial notice of their tender years. I therefore hold that, there was adequate evidence of the age of the complainants. In the absence of any contrary evidence, I hold that, the complainants were minors in the strict meaning of the law.

21. I shall now consider the element of penetration. Section 2 of the Sexual Offences Act, defines "penetration, to mean "The partial or complete insertion of the genital organs of a person into the organs of another person".

22. In the instant case, PW1 told the court as follows in his evidence in chief:

"He locked the windows and door. He told me to remove my trouser and underpants. He told me to lie on a desk. I did. He inserted his "dudu" into my anus. I started crying. It was painful. He removed his "dudu" and opened the door for me"

23. PW2 on his part testified and stated as follows:

"He called me and told me to hold the bench. I was alone in the kinyozi. When I refused, he forced me to remove my trousers and underpants. He inserted his "Kitu ya kukojoa inside my butts" I did feel pain. I cried"

24. The aforesaid evidence of these two complainants indicates that, the complainants were subjected to penetration as defined by the law. However, it suffices to note that medical evidence to corroborate it was critical. In that regard, PW5 Kezzie Shako attached to Nairobi Police Surgery testified that, she examined both complainants and noted that; "BOJ", aged 6 years, had "normal anatomy of the genitals. Anal tube was normal: anal structure normal. He complained of painful barrel movements" as for "JM" aged 11 years old, he too, had normal anatomy of external genitalia.

25. PW8 Karen Mwhaki, a nurse at; Mama Lucy SGBV Hospital stated that, she examined "JM" on 30th June 2016, and noted no visible injuries, the male genital was normal; no bruises, or tears were seen on anal area; and sphincter muscle tube was normal. She produced a medical certificate produced by Rose Waweru a colleague that indicated, "BOJ" was examined on 30th June 2016, and no physical injuries were noted, the genital examination was normal, no bruises or tears were seen on penile examination and anal muscle was of normal sphincter.

26. Upon analysis of the evidence above, the learned trial magistrate stated as follows: -

"During cross examination, the accused did not challenge the minors on the allegation levelled against him, neither did he raise the issue of the bicycle that they allegedly wanted to snatch from him (he mentioned this during his defence). It was also evident from the police doctor that the accused person had an injury to his forehead. From the testimony of PW8, the accused person was beaten by the mob before he was arrested. The accused also attested to this fact. Although the medical documents did not indicate the effect of penetration, if there was any, I do believe the two boys and the fact that, their evidence was corroborated by the witnesses who came thereafter"

27. However, my analysis of the evidence reveals as follows:

a) First and foremost, the complainants were sexually assaulted on various occasions. In fact, as per the particulars of the 2nd count, the complainant "JM" was defiled for a period of over one year;

b) Secondly, although the particulars of the 1st count indicates "BOJ" was defiled on 26th June 2016, he was medically examined on; 30th June 2016 and 1st July 2017, after a considerable time;

c) Finally, as can be deduced from the medical reports. there was no direct evidence of defilement was detected on examination of the complainants.

28. In fact, the trial court clearly stated that, the medical reports "did not indicate the effect of penetration if there was any". In that case the trial court ought to have resolved the doubt in favour of the appellant, in relation to the main counts of defilement.

29. I shall now consider the last issue as to; whether it is the appellant who committed the subject offences. In this regard, both complainants clearly identified the appellant as their barber. The parents too testified that, the appellant is the one who used to shave the boys. The complainants' teacher confirmed the appellant owned the barber shop and so did the appellant himself.

30. However, the appellant attributed his arrest on a grudge, but I find the same untenable. The two complainants being children of tender years and unknown to each other, would have absolutely no reason to plant the charges on the appellant. Even then, the appellant did not raise that issue while cross-examining PW1 and PW2 and or their parents.

31. To the contrary, PW1 stated that:

“I know the accused person. He is “mtu wa kinyozi”.

In cross examination, he stated

“I came to your house twice”.

PW2 stated:

“The person in front of me is the Kinyozi”

He went on to state;

“He had done it many times. He used to call me to the barbershop”.

32. It is therefore evident that, the complainants met the appellant, not once, twice but on several occasions and for long period of time. As such they knew him very well. In addition, PW3 testified that, when the mob confronted the appellant, he tried to run away, but he was overpowered and arrested.

33. In rebuttal evidence during his defence, the appellant testified only to the events on the date of his arrest. He then introduces a brand new version of evidence of two boys “robbing” him of a bike, and how he was hit with a shovel, and he let go the bike. That, he ran to the police station to seek for help. Then, he saw four boys he used to shave. He was asked to go to the police station and thereafter, he was charged with defilement and brought to court.

34. Analysis of his defence reveals, that is as an afterthought. A mere tissue of lies. PW3, PW4 and PW5, clearly testified that, he was assaulted by the mob, not the “two boys” who he alleges wrestled him. In addition, PW7 No. 73411 PC Gregory Gitonga, told the court that, he found the appellant arrested by the mob and taken to Obama Police Station. Therefore, the appellant did not rebut the evidence of the complainant.

35. The upshot thereof is that; I find adequate evidence that he was involved in the committing of the offence. However, based on the medical evidence, I find that, the charges on the main counts of defilement were not proved, but there is sufficient evidence to support the alternative counts.

36. In that regard, I quash the conviction on the main count and set aside the sentence thereon, and substitute it with the conviction on both alternative counts of committing an indecent act with a child.

37. As regards the sentence, I find that, the sentence provided for the offence in section 11(1) of the Sexual Offences Act, states

“(1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.

38. I have considered the following factors in meting out the sentence herein, the appellant has no previous records of conviction, his mitigation, pre-sentence report, period spent in custody during trial and period of sentence served.

39. However, the offences the appellant committed are very serious taking into account the psychological impact on the victims. I sentence the appellant to serve ten (10) years imprisonment on each alternative count from the date of sentence in the trial court. The sentence to run concurrently.

40. It is so ordered.

DATED DELIVERED VIRTUALLY AND SIGNED ON THIS 9TH DAY OF JUNE 2021.

G. L. NZIOKA

JUDGE

In the presence of:

Appellant present in person

Mr Kiragu for the Respondent

Edwin Ombuna – Court Assistant