REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO.3 OF 2017

REPUBLIC.....APPELLANT

VERSUS

VINCENT KIPKURUI KOROS.....RESPONDENT

(Being an appeal from the Ruling and acquittal by HON NDURURI (P.M.) in Kericho Sexual Offences Criminal Case No.29 of 2016 delivered on 6/1/2017)

J U D G M E N T

1. The Respondent was acquitted under Section 210 of the offence of defilement Contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offices Act (SOA) No.3 of 2006.

2. The particulars of the offence were that on the 23rd day of February, 2016 between 17.00 and 12.30 hours in Kericho West Sub-County of Kericho County, the Respondent unlawfully caused his penis to penetrate the anus of NCS, a boy aged 7 ½ years (hereafter referred to as the child).

3. The Respondent was charged with an alternative Count of committing indecent Act with a child Contrary to Section 11 (1) of the Sexual Offences Act No.3 of 2006 in that on the same material particulars as in Count 1 above, the Respondent intentionally and unlawfully caused his penis to come into contract with the anus of NCS a child aged 7 ½ years.

4. The prosecution called four witnesses to testify in this case. The child was unable to testify and the prosecution made an application under Section 31 of the Sexual Offices Act to have the child declared a vulnerable witness and to have him testify through his mother as an intermediary and the Application was allowed.

5. PW.1 and PW.2, the mother and father to the Complainant respectively testified that on the material day when they arrived at home in the evening at 7.30 p.m., the child NCS was missing. PW.1 and PW.2 looked for him but did not find him.

6. PW.1 and PW.2 said the child returned at midnight limping and in pain. PW.1 said the child was shaking. She took him to his bed and turned him on his stomach. She saw blood coming from his anus mixed with faeces. PW.1 said she was with PW.2. She asked the child where he had been and he told them he had been at the bushes with Kipkurui of Elizabeth.

7. PW.1 said they also have a relative called Kipkurui and when she asked the child if he was the one, the child was categorical that it was Kipkurui of Elizabeth who did tabiambaya (bad manners) in his anus.

8. The parents of the child (PW.1 and PW.2) took the child to Hospital the following day and reported the

matter to the Police Station on the same day. They said the Respondent was arrested by neighbours and taken to Sosiot Police Station. They said the Respondent is a neighbor whom they know as Kipkurui of Elizabeth because his mother is called Elizabeth.

9. ***PW.3 P.C. JOSHUA AMWAI*** attached to Sosiot Police Station received the report from the parents of the Complainant and he arrested the Respondent. He said the parents of the Complainant attempted to settle the matter out of Court but he made them to take the Respondent to the Police Station after threatening to arrest them for blocking the course of justice.

10. ***PW.4 CHERUIYOT MICHAEL***, the Clinical Officer who examined the Complainant on 25/2/2016 said he examined the child and saw old bruises in his anus both on the posterior and interior. He said the child complained of pain in the lower abdomen.

11. PW.4 said there were treatment notes from Sosiot Health Centre which indicated that there was spermatozoa but he did not see any spermatozoa because the child had already defecated. The child was treated for HIV prevention and also for worms, typhoid and amoeba. PW.4 produced the P.3 Form as an exhibit in this case. The Doctor said the bruises he noted were 3-4 days old.

12. At the close of the prosecution case, the court made a ruling that the prosecution had not met the threshold set out in the case of ***RAMANLAL T. BHATT -VS- REPUBLIC [1957] EA 332*** to warrant the Respondent to be placed on his defence.

13. The Respondent was acquitted under Section 210 of the Criminal Procedure Code and the state being aggrieved with the acquittal has appealed to this Court on the following grounds:-

i. THAT the trial magistrate did not appreciate the ingredients of the offence of defilement.

ii. THAT the Respondent was acquitted inspite of the evidence adduced by the prosecution.

iii. THAT the Trial Magistrate failed to appreciate the standard of proof required in determining whether the Respondent had a case to answer.

14. The parties filed written submissions which I have duly considered. The Appellant submitted that prosecution proved the ingredients of the offence of defilement in that there is evidence that there was penetration and further the Respondent was positively identified and the age of the victim was proved.

15. The Appellant further submitted that there was evidence that it was the Respondent who sodomized the Complainant and further that the prosecution established a prima facie case to warrant the Respondent to be placed on his defence.

16. The Respondent opposed the appeal and submitted that the medical officer did not find any evidence to prove sodomy. Further that the child told PW.1 and PW.2 that the Respondent did “tabiambaya” (bad manners) to him and that would not constitute sodomy.

17. The Respondent also submitted that there was no medical evidence to link the Respondent to the act of penetration since the Respondent was not examined and further, the Clinical Officer (PW.4) said there were old bruises on the child’s posterior aspects of the anus and if there was penetration, there would have been massive internal injuries.

18. The Respondent further submitted that the prosecution evidence was inconsistent and uncorroborated and did not meet the threshold set down in the case ***BHATT -VS- REPUBLIC [1957] EA 332***.

19. I have considered the submissions filed by both parties. This being a first appellate court, the duty of this court is to re-evaluate the evidence adduced before the Trial Court and to arrive at my own conclusion bearing in mind that the trial court had the opportunity to observe the witnesses.

20. The issues for determination in this appeal are as follows:-

i. Whether the prosecution (the Appellant) proved the ingredients of the offence of defilement.

ii. Whether the trial court erred in acquitting the Respondent under Section 210 of the C.P.C.

iiii. Whether the appeal should be allowed.

21. On the issue as to whether the prosecution proved the ingredients of the offence of defilement, there is evidence that PW.1 and PW.2 were allowed to testify on behalf of the child as intermediaries under Section 31 of the Sexual Offences Act No.3 of 2006, which states as follows: -

1. A court, in criminal proceedings involving the alleged commission of a sexual offence, may declare a witness, other than the accused, who is to give evidence in those proceedings a vulnerable witness if such witness is—

(a) the alleged victim in the proceedings pending before the court;

(b) a child; or

(c) a person with mental disabilities.

(2) The court may, on its own initiative or on request of the prosecution or any witness other than a witness referred to in subsection (1) who is to give evidence in proceedings referred to in subsection (1), declare any such witness, other than the accused, a vulnerable witness if in the court's opinion he or she is likely to be vulnerable on account of—

(a) age;

(b) intellectual, psychological or physical impairment;

(c) trauma;

(d) cultural differences;

(e) the possibility of intimidations;

(f) race;

(g) religion;

(h) language;

(i) the relationship of the witness to any party to the proceedings;

(j) the relationship of the witness to any party to the proceedings;

(k) the nature of the subject matter of the evidence; or

(3) The court may, if it is in doubt as to whether a witness should be declared a vulnerable witness in terms of subsection (2), summon an intermediary to appear before the court and advise the court on the vulnerability of such witness.

(4) Upon declaration of a witness as a vulnerable witness in terms of this section, the court shall, subject to the provisions of subsection (5), direct that such witness be protected by one or more of the following measures—

(a) allowing such witness to give evidence under the protective cover of a witness protection box;

(b) directing that the witness shall give evidence through an intermediary;

(c) directing that the proceedings may not take place in open court;

(d) prohibiting the publication of the identity of the complainant or of the complainant's family, including the publication of information that may lead to the identification of the complainant or the complainant's family; or

(e) any other measure which the court deems just and appropriate.

(5) Once a court declares any person a vulnerable witness, the court shall direct that an intermediary referred to in subsection (3), be appointed in respect of suchwitness unless the interests of justice justify the non-appointment of an intermediary, in which case the court shall record the reasons for not appointing an intermediary.

(6) An intermediary referred to in subsection (3) shall be summoned to appear in court on a specified date, place and time to act as an intermediary and shall, upon failure to appear as directed, appear before the court to advance reasons for such failure, upon which the court may act as it deems fit.

(7) If a court directs that a vulnerable witness be allowed to give evidence through an intermediary, such intermediary may—

(a) convey the general purport of any question to the relevant witness;

(b) inform the court at any time that the witness is fatigued or stressed; and

(c) request the court for a recess.

(8) In determining which of the protective measures referred to in subsection (4) should be applied to a witness, the court shall have regard to all the circumstances of the case, including—

(a) any views expressed by the witness, but the court shall accord such views the weight it considers appropriate in view of the witness's age and maturity;

(b) any views expressed by a knowledgeable person who is acquainted with or has dealt with the witness;

(c) the need to protect the witness's dignity and safety and protect the witness from trauma; and

(d) the question whether the protective measures are likely to prevent the evidence given by the witness from being effectively tested by a party to the proceedings.

(9) The court may, on its own initiative or upon the request of the prosecution, at any time revoke or vary a direction given in terms of subsection (4), and the court shall, if such revocation or variation has been made on its own initiative, furnish reasons therefor at the time of the revocation or variation.

(10) A court shall not convict an accused person charged with an offence under this Act solely on the uncorroborated evidence of an intermediary.

22. PW.1 and PW.2 said when the Complainant disappeared, they looked for him and did not find him

and when he returned at midnight, he was limping, he was in pain and there was blood coming out of his anus mixed with faeces.

23. There is evidence that the child was taken for medical examination on 25/2/2016 and the act was committed on 23/2/2016 and the child had been treated in the intervening period.

24. I find that the prosecution proved the three ingredients of defilement. There was penetration, the child told PW.1 and PW.2that it was Kipkurui of Elizabeth who did it and therefore the Respondent was positively identified and the birth certificate produced on behalf of the Complainant showed he was 7 ½ years at the time of the commission of the offence. In ***RONALD NYAGA KIURA VERSUS REPUBLIC (2018) eKLR,*** the court stated as follows*;*

> ***"It is important to note that at the close of prosecution, what is required in law at this stage is for the trial court to satisfy itself that prima facie has been made out against the accused person sufficient enough to put him on his defence pursuant to the provisions of Section 211 of the Criminal Procedure Code. A prima facie case is established where the evidence tendered by the prosecution is sufficient on its own for a court to return a guilty verdict if no other explanation in rebutted is offered by an accused person."***

25. I therefore find that the Trial Court erred in acquitting the Respondent under Section 210 of the Criminal Procedure Code in view of the overwhelming evidence adduced by the prosecution.

26. I rely on the provisions of Section 348A of the Criminal Procedure Code which states as follows: -

> ***(1) When an accused person has been acquitted on a trial held by a subordinate court or High Court, or where an order refusing to admit a complaint or formal charge, or an order dismissing a charge, has been made by a subordinate court or High Court, the Director of Public Prosecutions may appeal to the High Court or the Court of Appeal as the case may be, from the acquittal or order on a matter of fact and law.***
>
> ***(2) If the appeal under subsection (1) is successful, the High Court or Court of Appeal as the case may be, may substitute the acquittal with a conviction and may sentence the accused person appropriately.***

27. I find that the prosecution established a prima facie case to warrant theRespondent to be placed on his defence.

28. If the Respondent does not raise a reasonable defence he should be convicted as charged.

29. I accordingly allow the appeal and I set aside the acquittal and rule that the Respondent has a case to answer.

30. I direct that the file be placed before any other court other than the court that acquitted the Respondent for defence hearing and for Judgment.

31. Since the Respondent had been released on bond before the acquittal, the same is reinstated

Orders to issue accordingly.

DELIVERED, SIGNED AND DATED AT KERICHO THIS 9TH, DAY OF JULY,2021.

A. N. ONGERI

JUDGE