



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NUMBER 170 OF 2016

ABUSHAID KAMANJE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal against both the conviction and the sentence of Senior Principal Magistrate Hon. L. Gicheha delivered on 24th October, 2016 in NAKURU CM Adult Criminal Case Number 90 of 2015 Republic v Abusaid Kamanje)

J U D G M E N T

1. The appellant herein was charged with;

Defilement contrary section 8(1) (3) of the Sexual Offences Act No. 3 of 2006.

ABUSAID KAMANJE: *On the 28th day of March 2015 at [particulars withheld] Area within Nakuru County unlawfully and intentionally committed an act by inserting a male organ namely penis into a male genital organ namely anus of ES a child aged 14 years causing penetration;*

Alternative Charge

Committing an indecent act with a child contrary to Section 11(1) of the Sexual offences Act No. 3 of 2006.

ABUSAID KAMANJE: *On the 28th day of March 2015 at [particulars withheld] Area within Nakuru County unlawfully and knowingly committed an indecent act with a child namely ES aged 14 years by touching his private parts namely anus.*

2. By a judgment dated 24th October, 2016 he was found guilty of the offence of **defilement contrary to Section 8(1) (3) of the Sexual Offences Act** and sentenced to twenty (20) years imprisonment.

3. Aggrieved by that decision he filed appeal on 1st November 2016 and amended Grounds of Appeal on 1st July 2019, together with his written submissions.

1. **THAT the trial magistrate erred in law and fact by relying on the evidence that were very inconsistent and contradictory to each other.**

2. **THAT the trial magistrate erred in law and fact by not considering that a *voire dire* examination wasn't done to the complainant despite being of the tender years.**

3. **THAT the trial magistrate erred in law and fact by failing to note that the most crucial witnesses did not testify.**

4. His position was that;

ü The evidence was not sufficient to support the conviction.

ü That no *voire dire* was conducted

ü Crucial witnesses did not testify

He relied on his written submissions while the state through Ms. Nyakira made an oral response.

5. The case for prosecution was presented by three witnesses;

PW1 ES, fourteen (14) year old boy testified that he was an orphan who lived with his grandmother at [particulars withheld], and was at the same time a street boy. On 28th March 2015 he was at [particulars withheld], Nakuru County around 8.00 p.m. and was looking for his friends. He met the appellant who gave him some food to carry for him. When they entered appellant's shack the appellant held him tightly on the neck, hit him on the face and threatened him against screaming. He proceeded to undress him and insert his penis forcefully into his anus. He felt a lot of pain. The appellant however finished and ES slept.

The next morning he woke up and went to report to the Bondeni Police Station. He was escorted to Nairobi Women's Hospital, and later to Provincial General Hospital Nakuru, both P3 and Post Rape Care forms were completed together with age assessment reports. On cross examination by the appellant, he told the court that the appellant defiled him. He denied calling anyone to attack the appellant.

PW2 was Dr. Njoroge Kanyotu. He testified on behalf of Dr. Mukando who filled the P3 form. He also produced the Post Rape care which was filled by a Sister Mwege.

According to Dr. Mukando the complainant told him he had been beaten and sodomised by a colleague at the children's home. He had bruises on the cheek and darkened skin. The injuries were months old. He had bruises on his anus. P3 was filled on 26th June, 2015.

PW3 No. 73594 PC Wyclif Omutu testified that on 29th March, 2015 at 11.00 a.m. a group of street boys brought the complainant to Bondeni Police Station where he reported that he had been sodomised by the accused person. He arrested the accused person and escorted the complainant to Nairobi Women's Hospital where he was examined and admitted in the ward for one week. He was brought back to [particulars withheld] Children's Home where he stayed for two (2) months. Age assessment for complainant was fourteen (14) – fifteen (15) years old. He could not trace the other street boys to record their statements. The prosecution closed its case.

The accused was placed on his defence. He gave unsworn statement and did not call any witness. He said he was a loader living at [particulars withheld] where the Governor had given him and others a house to live in. In addition they were given vouchers to enable them eat and play football. He said they would go to work and go back in the evening. That where they lived they were guarded by police officers. He denied defiling the complainant.

6. **Submissions**

The appellant argued each ground separately.

On the first ground he argued that it was not clear as to where and when the complainant was sodomised.

That the complainant testified said it was 28th March, 2015 at 8.00 p.m. inside the appellant's shack but when the P3 was filled it said the offence happened on 29th March 2011 at 10.45 a.m. in a children's home where both the appellant and the complainant were residents.

Further that the medical evidence was completely unreliable, if the sodomy happened in March 2015, and the examination was in June 2015 how could the doctor confirm that the injuries he found were inflicted in March 2015? He submitted that this was a case of mistaken identity.

On the second ground the appellant submitted that on the authorities available; **Samuel Warui Kirimi v Republic No. 16 of 2014 Court of Appeal**, the Court of Appeal was of the view that fourteen (14) years is the correct threshold for *voire dire* examination and that in **Kibageny Arap Korir v Republic (1959) EA 82**, the same court held that a child of tender years meant a child below the age of fourteen (14) years. He went on to cite the provisions of the Children Act which define child of tender years as ten (10) years and below and that the Sexual Offences Act relied on the definition of child as found in the Children Act. He argued that the trial magistrate erred in failing to conduct *voire dire*, and hence, a ruling should be made in his favour.

On the third ground the appellant's view was that the complainant's fellow street boys ought to have been available to testify as well as the complainant's grandmother. That failure to call them locked out crucial witnesses, and the court could draw the inference that their evidence would not have supported the case for the prosecution.

In response Ms. Nyakira submitted that the complainant's age was assessed as between fourteen (14) – fifteen (15) years old. That the medical report showed there were bruises on both left cheek and anus and the complainant knew the accused very well. Hence defilement and the penetration had been proved. Only thing was for court to uphold the conviction and sentence.

7. Analysis and Determination

This being a first appeal the court is guided by **OKENO VS REPUBLIC [1972] EA 32, at p36**. also cited with approval in **David Mwingirwa v Republic [2017] eKLR** where the court stated

“The High Court on the face of it appears to have approached the matter on the basis of whether the magistrate's findings could be supported by the evidence, instead of whether they should be supported... The first appellate court must reconsider the evidence, evaluate it itself and draw its own conclusions, in deciding whether the judgment of the trial court should be upheld, as well, of course as deal with any questions of law raised in the appeal, see Selle v. Associated Motor Boat Co. [1968] EA 123.”

This duty is to re-assess and re-evaluate the evidence and arrive at its own conclusions.

It is evident from the P3 that the complainant reported vide OB report number 18/29/3/2015. According to the P3 the

“Date and time of alleged offence is 29/3/2015 at 10.45 hours, by a colleague in a children's home after beating him.”

Yet the complainant testified he was sodomised on 28th March, 2015 about 8.00 p.m. inside the appellant's shack. The Post Rape Care indicates that the offence was allegedly committed on “29/3/2015 on the streets of Nakuru”. That the alleged perpetrator was seventeen (17) years old also a street boy.

The date of examination for the Post Rape Care was 22nd June, 2015 where the presenting symptoms were

ü Psychological trauma

ü Swollen left eye

The circumstances were set out, that the complainant was called by the perpetrator who was older than him who beat him and had penetrating anal intercourse. He was found to have bruises at 12 o'clock on the anal orifice. The Post Rape Care indicated that he had been treated at Nairobi Women Hospital but there was no information from there as to what the findings were or his state of clothing. The investigating officer did not avail any evidence that the complainant was treated at Nairobi Women's Hospital on 29th March 2015, or admitted therein as alleged, and the findings of the treatment on that date.

There was no evidence of any treatment or admission at Nairobi Women Hospital. How crucial was this? It was the first evidence of the medical examination that would have supported the complainant's testimony of having been penetrated anally on that day.

8. The medical evidence before court was collected on 22nd July, 2015 three months after the alleged incident. There is nothing on record to confirm what the bruises on the cheek, the swollen left eye, bruise on the anus, were inflicted on 28th March 2015, or 29th March 2015, it was also not clear where this offence happened, in the appellant's house? At the children's home? In the streets of Nakuru? It is not possible that all three could be true, yet the information is said to have come from the same complainant.

9. The police officer claimed that the accused was brought in by the complainant and six (6) other street boys on 29th March 2015 at 11.00 a.m. and he arrested him immediately, yet the charge sheet indicates that the appellant was arrested on 31st March 2015 and arraigned in court on 1st April, 2015. So, who is telling the truth here? Was the appellant escorted to the police station on 29th March, 2015 or was he arrested on 31st March 2015, two (2) days after the alleged incident? Who on the 31st March? Where was he arrested and how was he identified for that arrest. This contradiction is not an idle one as it hinges on the identity of the offender. All these inconsistencies in the case for the prosecution create a situation where holes begin to emerge in the prosecution's case.

10. Regarding the witnesses who were not called, it was not necessary to call the grandmother of the complainant. The other street boys testimony was necessary as to where the appellant was arrested, whether they brought the appellant to the police station, as this was not the testimony of the complainant. If indeed they took themselves to police station why were their statements not recorded on the material date?

11. In any event nowhere in the complainant's testimony did he say that he and six (6) others took the accused to the police station. He just reported to Bondeni Police Station. That is all. The issue of arrest of the accused by him and other street boys happens to be the uncorroborated evidence of PW3. The unclear evidence of arrest seems to support the appellant's evidence and submission that he was arrested for something he did not know and kept in custody.

12. Regarding the issue of *voire dire*, it is evident that the same was not conducted. However there is nothing even in the appellant's submission to show that omission occasioned him any prejudice. In any event the complainant was assessed to be between fourteen (14) – fifteen (15) years old and as submitted by the appellant, he is entitled to the lowest punishment in the circumstances. The court would then have to take the upper limit of the complainant's age, fifteen (15) years and hence lower the recommended minimum prison term from twenty (20) years to fifteen (15) years as the sentence would now fall under **Section 8(4) of the Sexual Offences Act.**

13. This case was not investigated at all. The investigating officer did not visit any of the alleged scenes, the appellants shack, or the children's home or the specific place in the streets where the offence allegedly took place, neither did he bother to obtain and avail the complainant's treatment records at Nairobi Women Hospital and if it is true that the accused was brought to the police Station on 29th March

2015 why the appellant was not also taken to hospital for medical examination.

14. From the foregoing it is evident that the prosecution had not even established a prima facie case in the first place to warrant the appellant being put on the defence is clearly spelt out as is clearly set out in **Bhatt v Republic** on the standard of evidence required to make up a prima facie case. It cannot be any amount of discredited, inconsistent evidence, it cannot be.

15. The trial magistrate lay emphasis on the mechanics of the charge, penetration, age, perpetrator, yet the evidence of penetration was questionable, the import of the age of between fourteen (14) to fifteen (15) years was not taken into consideration, and as to whether there was any connection between appellant and the alleged offence of 28th March, 2015.

16. Further, although the PRC indicated that the perpetrator was alleged to be 17 years, the trial court did not look into that to satisfy itself whether the alleged perpetrator was a minor or not.

17. In the upshot, having considered all the evidence as presented before the learned trial magistrate, I am of the view that the conviction was unsafe. Consequently the same is quashed, the sentence set aside and the Appellant be set at liberty forthwith unless otherwise legally held.

Dated, delivered and signed at Nakuru this 9th day of April, 2020.

Mumbua T. Matheka

Judge

In the presence of: Via Zoom

Edna Court Assistant

Ms Mburu for state

Appellant present