



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

CRIMINAL APPEAL 210 OF 2015

KW.....APPELLANT

VERSUS.

REPUBLIC.....RESPONDENT

[An appeal from conviction and sentence in original Kimilili SPM Criminal Case No. 210/2015 delivered on 13/11/2015 by D.O. Onyando (SRM)].

JUDGMENT.

The appellant **K W** was charged with offence of defilement of a boy contrary to section 8(1) as read with Sub Section (2) of the Sexual Offences Act No. 3 of 2006. Particulars of offence are that; on the 30th day of April, 2015 in Bungoma County, Intentionally caused his penis to penetrate the anus of AM a child aged 6 years.

In the Alternative Charge; committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. Particulars of offence are that; on the 30th day of April, 2015 in Bungoma County, intentionally touched the Anus of AM a child aged 6 year with his penis. Supersede

He was convicted of the main charge and of defilement Contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act and sentenced to life imprisonment. Aggrieved by the conviction and sentence, he filed this appeal on the followings grounds;

- 1. THAT, I was not accorded a fair trial under article of the constitution of Kenya.**
- 2. THAT, the trial court did not consider or stands between the two parties and weigh the truth as an independent arbitrator because I was not examined by the doctor to prove the same.**
- 3. THAT, the trial magistrate erred in law when he convicted me the appellant without enough light in this matter because here was no compelling reasons to believe that I committed the crime but mere allegations.**
- 4. THAT, the trial magistrate awarded me a harsh sentence and yet the prosecution evidence was doubtful integrity, inconsistent and wanting thus leaving suspicion in this case.**
- 5. THAT, the trial Courts failed in law to hold that I committed the crime and while the DNA test was not conducted to prove the truth whether it was me or the complainant was coached to fix me in this matter.**
- 6. THAT, the trial court relied on one side of the prosecution by rejecting my defence and thus preached section 169[1] of the CPC.**

The appellant filed his written submission. He submitted that the Charge Sheet was defective; as the complainant in the Charge was a male; he should have been charged with sodomy, that he was not taken to Medical examination for D.N.A. testing as required by Sec. 36 of the Act; and finally that his defence was not considered. In his oral submissions the appellant further submitted that the crucial witnesses were not called to testify including the doctor, and the person who allegedly informed the complainant's mother of the incident.

Mr. Akello for state opposed the appeal. He submitted that appellant was charged with defilement of a boy child; the evidence was consistent that he penetrated the anus of the complainant, that the complainant identified the appellant as the perpetrator and finally that the sentence of life imprisonment was lawful.

The complainant AM was born in 15.8.2008 and being about 6 years old told the court that the appellant asked him to lick on his penis and then inserted it in the complainant's anus. He informed his grandmother who took him to hospital. Pw2 BN was at her parents home having

differed with her husband when she left the complainant with father on 30.4.2015 the mother In-law called her and informed her of the incident. She came home and the complainant reported to her. She took the complainant to hospital. Pw3 Kipsang Masong the Clinical officer examined the anus of the complainant who had taken bath and he noticed an inflammation in the anus. Pw4 Corpl. Zilda Kilele was at he police station on 2.5.2015 when complainant who brought an allegation of having been defied. He advised them to go to hospital and appellant was later arrested and charged with present offence.

The appellant gave unsworn evidence. He stated that he did not commit the offence and that the charges have been framed by his step mother. It is upon this evidence that he was convicted and thereupon filed this appeal.

The first ground of the appeal is that the charge is defective in as much as it refers to defilement and not sodomy. The charge against the appellant was; *defilement of a boy contrary to section 8(1) as read with Sub Section (2) of the Sexual Offences Act No. 3 of 2006. Particulars of offence are that; on the 30th day of April, 2015 in Bungoma County, Intentionally caused his penis to penetrate the anus of AM a child aged 6 years.*

In the Alternative Charge; committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. Particulars of offence are that; on the 30th day of April, 2015 in Bungoma County, intentionally touched the Anus of AM a child aged 6 year with his penis.

Section 8 defines defilement as; **8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed as defilement.**

Penetration is defined as; means the partial or complete insertion of the genital organs of a person into the genital organs of another person.

Sec. 2 defines genital organs as; the whole part of a male or female genital organs and for purposes of this act includes the anus.

It is therefore evident that the insertion of the genital organs of a person into the anus of another person is defilement if the other person is a child. The charge sheet as drafted is not in my view defective.

This being a charge of defilement the prosecution must establish all the ingredients of the offence, it must prove the age of the complainant; penetration and identification of the perpetrator.

The age of the complainant was stated by the mother (Pw2) to be 6 years old. The complainant was born on 15.8.2008. She did not produce any birth documents but the learned trial magistrate even on his own observation found that the child was of that apparent age.

The appellant submits that the act of penetration was not proved as the doctor was not called as a witness and that he was not examined or any D.N.A. test done to show that he committed the offence; Appellant took issue with the fact that no DNA test was conducted on him to ascertain that it was indeed he who defiled the complainant contrary to **Section 36(1)** of the **Sexual Offences Act**. It should be pointed out that whereas **Section 36(1)** of the **Sexual Offences Act** makes provision for DNA testing as a means of ascertaining whether an accused person committed a sexual offence, the provision employs the use of the word "may" which means that it is not a mandatory requirement. Further, the fact of rape or defilement is not proved by way of DNA test but rather by way of evidence see **AML -Vs- Republic Criminal Appeal 74 of 2011 [2012] eKLR**.

The appellant contends that penetration was not proved in the case because crucial witnesses particularly the grandmother of the complainant to whom the complainant reported the issue was not called to testify. It is now settled that penetration can be proved by oral evidence of the complainant, or witness and/or confirmed by the evidence of Medical examination. The only person who testified in respect to the penetration is the complainant. The evidence of the complainant in the trial court on 25.6.2015 was Hearing to be conducted in court as the case involves a minor.

Voire dire

What is your name?

Answer: I am AM

Question: How old are you?

Answer: Witness remains mum

Question: Do you go to School?

Answer: I go to [particulars withheld] Primary School in class one

Question: Do you go to Church?

Answer: I go to church

Question: Do you know where we are?

Court: Witness remains mum

Court: The witness is still young and does not look intelligent enough to know the meaning of oath. He shall not give sworn evidence.

D.O. ONYANGO (SPM)

25/6/2016

PW1 A MINOR UNSWORN STATES IN KISWAHILI:

I am AM.

I am a student at [particulars withheld] Primary School in class one. I go to church and will only speak the truth. I knew the accused.

Court: Witness identified accused in the dock.

He removed his thing and asked me to lick. I did as he said. His thing is the thing he uses to urinate.

Court: Witness moves to the dock to point at the crouch of the accused.

He also inserted his thing in my anus.

Court:- Witness points to his anus.

He told me to go away. It was painful. I was walking but with pain. I went and told my grandmother. My mother is B she escorted me to hospital. The doctor examined my buttocks.

Court: Witness points to his back.

My mother also took me to police.

D.O. ONYANGO (SPM)

25/6/2015

The evidence of the Clinical officer was as follows;

I am Kipsang Masong. I am a clinical officer at Kimilili Sub-county Hospital. I examined a child known as AM on 2.5.2015 who had been escorted to Hospital with allegation that he was sexually assaulted by a person known to him. I examined the anus of the child. The child was depressed. He had taken a bath by the time he was brought. He had inflammation on the anus. We gave him post protoxis for HIV, painkillers and antibiotics. The child was aged 6 years. I have the birth Clinical Card which was shown. I filled the P3 Form and wish to produce the same.

Court: P3 Form is PExh. 1.

I also have the treatment sheets.

Court: Treatment sheet from Kimilili district Hospital is PExh. 2.

He produced the P3 form Exh. 1 which on the part to describe injuries to the anus is indicated;

- Anal orifice normal
- No bruises noted i.e. child has taken birth on examination.
- No anal discharge.

From the voire dire examination of the complainant the trial magistrate clearly formed the opinion that the complainant was still young and does not look intelligent enough to know the meaning of an oath. He however, did not make a finding if the child possessed of sufficient intelligence to testify and give coherent evidence for reception by the court. From the evidence tendered by the child, it is evident that he

was of such age that he would be termed a vulnerable witness who would testify through an intermediary. His evidence on penetration is not supported by the Clinical officer who testified that he saw no bruises, anal orifice was normal and no anal discharge.

Finally the appellant submits that the critical witnesses were not called by the prosecution. I agree with the appellant that the grandmother to who the complainant reported the incident was a crucial witness. This is the person who received the complainant first, and informed Pw2, she had the initial report observed the complainant as it were set the process in motion. She was not called as a witness leaving the only evidence of the offence is that of the child. Her absence in my view denied the trial court, the crucial evidence on the commission of an offence leaving a gap in the prosecution case.

Upon evaluating the evidence and consideration of the appeal, I find that the evidence by the prosecution did not prove the offence of defilement against appellant beyond reasonable doubt. I therefore allow the appeal quash the conviction and set aside the sentence of life imprisonment imposed. I direct the appellant **KW** to be set at liberty unless otherwise lawfully detained.

Dated at Bungoma this 21st day of January, 2019.

S.N. RIECHI

JUDGE