



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 5 OF 2017

MANSOOR HUSSEIN ALIAS ABDULAPPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(An appeal from the original conviction and sentence in Mombasa Chief Magistrate's Court Criminal Case No. 2754 of 2013)

JUDGMENT

1. The appellant herein Mansoor Hussein *alias* Abdul was convicted on 2 Counts of indecent act with children contrary to Section 11(1) of the Sexual Offences Act. He was sentenced to serve 15 years imprisonment for each count. The sentences were to run concurrently. He filed a petition and grounds of appeal on 7th November, 2016.

2. On 4th March, 2019, he filed amended grounds of appeal, with leave of the court. He raised the following grounds of appeal:-

(i) That the Learned Trial Magistrate erred in law and fact by convicting and sentencing him to 30 years imprisonment on two counts of indecent act contrary to section 11(1) of the Sexual Offences Act, No. 3 of 2006 without considering that the same was excessive for the minimum sentence for indecent act is 10 years imprisonment;

(ii) That the Learned Trial Magistrate erred in law and fact by convicting and sentencing him without considering the provisions of Section 137I(1) and (2)(a) of the Criminal Procedure Code; and

(iii) That the Learned Trial Magistrate erred in law and fact by failing to consider his defence.

3. In his written submissions, the appellant urged this court to reduce the sentence meted out against him in the 2 Counts he was convicted of, for being excessive. He submitted that the minimum sentence for the offence of indecent act is 10 years imprisonment, yet he was sentenced to 15 years imprisonment on each count.

4. The appellant cited the provisions of Section 137I(1) and (2)(a) of the Criminal Procedure Code to emphasize that the Trial Court should have taken into consideration the duration of time he was in custody as his case was ongoing in the lower court. He indicated that he was arrested on 13th November, 2013 and arraigned in court on 15th November, 2013. He was convicted on 23rd July, 2015 and sentenced on 26th October, 2015. He stated that he had been in remand for 2 years prior to the date he was sentenced. He submitted that the Trial Magistrate should have computed the said duration as part of his sentence. He prayed for his appeal to be allowed and the sentence of 30 years imprisonment to be set aside.

5. Ms Marindah, Prosecution Counsel, opposed the appeal in her written submissions filed on 26th March, 2019. She stated that there was ample evidence of indecent acts having been committed on both PW1 and PW2. She referred to the definition part of the Sexual Offences Act to show that the act of the appellant's penis getting into contact with the anus of PW1 and PW2 did amount to indecent acts.

6. It was submitted that the evidence by the prosecution witnesses put the appellant at the scene of crime. The Prosecution Counsel stated that the appellant did not offer any defence regarding the offences he was charged with and there was no bad blood between him and PW1 or PW2 or their family members.

7. On the issue of the sentence imposed against the appellant, Ms Marindah submitted that it was within the jurisdiction of the Trial Magistrate to either impose the minimum sentence or more. She referred to the case of **Lawrence Kamau Nganga vs Republic** [2017] eKLR, where the High Court in Nyeri upheld a sentence of 20 years imprisonment for an appellant who was convicted for the offence of having committed an indecent act on the complainant therein. She prayed for the appeal to be dismissed.

8. In his further submissions filed on 25th April, 2019 the appellant stated that the evidence given in the lower court failed to support the charge of defilement. Further, that the prosecution's evidence revealed a case of attempted assault and attempted defilement which rendered the charge defective. He stated that the prosecution and the Trial Court had a chance to amend the charge but they failed to do so. To that end, he referred to the provisions of Section 214 of the Criminal Procedure Code. His other submissions dwelt on the issue of sentence which he had addressed in his submissions filed on 4th March, 2019.

ANALYSIS AND DETERMINATION

9. The duty of the first appellate court is to analyze and re-assess the evidence adduced before the lower court and draw its own conclusion while bearing in mind that the appellate court has neither seen nor heard the witnesses testify. In **Kiilu and Another vs Republic** [2005] 1 KLR 174, the Court of Appeal held as follows:-

“1. An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.

2. 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 findings and 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.”

10. PW1, II [name withheld] was a minor aged 12 years. He was taken through voir dire examination. He gave sworn evidence. He testified that on 2nd November, 2013, he and his brother (PW2) were carried by the appellant on a handcart which he was using to supply water in people's houses. He stated that the appellant took them with 2 of their friends to a dilapidated house. He told PW1 to remove his shorts. He took PW1's penis and sucked it.

11. He then told PW2 to remove his shorts and the appellant put his penis on PW2's anus. He warned them that he would kill them if they talked about it and then told them to run away. They told their mother what had happened. They were taken to Nyali Police Station where they reported. They were then taken to Hospital and the appellant was arrested the following day.

12. PW2, MI [name withheld] was a minor aged 11 years. He was also taken through voir dire examination and gave sworn evidence. He recounted that on 12th November, 2013 they were playing near their mother's place of work when the appellant who was passing by with a hand cart of water carried him, PW2 and 2 others to a burnt out house. The appellant told PW2 to remove his short and the former put his penis in the latter's anus. PW2 further stated that the appellant took PW1's penis and sucked it. PW2 indicated that one of the children told his mother about the incident and she took them to the Police. Thereafter, they were taken to Coast Province General Hospital (CPGH) where they were examined.

13. PW3, Dr. Ngone produced PRC and P3 forms for both PW1 and PW2. He stated that they were examined and found not to have any injuries.

14. PW4 was Inspector Joseph Kiplagat, Force No. 233514. He was the Deputy OCS Nyali Police Station. It was his evidence that on 13th November, 2013, he received a phone call from one Jimmy Kenga, a Community Policing Officer from Mwanchari who informed him that there was suspect who had defiled some boys and people wanted to burn him.

15. PW4 went to the scene and arrested the appellant whom he took to the Police Station. He was also accompanied by the victims and their mother. He sent the victims to Coast Province General Hospital for examination. He further recounted what he was told by PW1 and PW2 on what the appellant had done to them. He thereafter charged the appellant.

16. PW5, was Jimmy Kenga, a member of the Community Policing at Nyali. He recounted how on 13th November, 2013 he was called to Blue Bench, Mwandani by an Elder. He was informed there was a man who was sodomising children and he had locked him up as a mob wanted to kill him. He called the OCS Nyali who gave him a Police Officer who accompanied him to the said place. They picked the boys who had been allegedly defiled. Their mother accompanied them.

17. When called upon to make his defence in the Trial Court, the appellant chose to remain silent and wait for the Judgment to be delivered.

18. The issues for determination are:-

i. If the prosecution proved its case on the alternative charges beyond reasonable doubt;

ii. If the appellant's defence was considered; and

iii. If the sentence was harsh or excessive.

If the prosecution proved its case on the alternative charges beyond reasonable doubt

19. The appellant was charged with two main counts of defilement. Each count had an alternative charge of indecent act. The appellant argued that since the evidence adduced did not support the main charge of defilement, he should have been acquitted. The position of the law is that when the prosecution failed to prove the main counts leveled against the appellant, the Trial Court was duty bound to consider if the

evidence adduced against the appellant reached the threshold required in a criminal case, to form the basis of convictions on the alternative charges.

20. Section 2 of the Sexual Offences Act No. 3 of 2006 defines "indecent act" as an unlawful act which causes :-

“(a) any contact between any part of the body of a person with the genital organs, breasts, buttocks of another, but does not include an act that causes penetration.”

21. The evidence adduced before the Trial Court by PW1 was to the effect that the appellant told him to remove his shorts and he sucked his penis. The above evidence undoubtedly proves that the appellant's mouth came into contact with PW1's genital organ, namely penis, when he sucked it. By so doing, the appellant committed an indecent act on PW1. It is therefore my finding that the Trial Magistrate did not misdirect herself in finding the appellant guilty of the alternative charge of indecent act in Count 1.

22. With regard to PW2, his evidence was that the appellant told him to remove his shorts and he inserted his penis in PW2's anus. Medical evidence did not reveal any injuries on PW2's anus. The Trial Magistrate therefore correctly found the appellant guilty of the offence of indecent act. This is for the reason that the evidence adduced was to the effect that the appellant's genital organ, namely, penis came into contact with PW2's anus. PW1's evidence with regard to what the appellant did to him was corroborated by the evidence of PW2 and vice versa. It is this court's finding, that there was overwhelming evidence to support the evidence of indecent act in the alternative charge to Count II.

23. It is my finding that the Trial Magistrate considered the evidence adduced and directed herself appropriately. I am of the same finding as the Hon. Magistrate that the prosecution proved its case beyond reasonable doubt on the 2 alternative charges.

If the appellant's defence was considered.

24. When called upon to defend himself, the appellant exercised his right to remain silent. It can therefore not be said that his defence was not considered. On the said issue, the Trial Magistrate noted that the legal burden of proof was entirely on the prosecution even though the appellant did not wish to explain the facts. She further noted that it was the appellant's constitutional right to remain silent in his defence. Flowing from the above, the appellant can therefore not state that his defence was not considered. He offered no defence.

If the sentence imposed against the appellant was harsh or excessive.

25. The appellant was sentenced to serve 15 years imprisonment for each alternative charge. The sentences were however to run concurrently. The issue of him having to serve 30 years imprisonment does not arise. He urged the court to take into account the 2 years he had been held in remand during the trial process. He also submitted that since the minimum sentence for indecent act is 10 years, he should not have been sentenced to 15 years imprisonment on each count.

26. The provisions of Section 11(1) of the Sexual Offences Act provide for a minimum sentence of 10 years for the offence of indecent act with a child or an adult. In this case the victims of sexual assault were children. The Hon. Magistrate did consider the mitigation by the appellant who was apologetic. He said that he was the sole bread winner and prayed for leniency.

27. The objective of sentencing is not only to punish the offender but is also meant to rehabilitate him so that by the time he will have served his sentence, he will be a reformed person who will fit better in society.

28. In the circumstances of this case, a sentence of 10 years on each count would have served the ends of justice. I therefore reduce the appellant's custodial sentence from 15 years to 10 years in each count. The reduced sentences take into account the period that the appellant was remanded in custody awaiting trial in line with provisions of Section 137 I (2) (a) of the Criminal Procedure Code. The two sentences of 10 years imprisonment shall run concurrently.

The appeal succeeds only to the above extent. The appellant has 14 days right of appeal.

DELIVERED, DATED and SIGNED at MOMBASA on this 14th day of June, 2019.

NJOKI MWANGI

JUDGE

In the presence of

Appellant present in person

Ms Ogwen, Principal Prosecution Counsel for the DPP

Mr. Oliver Musundi – Court Assistant