



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.205 OF 2018

(An Appeal arising out of the conviction and sentence of Hon. E. Kanyiri

- SRM delivered on 1st October 2018 in Makadara CM. CR. (SO) Case No.63 of 2017)

PETER MBITHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Peter Mbithi was charged with the offence of **defilement** contrary to **Section 8(1)** as read with **Section 8(4)** of the **Sexual Offences Act**. The particulars of the offence were that on 18th March 2017 within Nairobi County, the Appellant intentionally caused his penis to penetrate the anus of ES (the complainant), a boy age seventeen (17) years. In the alternative, the Appellant was charged with **committing an indecent act with a child** contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars of the offence were that on the same day and in the same place, the Appellant intentionally touched the buttocks of the complainant. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was found guilty as charged on the main count of **defilement**. He was sentenced to serve twenty (20) years imprisonment. The Appellant was aggrieved by his conviction and sentence. He filed appeal to this court against the same.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of evidence that did not establish his guilt to the required standard of proof. The Appellant was of the view that his constitutional rights to fair trial were breached during the trial. He faulted the trial magistrate for finding him guilty of the charge yet crucial and critical witnesses were not called to testify in the case. He accused the trial magistrate for disregarding material contradictions and inconsistencies in the prosecution's case. He was finally aggrieved that his defence had not been taken into consideration before the trial magistrate reached the impugned decision convicting him as charged. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, the Appellant presented to court written submission in support of his appeal. Additionally, he made oral submission urging the court to find that the prosecution failed to establish the charge brought against him to the required standard of proof. The Appellant stated that the entire prosecution's case against him was based on a lie. The evidence adduced by the prosecution witnesses, particularly the complainant, consisted of falsehoods, were contradictory and lacked corroborative evidence in material respects. He pointed out that the complainant's testimony that he was sexually assaulted was not corroborated by medical evidence. Other than the testimony of the complainant, there was no other evidence that was adduced by the prosecution to link him to the crime. The Appellant wondered why the complainant's father tried to create a diversion by claiming that the complainant was a person of low intelligence. He pointed out that no medical report was produced to establish that the complainant was a person of low intelligence. He accused the investigating officer of failing to thoroughly investigate the case and thereby arrived at the erroneous decision to charge him. He faulted the trial magistrate for failing to consider the evidence that he had adduced in his defence which clearly exonerated him from the offence. In the premises therefore, he urged the court to allow the appeal.

Ms. Akunja for the State opposed the appeal. She submitted that the complainant gave cogent and consistent evidence how the Appellant lured the complainant into his house before he sodomized him. After the act, the Appellant threatened the complainant with dire consequences if he disclosed what had occurred to anyone. Learned prosecutor submitted that the Appellant had on several occasions prior to the material day, sexually assaulted the complainant in a bush along Mombasa Road. She reiterated that all the ingredients to prove the charge were established by the prosecution. She conceded that although no physical injuries were seen upon medical examination of the complainant, the examination revealed that the complainant's anal opening was loose. This was evidence that corroborated the complainant's testimony that he had been sexually assaulted. The Appellant's defence was considered by the trial court before he reached the verdict. She urged the court to dismiss the appeal and uphold the conviction and sentence of the Appellant.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. As was held by the Court of Appeal in **Njoroge vs- Republic [1987] KLR 19 at P.22:**

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570)”.

In the present appeal, the issue for determination by this court is whether the prosecution established the case against the Appellant on the charge of **defilement** contrary to **Section 8(1)** as read with **Section 8(4)** of the **Sexual Offences Act** to the required standard of proof beyond any reasonable doubt.

This court has carefully re-evaluated the evidence adduced before the trial magistrate’s court. It has also considered the submission made before this court in light of the grounds of appeal lodged by the Appellant. It is now settled that for the prosecution to establish the charge of defilement, it must prove three essential ingredients: that there was penetration, the age of the victim and finally, the identity of the perpetrator. In the present appeal, it was clear to this court that the prosecution relied on the evidence of a single witness to secure the conviction of the Appellant. In ordinary criminal cases, a court can convict on the basis of evidence of a single witness provided that it warns itself of the danger of relying on such evidence (See **Maitanyi vs Republic [1986] KLR 198 at Page 200**). However, the situation is different in sexual offences. This is on account of the fact that in most cases, the sexual assault takes place in private and the only witness to the sexual assault is the victim. It is in that regard that the **Proviso** of **Section 124** of the **Evidence Act** is applied. The **Proviso** provides that the court can convict an accused on the sole evidence of the victim provided that the court is convinced that the victim is telling the truth.

In the present appeal, the complainant, a boy of seventeen (17) years, told the court that on 18th March 2017 he was sodomized by the Appellant. He told the court that on the material day, he had just arrived home from school when he was invited by the Appellant to his home. The Appellant lived in a room behind his shop within the neighbourhood where the complainant and his father PW2 BS lived. It was instructive that PW2 told the court that he did not know the Appellant nor was the Appellant his neighbour. The complainant told the court that when he entered the Appellant’s house, the Appellant locked the door, ordered him to remove his clothes and then applied oil on his buttocks before he inserted his penis into his anus. He told the court that he felt a lot of pain. He tried to scream but no one came to his rescue. After the sexual assault, he bled from his anus. The Appellant warned him not to tell anyone lest he stabs him with a knife.

The complainant told the court that the sexual assault that occurred on the 18th March 2017 was not the first time that the Appellant had sodomized him. He testified that the Appellant had sexually assaulted him on several occasions prior thereto in a bush along Mombasa Road. After the incident, the complainant did not tell anyone of what had transpired. It was on 30th March 2017 that the complainant told PW3 Eliza Wambui Gichuki, a counsellor, working at [particulars withheld] Primary School that he had been sexually assaulted by the Appellant. The complainant had been referred to the counsellor by his class teacher after it was observed that the complainant had become withdrawn and had changed from being his usual self. PW3 summoned PW2, the complainant’s father to go to school. He went to school on the following day *i.e.* 31st March 2017. He was informed of what the complainant had told the counsellor. The complainant was referred to Makadara Health Centre on the same day where he was examined by PW4 Bessy Wacheke, a nurse based at the Centre. This is what she noted:

“External male genitalia normal. Penis no abnormal discharge. Scrotum normal and no bruises seen. Anus is slightly loose anal sphincter muscle torn. Treatment given anal ointment and STI profilaxis.”

She concluded that her medical examination revealed that the complainant had indeed been defiled. The complainant was seen on 11th April 2017 by PW5 Dr. Joseph Maundu. He was a doctor based at the Police Surgery. He did not observe any physical injuries. There were no injuries on the complainant’s private parts. The anal muscle was loose and painful. He was of the opinion that the muscles had been damaged.

The case was investigated by PW6 PC Leah Keino. She took over the investigations from PC Benson Obuya. After concluding the investigation, she reached the decision to charge the Appellant. When the Appellant was put on his defence, he denied the charge. He was categorical that the charge brought against him was a frame up. He denied knowing the complainant. He reiterated that the charge brought against him was a scheme by people who were not happy with his business within the slum. He was emphatic that the charge brought against him was concocted.

As stated earlier in this judgment, it was evident that the prosecution relied on the testimony of the complainant to secure the conviction of the Appellant. On re-evaluation of the complainant’s evidence, this court agrees with the Appellant that the same appears to be inconsistent and contradictory. The complainant told the court that prior to the alleged sexual assault on 18th March 2017, the Appellant had severally sexually assaulted him in a bush along Mombasa Road. The distance from [particulars withheld] Slum and Mombasa Road is more than 5 kilometres. It was improbable that the Appellant could have sexually assaulted the complainant in a bush along Mombasa Road on several occasions without the act being seen by members of the public. The complainant did not give dates on which these alleged sexual assaults took place. This court was therefore unable to tell whether the complainant was telling the truth. The medical evidence did not support the assertion by the complainant that he had been severally sexually assaulted. If that was the case, medical evidence would have pointed out this fact. Further, taking into consideration the age of the complainant, this court was not persuaded by his testimony that he had been threatened by the Appellant to the extent that he failed to inform his father of the alleged sexual assault on 18th March 2017. The complainant was not an impressionable child who would easily be intimidated not to tell the truth. The fact that the father of the complainant told the court that the complainant was a person of low intelligence confirmed the doubts this court has as to the veracity and truthfulness of the complainant’s testimony.

On re-evaluation of the complainant's testimony, this court is not convinced that the complainant was telling the truth. There are too many gaps in his narration of what transpired that raises doubt in the mind of this court that the incident actually took place or if it did, that it was the Appellant who was the perpetrator. The doubts raised will of necessity be resolved in the Appellant's favour. In his defence, the Appellant denied that he committed the offence. That may well be the case.

In the premises therefore, this court holds that the prosecution failed to prove the charge of defilement as against the Appellant to the required standard of proof beyond any reasonable doubt. The Appellant is acquitted of the charge. His appeal is consequently allowed. The conviction is quashed. The custodial sentence imposed on him is set aside. He is ordered set at liberty and released from prison forthwith unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 12TH DAY OF JUNE 2019

L. KIMARU

JUDGE