REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO.19 OF 2016

(Appeal from original conviction and sentence in Kericho CM S.O. No.72 of 2012)

BENARD KIPKURUI TUM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant was arraigned in court on 4th May 2012 before V. W. Wandera, CM when he took plea and pleaded not guilty. The charge before the court which was filed on the same day was for unnatural offence contrary to section 162 (a) of the Penal Code. The particulars of the offence being that:-

> *"On the 26th day of April 2012 in Kericho District within Rift Valley Province, had carnal knowledge of BK against the order of nature."*

2. The trial commenced on 12th October 2012. On that day, the charge was substituted with a charge of defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act No.3 of 2006, the particulars of which were that:-

> *"On the 26th day of April 2012 in Kericho District within Rift Valley Province, intentionally caused his penis to penetrate the anus of BK a child aged 7 years."*

3. The accused took a plea again, and was recorded as having pleaded not guilty.

4. The prosecution called 5 witnesses in their effort to prove their case. In his defence, the appellant tendered unsworn testimony. He stated that the complainant attempted to steal his maize, and when he pursued the matter, by reporting the incident to the village elder, the Chief later said that he had sodomised the maize thief the complainant.

5. Thereafter the trial magistrate delivered judgment and convicted the appellant, and sentenced him to serve life imprisonment. Therefrom arose the present appeal brought by the appellant in person but argued by Counsel Mr. Siele Sigira. The ground of appeal are as follows:-

> **1) That the learned magistrate erred in relying on speculative incredible evidence to impose a life sentence on the appellant.**
>
> **2) That the learned magistrate erred in relying on witness evidence that was not tangible and concrete to warrant a conviction.**
>
> **3) The learned trial magistrate erred in erroneously failing to note that PW1 was aged 16 years as evidence adduced by (medical practitioner).**
>
> **4) That the learned magistrate erred in (not) considering that lengthy differences existed between the complainant's parent evidence and other evidence which was vivid in the prosecution case.**
>
> **5) The trial magistrate erred in not giving sufficient reasons why he rejected the appellant's defence.**

6. At the hearing of the appeal, the learned counsel for the appellant, Mr. Siele Sigira argued that there was a mistrial in that the appellant took a plea on a charge of unnatural offence under the Penal Code but the case wrongly proceeded on a charge of defilement under section 8 of the Sexual Offences Act. Secondly, the trial magistrate sentenced the appellant to life imprisonment on a non – existent section of the law. Thirdly, that the evidence of the prosecution did not prove the case against the appellant beyond reasonable doubt. Counsel relied on the case

of **Smm -vs- Republic – Machakos High Court Criminal Appeal No.166 of 2011 (2015) eKLR.**

7. In response learned Assistant Director of Public Prosecution Mr. Ayodo submitted that though it was not clear to which of the two charges the appellant took plea, there was no mistrial, as the unnatural offence charge was an alternative charge. Counsel argued also that though at page 8 of the judgment, the learned magistrate mentioned a non-existent section of the law, such an error was curable. Counsel added that the prosecution established beyond reasonable doubt that the appellant committed the offence as the evidence of PW1 and PW2 was corroborated by the medical evidence of PW3.

8. This being a first appeal, I am duty bound to re-evaluate the evidence on record and come to my own conclusions and inferences. See **Okeno -vs- Republic [1972] EA 32.** I have perused the record, the evidence on both sides and the judgment.

9. I will start with the technical points. Though counsel for the appellant has argued that the appellant pleaded only to the charge of unnatural act contrary to the provisions of the Penal Code; that assertion is not supported by the record. On the first day of appearance in court on 4/5/2012 the appellant took plea to the charge of unnatural offence contrary to section 262 (a) of the Penal Code. However, on 12/10/2012, the charge was substituted with one of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No.3 of 2006. Though the record suggests that the charges pleaded to were more than one charge, that is not the true position. In my view, it is clear from the record that the single charge was substituted, and the appellant pleaded to the initial charge which was substituted, and then later pleaded to the new charge on which he was tried. The initial charge was not an alternative charge as suggested by the Assistant Director of Public Prosecutions. I dismiss the proposition that there was a mistrial.

10. With regard to the magistrate citing a non-existent section of the law in the judgment in sentencing, in my view that must have been a slip of the pen. The reference in the judgment to section 8 (1) (a) and section 8 (21) of the Sexual Offences Act is thus curable as it did not cause any prejudice to the appellant. I thus dismiss the contention that the error was fatal.

11. I now turn to whether the prosecution proved the case against the appellant beyond reasonable doubt. I have no doubt that the age of the complainant was proved to be 7 years at the time. I have seen the child health card S/No.2074 in which BK was recorded as having been born on 16/6/2005. The record shows that the learned magistrate saw the original document. I find that the age of the complainant was thus proved to be 7 years.

12. With regard to the incident, I observe that the evidence of prosecution witnesses is very scanty and the investigating officer PW4 PC John Apae merely stated that the complainant and the mother made a report at Ainamoi Police Post on 3/5/2012 at 11.00 a.m. He was then stood down to get a Kalenjin interpreter, and never testified again and no reason was given by the prosecution. In my view, in the circumstance of this case, he was such a crucial witness, that the failure by the prosecution to call him to testify watered down their case significantly.

13. In addition to the above, though the incident occurred on 26/4/2012 and PW1 SL the mother of the complainant stated that she reported the incident to the area chief the next morning, it is in my view curious that such a serious incident would have been reported to the police on 3/5/2012 several days afterwards. The Assistant Chief also said the incident was reported on 2/5/2012. In my view, the fact that the Clinical Officer PW4 said that he found redness in the anus of the complainant several days later, did not prove sexual penetration, and by the appellant's penis. Such reddening in my view, could even have been caused by hard stool.

13. I find that it is not safe to uphold the conviction of the appellant herein, as there are many gaps, and contradictions in the prosecution evidence. The report to the Chief the next morning is contradicted, the P3 form was filled by PW3 the Clinical Officer Ben Ngetich on 4/5/2012; the Investigating Officer PW4 in his short testimony before he was stood down said that PW1 and PW2 the complainant made a report to the Ainamoi Police Post on 3/5/2012; and the Assistant Chief PW5 Kiptoo Barnabas Chirchir said that PW1 the mother of the complainant made a report on 2/5/2012, not the next day after the alleged incident.

14. The contradictions between the evidence of PW1 and PW5 on the date of report to the Chief's office, and the belated reports to the police and the Clinical Officer create sufficient doubts, whose benefit should have been given to the appellant, which I hereby do.

15. I thus find merits in the appeal. I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set as liberty unless otherwise lawfully held.

Dated and delivered at Kericho this 18th day of September 2019.

GEORGE DULU

JUDGE