



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 147 OF 2016

NDORO MWANGUNGU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence in Msa CM CR. Case No. 2187 of 2014 (Hon. Odenyo SPM) Delivered on 29/2/16)

J U D G M E N T

1. **Ndoro Mwangungu (“the Appellant”)** was charged with the offence of defilement of a boy contrary to **section 8 (1)** as read with **section 8 (2) of the Sexual Offences Act No. 3 of 2006**. It was alleged that on 26th November, 2014 at Changamwe within Mombasa County, the appellant intentionally and unlawfully caused his penis to penetrate the anus of AN, a boy aged 7 years old. There was an alternative charge of committing an indecent act with a child contrary to **section 11 (1) of the Sexual Offences Act**.
2. The appellant denied the charge and after trial, he was found guilty and convicted of the offence and sentenced to life imprisonment. He has now appealed to this court against the conviction and sentence.
3. This being a first appellate court, the court is enjoined to re-appraise and re-evaluate the evidence afresh and come to its own independent findings and conclusions. In so doing, the court must have in mind that it did not have the advantage of seeing the witnesses. **(See Okeno v. Republic [1972] EA)**.
4. The prosecution case was that on the material date, **ZMH (PW1)** sent the complainant to the shop to buy some medicine. The complainant returned later in the day limping. He did not tell her what had happened. She was later summoned to the village elder who told her that the complainant had been sodomised by the appellant. She escorted the complainant the following day to Coast General Hospital where he was examined.
5. The complainant, **AN (PW2)**, recalled how on the material day he was sent by his grandmother **(PW1)** to go and buy some medicine from the shop. After buying the medicine, he met the appellant who told him to use an alternative route to his home. When they reached some deserted place, he removed his clothes and sodomised him. He blocked his mouth to stop him from crying. He knew the appellant by the name vitu vya chai. He reported the incident to his mother and the village elder. He was taken to hospital for examination and treatment.
6. **PW3 Dr. Mifat Shatry** appeared and produced the P3 and PRC forms filled by Dr. Ngone. He told the court how the complainant was examined at the Coast General Hospital on 26th November, 2014. The complainant’s anus had fresh laceration caused by a blunt object.
7. The case was investigated by **PC. Harrison Oseko (PW4)**. When he was allocated the case by his senior, the appellant was already in the cells. He sent the complainant to the Coast General Hospital. The P3 form confirmed that the complainant had been defiled.
8. **PW4** then took statements from witnesses. He established that the on the material day, the appellant met the complainant who was from buying some medicine. He lured him into a thicket and defiled him. The complainant reported the incident to the village elder who mobilized members of the public who arrested the appellant and handed him over to the police.
9. In his defence, the appellant denied the charge and stated that he had been arrested and charged with the offence.
10. In his petition of appeal, the appellant raised four grounds of appeal. These were that; **the charge of defilement had not been proved; the reason of his arrest was not established and those who arrested him were not called to testify; that the trial court failed to consider his defence; that the charge sheet was defective; that the prosecution had contradictions and discrepancies and that no identification parade was held to identify him.**

11. The appellant submitted that there was contradiction as to the time the offence took place. That while the complainant was sent to the shop at 9 am, he testified that he was defiled after he left the mosque at 4pm. That there was no medical evidence to prove defilement. That those who arrested the appellant were not called to testify and that his defence had not been considered.
12. The state opposed the appeal. **Ms. Mwaura** submitted that the charge sheet was not defective. That; the prosecution evidence was consistent; defilement was proved; the arrest had not been challenged and that there was no defence that had been offered to create any doubt on the prosecution case. She urged the court to uphold both the conviction and sentence.
13. The first ground was that the charge sheet was defective. The appellant did not state how the charge sheet was defective. I have looked at the charge sheet dated 28th November, 2014. The same has set out all the particulars of the offence with clarity. The elements constituting the offence were also set out therein with clarity. I am satisfied that the same satisfied the provisions of **section 137 of the Criminal Procedure Code**. That ground fails.
14. The second ground was that the offence of defilement was not proved. That the medical evidence did not connect the appellant with the offence. For the offence of defilement to be proved, the age of the child and the act of penetration must be established. It must also be demonstrated that the accused was the perpetrator.
15. The age of the complainant was said to be 7 years at the time of the offence. The assessment form dated 01/12/2014 showed that the complainant was 8 years old. Accordingly, the age of the complainant was proved to the required standard.
16. On penetration, the complainant told the court that the appellant removed his clothes and sodomised him. The complainant was examined on 27th November, 2014, a day after the incident. The P3 form showed that there was fresh laceration on the complainant's anus. The weapon used was opined to be a blunt object.
17. It was the appellant's submission that there was no discharge or sperms that were discovered in the complainant's anus and therefore no penetration was proved. The answer lies in the fact that the complainant was washed after the act which was meant to remove any evidence of discharge. To my mind, the medical evidence corroborated the complainant's evidence of penetration.
18. The complainant submitted that the medical evidence could not be relied on as the doctor who examined the complainant had been interdicted from employment. This court finds that the trial court properly admitted the evidence of **PW3**. The interdiction of Dr. Ngome who filled the P3 form had nothing to do with his filling the P3 form. In this case. The P3 form was therefore properly admitted.
19. The other ground was that the prosecution evidence was contradictory. I have considered the evidence of **PW1** and **PW2**. Although the complainant was sent to look for medicine in the morning hours, he stated that it took him a long time to get the medicine. That he came out of the mosque at 4 pm and that is when the appellant lured him to the thicket where he sodomised him. I do not find any contradiction.
20. The appellant complained that the trial court failed to establish the reason for his arrest and that those who arrested him were not called to testify. The testimony of **PW1** and **PW4** was clear. The appellant was arrested by the village elder (nyumba kumi). The arrest followed the complaint by **PW2** that the appellant had sodomised him. To my mind, there was no suggestion that the appellant had been arrested for any other offence other than as testified by **PW1** and **PW2**.
21. As regards failure to call those who arrested the appellant, the complaint may have a basis. It is always important for the prosecution to link the offence with the arrest of an accused. In the present case however, although the village elder who arrested the appellant was not called to testify, that did not weaken the prosecution case. The testimony of **PW1, PW2 and PW3** had sufficiently connected the appellant to the offence and the arrest. That ground also fails.
22. The appellant complained that there was no identification parade that was carried out to identify him. The testimony of both **PW1 and PW2** was that the appellant was a villagemate who was known to the complainant. The complainant knew the appellant well and referred him by his nick name, vitu vya chai. This was not a case of identification, but one of recognition. The appellant was well known to the complainant. The offence occurred in broad day light. In this regard, there was no need to hold an identification parade as the assailant was well known to the victim. That ground also fails.
23. The final ground was that the trial court failed to consider the appellant's defence. The appellant only denied the charge and his defence was that he was arrested and charged with the offence. He did not state where he was at the material time that the complainant placed him at the scene of the offence. He never offered any defence that could displace the prosecution evidence. The trial court cannot be faulted for rejecting that defence. It was a mere denial.
24. As regards the sentence, the same was in accordance with the law. The victim was aged 7 years at the time.
25. Accordingly, I find the appeal to be without merit and dismiss the same.

DATED and DELIVERED at Mombasa this 6th day of September, 2019.

A. MABEYA

JUDGE