



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**CRIMINAL APPEAL NO. 4 OF 2017**

**NDIKU MWANZIA.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

*(From Original Conviction and Sentence in Criminal Case No. 169 of 2015 of the Senior Resident Magistrate's Court at Makueni)*

**JUDGEMENT**

**INTRODUCTION**

1. The appellant was charged with the offence 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 the offence were that on the 15<sup>th</sup> day of April 2015 at about 4.00 p.m. in Makueni County, the appellant intentionally and unlawfully caused his penis to penetrate the anus of M W a child aged below 11 years.
2. There was an alternative charge of **committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006**. The particulars were that on the same day and at the same place, the appellant intentionally and unlawfully touched the anus of M W, a child aged below 11 years.

**PROCEEDINGS BEFORE THE TRIAL COURT**

3. PW1 (M.W) was the complainant, he was subjected to *voir dire* but the trial Court found that he did not understand the meaning of an oath. He therefore gave an unsworn statement. He testified that on the material day, he was with PW2. The appellant asked him to accompany him (appellant) to water flowers. He used to see the appellant many times but did not know his work. They went to the house of one Matheka where the appellant removed PW1's shorts and inserted his urinating organ (once) to the place used by PW1 to defecate.
4. PW1 felt pain but did not do anything. They then parted ways. The appellant went to Malili corner and PW1 went home where he found PW2. His parents were not there. Later PW1 told his mum what had happened but she did not do anything. He was then taken to the hospital and then Makueni police station. He identified the appellant in the dock. He didn't know why the appellant inserted his thing in him. According to PW1, the act was done at Matheka's house which is near his home, they however did not enter the house and there was nobody at Matheka's house. There was no cross examination.
5. PW2 (K.W) was 8 years old and a class 4 pupil at [particulars withheld] Primary School. He testified that PW1 was his younger brother. That on 15/04/2015, the appellant asked PW1 to accompany him so that they could go and water flowers. He told PW2 not to follow them. Later, PW1 went home crying and told them that a penis had been inserted in his anus. He then reported to his mother what PW1 had told him.
6. The appellant was caught by his father and taken to their home and later to Wote police station. According to PW2, the appellant took PW1 downhill to water flowers which belonged to the father of Kanini known as Matheka. The appellant didn't want PW2 to accompany them so that he could do what he did to PW1. He said he knew the appellant because he used to see him at their home many times. He identified the appellant in the dock. On cross examination, he said that his parents were not at home when the appellant asked PW1 to accompany him to water flowers. In re-examination, he said that his father had sent him to the appellant on the material day as they were to go cut trees together.
7. PW3, A W is the father to PW1 and PW2. He testified that on 15/04/2015 at around 7.00 a.m., he sent PW2 to call the appellant so that they could go to where he had found some casual work. They went, worked and were paid after which they parted ways. PW3 proceeded to another place to graft mangoes. He returned home at around 7.00 p.m. and found his wife with PW2 standing near the gate. PW2 was telling his mother to ask PW1 what the appellant had done to him. He asked PW2 what had been done to PW1. PW2 told him that he had seen the appellant and PW1 going to water flowers.

8. PW1 then told PW3 that the appellant had called him to go water flowers and when they reached a corner, the appellant inserted 'kisu' inside his anus. Further, that the appellant had taken PW1 to corner shopping centre. PW3 then proceeded to the shopping centre to look for the appellant and he found him at corner baridi market

9. Upon being asked what he had done to PW1, the appellant said he had not done anything. They proceeded to Makueni County Referral Hospital and PW1 was examined by a doctor. PW3 examined PW1 on the anus but did not see anything. He identified the appellant in the dock. On cross examination, he said that, PW3 stated that they went to the hospital together and because it was at night, they were told to go to the police station the following day. He was given some documents at the police station.

10. PW4 Patrick Mwanza Mutua, a community policing member basically testified that on 10/04/2015, he heard some commotion in the home of PW3. He went there and found people beating the appellant. He stopped them. The police came and they proceeded to Makueni County Referral Hospital. On cross examination, he confirmed that he rescued the appellant from the crowd.

11. PW5 was Doctor Emmanuel Loiposha of Makueni County Referral Hospital. He testified that he examined both the appellant and the complainant. The appellant was allegedly defiled on 10/04/2015. He said there were feasible (I suppose he meant visible) ulcers around the anal region with epitheliation on the process of healing. It was tender to touch. He was treated with antibiotics, PEP and they also did an anal swab. He assessed the degree of injuries as harm. He produced both P3 forms as exhibits.

12. PW6 M N W, the complainant's mother testified that on 10/04/2015, she returned home in the evening and found her children there. PW1 looked disturbed and was crying. PW1 told her what the appellant had done to him. Apparently, he had taken him behind Matheka's house, removed his shorts and inserted his penis in his anus. When her husband arrived, she told him what had happened. He proceeded to the market where he found the appellant. She then accompanied her husband, the appellant and a village elder to Makueni County Referral Hospital. PW1 was treated and they were advised to go to the police station the next day. On cross examination, she denied that neither her nor her husband had threatened to do something bad to the appellant.

13. PW7 was PC Peter Wanjohi. He testified that on 16/04/2017 at around noon, he was on patrol with a colleague with Kikumini area. He received a call and was told that a suspect had been arrested by members of the public. He proceeded to the scene and found the appellant who had been tied with ropes on the hands and had been slightly beaten by members of the public.

14. He took the witnesses together with the appellant to the police station where he recorded their statements. This was after escorting them to the hospital where they were examined by PW5. He produced an immunization card which indicated PW1's date of birth as 05/12/2009. On cross examination, he said that he took the appellant through Makueni County Referral Hospital before reaching the police station.

15. After evaluating the prosecution's evidence the learned trial magistrate convicted the appellant for the offence of defilement and sentenced him to life imprisonment.

16. In convicting the appellant, the trial Court opined that the prosecution's witnesses were credible and gave cogent testimonies.

### **THE APPEAL**

17. Aggrieved by the decision of the trial Court, the appellant filed the instant appeal and raised the following grounds of appeal:-

***a) That learned trial magistrate erred both in law and facts when he convicted and sentenced the appellant over an offence that was not proved to the required standard.***

***b) That the learned trial magistrate erred in both law and facts by relying on medical evidence that was not sufficient to sustain the charges facing the accused and as such caused a serious miscarriage of justice.***

***c) That the learned trial magistrate erred in both law and facts in sentencing the accused person based on an unsupported and unreliable probation officers report and as such was unduly influenced to mete out an excessive sentence in the circumstances.***

***d) That the learned trial magistrate erred in both law and facts when he convicted the appellant against the weight of the evidence.***

18. The appeal came up for hearing on 30/10/2017. The appellant was represented by learned Counsel Mr. Mulei and the state was represented by Learned Prosecution Counsel Mr. Kihara.

19. Mr. Mulei relied on his written submissions dated 17/10/2017, he submitted that the evidence relied on by the trial Court was of a single witness, a boy child aged 5 years hence uncorroborated. He submitted that the learned magistrate did not record his reasons for believing that the complainant was talking the truth as required by section 124 of the Evidence Act, Cap 80 laws of Kenya. According to him, all the other witnesses relied on the victim's narration.

20. In opposing the appeal, Mr. Kihara stated that there was sufficient evidence to sustain a conviction. He basically reproduced what the prosecution witnesses had said in the trial Court. It was his contention that their testimonies were corroborative and that the case had been proved beyond reasonable doubt.

### **DUTY OF COURT**

21. The duty of a first appellate Court as aptly put in the case of **Okeno V. Republic (1972) E.A. 32** is to scrutinize the evidence on record, make it's own findings and draw it's own conclusions giving due allowance to the fact that the trial Court had the advantage of seeing and hearing the witnesses.

## **ANNALYSIS**

22. I will condense the grounds of appeal into one i.e.

**-whether the prosecution proved its case beyond reasonable doubt?**

23. Section 124 of the Evidence Act, Cap 80 Laws of Kenya provides as follows;

***“Notwithstanding the provisions of [section 19](#) of the Oaths and Statutory Declarations Act ([Cap. 15](#)), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:***

***Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth”***

24. A keen look at the evidence of the prosecution witnesses reveals that indeed, there was no eye witness. As rightly submitted by the appellant's Counsel, all of them relied on the account given by the complainant. PW 2, 3, 6 and 7 talked directly to PW1 after the alleged sodomy. At this juncture, it is important to look at what they reproduced in Court.

25. PW2 did not say that PW1 mentioned the appellant anywhere in his narration. According to him, PW1 and the appellant proceeded to water flowers at around 4.00 p.m. on 15/04/2015. PW3 was told that the act happened at corner shopping centre. According to him, the date of the incident was 15/04/2015. PW6 was told that the act happened behind Matheka's house. According to her, the date of the incident was 10/04/2015. PW7 was told that the act happened in the bush. According to him, the date of the incident was 16/04/2015.

26. It was important for the narratives of these witnesses to tally. I am alive to the fact that the victim was of very tender years and may have been scared and or traumatized however, PW3 and PW6 being the victim's parents, it would not be too much to expect that he would be calm and relaxed around them hence give a similar account.

27. As for the disparity in the dates, the charge sheet indicated that the alleged offence happened on 15/04/2015 at about 4.00 p.m. PW2 and 3 talked of 15/04/2015. PW 4, 5 and 6 talked of 10/04/2015. PW6 talked of 16/04/2015. I could have easily disregarded the disparities as mere typographical errors however; the evidence of PW6 aroused my curiosity. He was the arresting officer.

28. According to him, he received a call on 16/04/2015 at around noon and was told that there was a suspect who had been arrested by members of the public. I went a step further and confirmed from the handwritten notes of the learned magistrate that indeed the date and time indicated was 16/04/2015 at noon.

29. According to this witness all the other activities happened on the same day i.e. going to the hospital and police station. His evidence materially contradicts the other witnesses who said that by the time they were leaving the hospital, it was already at night and as such, they were advised to go to the police station the next day. This witness testified that he was the one who preferred the charges against the appellant. On cross examination, he confirmed that he took the appellant to the hospital before going to the police station.

30. It is noteworthy that the witness was not re-examined and as such, no clarifications were made. In my view, this is a contradiction that cannot be wished away. It puts some serious doubts on the prosecution's case. The learned magistrate did not apply himself to the highlighted shortcomings of the prosecution's case and in my view; he erred by not recording his reasons for believing the victims testimony.

31. In **JOHN MUIRURI V REPUBLIC (1983) KLR 445** the Court of Appeal stated as follows: -

***2. It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided.***

***3. Where a child of tender years gives unsworn evidence, then corroboration of the evidence is an essential requisite. But if a child gives sworn evidence, no corroboration is required but the assessors must be directed that it would be unsafe to convict unless there was corroboration.***

***6. The judge is under a duty to record the terms in which he was persuaded and satisfied that the child understood the nature of the oath. The failure to do so is fatal to the conviction.***

***9. The correct procedure for the court to follow is to record the examination of the child witness as to the sufficiency of her intelligence to satisfy the reception of evidence and understanding of the duty to tell the truth.”***

32. In the instant case, the victim gave an unsworn statement. It is my considered view that his evidence was not sufficiently corroborated.

33. Further and in light of the foregoing, I am inclined to agree with the appellant's Counsel that indeed, the learned trial magistrate was unduly influenced by the unfavorable probation report.

34. With regard to the medical evidence, the victims P3 form was produced as exhibit 2. The doctor, PW5 testified that there were visible ulcers around the anal region and that it was tender to touch. He also stated that an anal swab was done. In my view, the state of the victim's anal region showed that there was some activity, however, the prosecution was duty bound to prove that whatever had happened to the victims anal region was directly connected to the appellant.

35. What was the purpose of taking the anal swab if the same was not examined and results produced before the Court? It would have been better effort to at least say that examination was carried out but nothing was observed.

**CONCLUSION**

36. In my view, the conviction was against the weight of the evidence. It was unsafe. Thus court makes the following orders;

*i. The appeal is allowed.*

*ii. The appellant is released forthwith unless otherwise legally held.*

**SIGNED, DATED AND DELIVERED THIS 10<sup>TH</sup> DAY OF APRIL, 2018, IN OPEN COURT.**

**C. KARIUKI**

**JUDGE**

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