



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO. 3 OF 2017

JAMES MURAGE NJAGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from original conviction and sentence in

Criminal Case No.2 of 2016 of the Chief Magistrate's Court at Embu)

JUDGMENT

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 are that on 26th day of July, 2015 at [particulars withheld] village, Gatituri sub-location Mbeti North location within Embu County, intentionally caused his genital organ penis to penetrate the genital organ anus of **HKM** a child aged 10 years.

The trial court convicted the appellant and sentenced him to serve fifty (50) years imprisonment. The grounds of appeal are that:-

- 1) The appellant pleaded not guilty before the trial Magistrate.**
- 2) The learned trial Magistrate erred in both law and fact when he failed to consider that crucial and vital witnesses were not summoned or availed.**
- 3) The learned trial magistrate erred in both law and fact when he failed to consider that the prosecution evidence was insufficient to hold conviction.**
- 4) The learned trial magistrate erred in both law and fact when he failed to consider that there was a grudge between the appellant and complainant's mother.**
- 5) The learned trial magistrate also rejected the defense under weak reasons.**

The appellant submit that the prosecution evidence was not corroborated by any other evidence. No medical officer proved the offence. The medical evidence did not detect any penetration or injury on the complainant. The medical evidence did not prove anal penetration. The trial court mainly relied on section 124 of the Evidence Act that the evidence did not require corroboration. It is also submitted that penetration is an important ingredient in a charge of defilement.

The appellant also contend that crucial witnesses were not called. One Kimathi who was allegedly playing soccer with PW1 was not called. The appellant's employer, a pastor, was also not called to testify. Another crucial witness, Virginia Muthoni, a neighbour of PW2 was also not summoned to testify. The appellant relies on the case of **BUKENYA VS UGANDA (1972) EALR 549** where the court held that the prosecution must call all the witnesses even if their evidence is fatal to the prosecution case. The appellant also relies on the case of **PETER MUJIRIA MITAMBO VS REPUBLIC (2016) eKLR**.

The appellant further submit that the evidence by the prosecution that the he gave PW1 head phones so as to buy his silence was not proved. The prosecution case was based on the domestic grudge and PW2 used her son to frame the appellant. The charge sheet was defective. The appellant ought to have been charged with "unnatural offence contrary to Section 162 of the penal code and not with a sexual offence. The appellant's defence was not considered.

Miss Nandwa, prosecution counsel, opposed the appeal. It is submitted that the prosecution called the crucial witnesses. PW1 explained how he was defiled. PW3 produced medical evidence. PW1's age was proved as 10 years. He was born on 27/5/2005 as per the birth certificate. Anal penetration was proved. The evidence of PW1 was corroborated by that of PW2 and PW3. There was no grudge between the appellant and PW2.

This is a first appeal and the court has to re-evaluate the evidence afresh and make its own conclusion. PW1 was the complainant. The trial court found him fit to give sworn evidence after taking him through the *voire dire* process. He told the court that he was a class two pupil and was ten (10) years old. He knew the appellant. The appellant was living at a pastor's home. On 26/7/2015 he was playing soccer with Kimathi on the road in the evening when the appellant called him. He was taken to the appellant's one roomed timber house. He was made to lie on the bed and he was defiled. He felt pain in his anus. The appellant gave him black earphones. He went home and informed his mother. His mother took him to Embu level five hospital. The matter was later reported to the police.

PW2 NWM is the complainant's mother. On 30/7/2017 her neighbour Virginia Muthoni told her that her son (K) had been sodomized by the appellant. She was asked to enquire from PW1 whether he had also been sodomized since he was a friend to the other child. He talked to PW1 who informed him that the appellant had sodomized him and had given earphones. The appellant had warned PW1 against disclosing the information. She reported at Itabua Police station. PW1 was examined at the Embu provincial hospital.

PW3 DR. PHYLLIS MUHONJA was based at the Embu provincial Hospital. She examined PW1 on 31/7/2015. There were no external injuries on PW1's anal area. This was six (6) days after the incident. Anal swab was done but no spermatozoa was detected. She could tell that there was anal penetration from her examination.

PW4, P.C JOHN GITAHI was based at Itabua Police station. On 1/8/2015 he was instructed to investigate the case. He issued PW1 with a P3 form. The appellant had fled to Nairobi. He was arrested and charged with the offence.

In his unsworn defence, the appellant testified that he is a water vendor. It is his evidence that PW2 was his sister in-law. She wanted her brother to sell land. He decided to leave for Nairobi with his family. PW2 followed him to Nairobi and started insulting him. He is the eldest son. PW2 separated from his brother and she wanted him to convince his brother to take him back. PW2 then warned him after he told her that he could not talk to his brother.

The issue for determination is whether the prosecution proved its case beyond reasonable doubt. The evidence of PW1 is that the appellant called him to his house, removed his trouser and defiled him. It was in the evening and he was playing football. PW1 knew the appellant. According to PW3, although no spermatozoa was observed after anal swab was done, the physical observation of PW1's anal area made her to conclude that PW1 was defiled. PW2 testified that PW1 informed her on 30/7/2015 that the appellant had defiled him.

Given the evidence on record, I do find that it is established that PW1 was defiled. PW1 did not make any reference to another person. The incident occurred on 26th July, 2015. PW1 told his mother on 30/7/2015. According to PW2, it is the mother of the other child, Kimathi, who was playing soccer with PW1 who asked her to enquire from PW1 whether he had also been defiled. It is not clear whether there was another case involving Kimathi. Since the complainant in this case testified as well as his mother and the medical officer, I do find that those were crucial witnesses. Even if Kimathi and his mother did not testify, their evidence could not change the evidence of PW1 which is corroborated by the evidence of PW3.

The appellant contend that the charge sheet was defective. He ought to have been charged under section 162 of the penal code. Section 162 of the penal code was not repealed by the Sexual Offences Act. The Section provides for the offence of unnatural offence which includes having canal knowledge of an animal, and canal knowledge against the orders of nature, presumably canal knowledge through the anus. The offence carries a maximum sentence of 14 years and if the victim did not give his consent, then the offender can be sentenced to twenty one years imprisonment. Section 162 outlaws homosexuality and those punishable are both the perpetrator and the person who allows his anus to be penetrated either he be a male or female person.

Section 2 of the Sexual Offences Act defines genital organs as the whole or part of male or female genital organs and includes the anus. Section 8 (1) defines the offence of defilement which is the act which causes penetration of a child. Penetration is the partial or complete insertion of the genital organs of a person into the genital organs of another person. Since Section 2 of the Sexual Offences Act includes the anus as one of the genital organs which form part of the offence of defilement, the appellant cannot contend that the charge sheet was defective. The police have at times used Section 162 of the Penal Code instead of Section 8 of the Sexual Offences Act. My view is that Section 162 of the Penal Code was deliberately left intact and for good reasons when the Sexual Offences Act was passed so as to deal with situations involving adults who penetrate others through the anus or those who penetrate animals. The offence of defilement revolves around penetration of those below 18 years old, be they female or male. I find that the charge was proper.

The appellant's evidence was considered. The same does not raise any doubt on the prosecution case. The prosecution evidence does prove that PW1 was defiled and it is the appellant who defiled him. I am in agreement with the findings of the trial court. The appellant's employer, the pastor, was only mentioned in reference to where the appellant was working. There was no need to call the pastor as a witness. I do find that the prosecution proved its case beyond reasonable doubt.

The record shows that a birth certificate was produced. PW1 was born on 27th May, 2005 and was below 11 years old on 26th July, 2015 when the offence occurred. Section 8 (2) of the Sexual Offences Act provides for life imprisonment. The appellant was sentenced to serve fifty (50) years imprisonment. I hope he will outlive his prison sentence. His age was not stated but he claimed to have had a wife. I wonder why the appellant would have left his wife for a young innocent boy.

The upshot is that the appeal lacks merit and is hereby disallowed.

Dated and signed at Marsabit this.....Day of June, 2018.

S. CHITEMBWE

JUDGE

Dated, signed and delivered at Embu this 9th day of July, 2018.

F. MUCHEMI

JUDGE