



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CRIMINAL APPEAL NO. 51 OF 2014**

**JOSEPH MUMO ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

(From the Original Conviction and Sentence in Criminal Case No. 23 of 2013 of the Chief Magistrate's Court at Malindi – Y.A. Shikanda, Ag. SRM)

**JUDGEMENT**

The appellant was charged with the offence of defilement contrary to section 8 (1) (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that the appellant on 2.9.2013 at [Particulars Withheld] Village of Watamu location within Kilifi County intentionally and unlawfully caused his penis to penetrate the anus of L B. a boy aged 5 years.

The appellant was found guilty and sentenced to serve life imprisonment. The grounds of appeal are that:

- (i) The trial court failed to consider that the alleged penetration was not proved beyond reasonable doubt.
- (ii) The conviction is based only on the evidence of the complainant.
- (iii) The prosecution did not prove its case beyond reasonable doubt.
- (iv) The trial court erred by rejecting the appellant's sworn defence which was strong and the truth.
- (v) Section 36 (1) of the Sexual Offences Act was not complied with.
- (vi) The case proceeded for hearing yet the appellant had not been supplied with witness statements.

In his written submissions, the appellant states that the issue of penetration was not proved beyond reasonable doubt. The complainant was examined and he had a cut on his anus and it was not established what caused the cut. PW5, the clinical officer did not reveal what caused the cut in the anus of the complainant. There was no basis for PW5 to state that sodomy was highly possible. The type of weapon

which caused the cut was not stated. The medical evidence does not state anywhere that there was penetration. There is only an assumption that the complainant was sodomised. No spermatozoa was found on the complainant yet there is no evidence to the effect that a condom was used. What was before the trial court was mere assumption by the clinical officer. In fact, there was evidence that the anal splinter muscles appeared to be intact. That proved the fact that the complainant's anus was not penetrated.

The appellant further submits that PW3 was a minor. The trial court concluded that the minor was telling the truth. The complainant's mother alleged that the child was given doughnuts by the appellant. There was no evidence to that effect. The mother alleged that she saw blood on the child's short. That was not proof of defilement. The complainant's evidence was not corroborated. PW2 alleged that the appellant went to him with many children. There is no evidence that the complainant was one of the many children. The medical evidence indicate that anal swabs were taken and no sperms were noted. The case was not proved as required. It is further submitted that there was a mob which threatened to brake the door and attack the appellant. It is not clear whether it was the complainant who talked to the mob that he had been defiled by the appellant. None of those who were in the mob was called to testify. The police officers who were sent to arrest the appellant did not also testify. These were crucial witnesses who ought to have testified. The appellant's defence was very strong but was totally rejected for no reason.

The State opposed the appeal. Mr. Fedha, prosecution counsel, submitted that the charge sheet was proper. Witness statements were supplied to the appellant according to the record of the trial court. The victim's mother came to know about the defilement. The medical evidence proved the case. The credibility of the prosecution witnesses was not shaken. The victim was a minor. The case was proved beyond reasonable doubt.

This is a first appeal and this court has to evaluate the evidence afresh and make its own conclusion. PW1 is the mother of the complainant. She testified that the complainant was five years old and a KG3 pupil. On 2.9.2013 at about 5.00 pm she was behind the shop at her place of work. She heard a child crying. She then heard a male voice saying "**shika ukanunue chochote unachotaka**". She then heard a female voice saying "**L kunanini?**" PW1 rushed to the place and found so many people gathered at a nearby cafe. She heard them saying the child had been defiled. She saw her son whose green short had blood. She pulled the short and noticed that the child was bleeding from his anus. The child told her that the person who had defiled him was locked inside the café. A neighbor pushed the door open and saw a man lying down on a mattress. The child was still crying. When the door was opened, the child pointed at the appellant. PW1 used to see the appellant for about one month. She took the complainant to hospital. The child was holding Kshs.20/=. The child told her that the appellant bought him doughnuts and then asked him to enter the café. He then asked the child to remove his clothes and he defiled him. The child was taken to Gede dispensary and later referred to Malindi sub county hospital.

PW2 JOSEPHINE MWANZIA resides at [Particulars Withheld] in Watamu. On 2.9.2013 at about 4.00 pm she was at her shop. Somebody knocked at the door and told her to open. She found the appellant with a lot of children behind him. He gave out Kshs.50/= and asked for doughnuts. PW2 gave him the doughnuts and closed the door. While at the back of the shop she heard a child crying for his mother. She went to the door where the child was crying and found it was locked from inside. She heard a male voice asking the child to keep quiet. PW2 asked the person to open the door but he refused. She threatened to break the door. The man opened the door and PW2 noticed that it was the appellant. The child left while holding Kshs.20/=. She saw the child who was the complainant. PW2 asked the appellant why the child was crying and he told her that he was crying for fried potatoes. The man closed the door and PW2 followed the child. The child was crying and was pointing at the area around the buttocks saying "**mzee wa hotel**". PW2 saw watery substances and blood oozing from the child's anus. They took the child to his mother. PW1 screamed and a crowd gathered. The crowd went to where the appellant was and dragged him out. The child was walking with difficulty. PW2 knew the appellant.

PW3 was the complainant. He told the court that he was five years old and in KG3 at school. On the material day, he was going to his mother. On his way home the appellant called him. He used to see the appellant but did not know him. The appellant used to sell food. The appellant made him to lie on the mattress and then defiled him. He removed his short and put his urinating thing into his anus. PW3 felt

pain and started crying. He came out of the hotel and met mama Jimmy outside. She checked him on his anus. He was taken to Gede hospital by his parents and mama Jimmy. He then recorded the statement with the police. The appellant gave him Kshs.20/=.

PW4 FURAHA KAHINDI is a grocer at Watamu. On 2.9.2013 she was at home. It was about 5.00 pm. She saw PW3 who is her brother's son crying. He asked him what was the problem and PW3 pointed out a certain house which was the appellant's stall. She pulled the child's pair of short and saw blood around his buttocks. She went to the stall with mama Mary. They found the door closed. They then called the child's mother and told her that PW3 had been defiled. Villagers broke down the door that was closed from inside. The appellant was inside. The child was taken to Gede health center but was referred to Malindi District hospital.

PW5 IBRAHIM ABDULAHI is a senior clinical officer who was based at the Malindi District hospital. On 4.9.2013 he examined PW3 and filled a P3 form. He found a cut of about 2 cm at the anal orifice. There was minimal bleeding. There was a cut of about 3 cm in the anus. Anal swab was taken but there was no spermatozoa found. He concluded that sodomy was highly possible. PW6 CPL. MARGARET TERENOI was stationed at Watamu police station. The case was investigated by **Cpl. Maryon Abdi** was transferred to Nairobi headquarters. It was later handed over to **Cpl. Ayuma** who was attending a course. PW6 produced the exhibits involved in the case. These were the complainant's birth certificate, a blood stained short and the Kshs.20/= coin that was alleged to have been given to the complainant.

In his sworn defence the appellant testified that he used work at a food kiosk before he was arrested. The café belonged to his aunt who had closed it down. She opened it up for him when he went to Watamu. He was not aware that his aunt owed the landlord unpaid rent. He went to Watamu in July 2014. The child's father went there and asked for the aunt. The appellant told him that she had travelled to Kilifi. He was told that she had three months rent arrears. On 1.9.2013 the child's father went to inform him that if the rent was not paid by 2.9.2013 he would show him. The rent was Kshs.3,000/= per month. He called his aunt who promised to go and talk to the landlord. On 2.9.2013 he did not open the cafe. The child's father went there and asked for his money. He told him that he had no money. He went to the market and returned at about 5.30 pm. He found boda boda cyclists outside the kiosk. He entered inside and heard voices saying "**he has come**". After five minutes the door was knocked. Young men entered started assaulting him saying that he could not stay in the house for free. He was rescued by police officers who took him to hospital. He denied committing the offence. It is his evidence that he was fixed because of the rent dispute.

The issue arising from the appeal is whether the prosecution proved its case beyond reasonable doubt. The charge relates to defilement of a boy. The record shows that the charge sheet was amended on 10.3.2014. The initial charge sheet had the words "**using his hand**" at the end. The fresh typed charge sheet was presented and the charges were read over to the appellant afresh. The words "**using his hand**" were removed. No witness had testified by then. The charge sheet correctly indicate that the appellant was facing charges under section 8 (1) as read with section 8 (20) of the Sexual Offences Act. The charge sheet is proper.

The appellant submit that the medical evidence does not prove that there was penetration. The evidence of PW1 is that he was defiled. PW2 and PW4 saw the complainant crying. He had blood on his green short coming from the anus. The medical evidence indicate that there was tear of about 2 cm long at the anal area. The treatment notes confirm that there was that cut on the anal area. The P3 form indicate the injuries sustained by the complainant. I do find that indeed the complainant was defiled. The provisions of section 36 of the sexual Offences Act is not mandatory.

It is the evidence of PW1 that she heard the complainant crying. PW2 and PW3 also heard the child crying. They all saw the child bleeding from the anus. It is the evidence testified that she saw the appellant with a group of children. He bought doughnuts for Kshs.50/= PW1 told the court that the complainant informed her that he was given doughnuts by the appellant. The must be the doughnuts bought from PW2's shop. The complainant pointed at the appellant's stall. The door was pushed open and found the appellant inside. That evidence is corroborated by the medical evidence which confirmed

that PW3 was sodomised.

The appellant's defence is that the complainant's father was the landlord of the hotel owned by his aunt. He told him that he would know him. That evidence does not displace the fact that the complainant was defiled. The defilement of PW3 has no relationship with the ownership of the hotel. The fundamental issue is whether the complainant was defiled. The evidence on record proves that the complainant was defiled. That fact has no relation with the alleged rent arrears. The appellant's defence was not strong or truthful as submitted by the appellant. The evidence proves that the appellant was at the scene of crime. He was found alone in his stall on a mattress. PW2 came into contact with the child. The appellant opened the door and released the child. The evidence confirms that the appellant gave the child Kshs.20/=. The Kshs.20/= coin was produced as evidence. The issue of the child's age was settled by the production of his birth certificate. The child was born on 4.7.2008. The offence occurred on 2.9.2013. The child was five years old as per the charge sheet.

From the evidence adduced before the trial court, I am satisfied that the prosecution proved its case beyond reasonable doubt. The appellant was arrested by members of the public. The contention that none of the members of public testified cannot disprove the offence. PW2 and PW4 were there when the appellant was arrested. These are independent witnesses who had no reason to fix the appellant.

In the end, I do find that appeal lacks merit and is hereby disallowed.

**Dated and delivered in Malindi this 8<sup>th</sup> day of February, 2017.**

**S.J. CHITEMBWE**

**JUDGE**