THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL APPEAL NO. 67 OF 2017

COSMAS NYAMU OKETCH… ……..……APPELLANT

-VERSUS-

REPUBLIC …….……..……..RESPONDENT

(Being an appeal from the conviction and sentence in the Resident Magistrate's court at Narok in criminal case No. 26 of 2012, R. v. Cosmas Nyamu Oketch)

JUDGEMENT

1. The appellant has appealed against his conviction and sentence of life imprisonment contrary to section 8(1)(2) of the Sexual Offences Act 3 of 2006, which was imposed upon him by the court of Resident Magistrate at Narok. The state has supported both the conviction and sentence.

2. The appellant was convicted on the sole evidence of the complainant (PW1) who was a child of tender years aged 4 years. He has raised 4 grounds in his petition of appeal to this court. Additionally his counsel, Mr. Motanya filed 10 supplementary grounds of appeal dated 29/2/2016. I consider ground 8 to be crucial in this appeal and I will start with that ground. In that ground he has faulted the trial court both in law and fact in convicting the appellant for the offence of sodomy in the absence of uncorroborated evidence. In this regard the main evidence is that of the complainant himself, who was allowed to make unsworn evidence. The complainant was subjected to a *voire dire* examination and at the end of it, the trial court found that this 4 year old child of tender years was unable to understand the nature of the oath. The trial court then allowed him to make an unsworn statement. His evidence in this regard was that the appellant was their neighbour at Ntulele market. It was also his evidence that his grandmother (PW2) had gone to fetch water.

3. He also testified that he went to the residence of the appellant. The appellant then sent him to go and buy soap. Thereafter the appellant removed the clothes of the complainant and made him to lie on bed. The appellant then proceeded to insert his penis inside his buttocks. PW1 felt pain thereafter and went home and reported this incident to the grandmother. As a result of this incident, the complainant could not walk easily. Before he left the house of the appellant, the appellant gave him one sweet.

4. The complainant was taken by his grandmother (PW2) to hospital, where he was examined by Doctor Allan Soita (PW4). Upon examination, the doctor found that the complainant had been sodomized by a person known to him. He found that his clothes were soiled and were blood stained. Furthermore, the doctor found that the complainant had difficulties in walking and sitting. The anus had bruises and laceration of the anal wall. Furthermore, he noted that there was clear fluid discharge from the anal area. The doctor concluded that this was evidence of forceful anal penetration. He then put in evidence the examination report (P3 form) as exhibit 1a and the post rape care form as exhibit 1b).

5. The appellant testified on oath and called 2 witnesses, namely Josephine Wanjiko(DW2) and Anne Wanjiru (DW3). In his sworn evidence, the appellant testified that the complainant knows him very well and that they were neighbours. He was then cross-examined. When he was asked as to why the complainant identified him in court as the person who had sodomized him, the appellant responded that it was because it was him alone, the prosecutor and the magistrate, who were in court during that trial time.

6. This is first appeal. As a first appeal court, according to *Okeno v. R (1972) E.A 32*, I am required to re-assess the evidence that was produced in the trial court and make my own independent conclusions based on that evidence. I have done so. I find from that evidence that the trial of this appellant was unsatisfactory. In this regard I find that the trial court should have allowed the appellant to cross-examine the complainant, notwithstanding that the complainant had made an unsworn statement. The purpose of cross-examination is to test the accuracy, veracity or credibility of the witness. This is provided for in section 154 of the Evidence Act (Cap 80) Laws of Kenya which provides as follows:

"When a witness is cross-examined he may, in addition to the questions hereinbefore referred to, be asked any question which tend-

(a) to test his accuracy, veracity or credibility;

(b) to discover who he is and what is his position in life;

(c) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to incriminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture."

7. The non-cross examination of the complainant was a fundamental misdirection which affected the trial. Cross-examination was very essential in this appeal given that the defence of the appellant was that he was framed as a result of misunderstanding with the complainant's grandmother (PW2) and her employer, who had threatened to do something to the appellant and his colleagues.

8. Furthermore, in the judgement of the trial court, there is no definite factual finding by that court that the complainant (PW1) was a credible and truthful witness, which finding of fact is required of a trial court in terms of section 124 of the Evidence Act, in respect of Sexual Offences.

9. In the circumstances, I find that the trial of the appellant was unsatisfactory since he was convicted on the unsworn statement of the complainant, which was never tested under cross-examination. Although, the complainant had made an unsworn statement, the trial court should have allowed the appellant to cross-examine him. The complainant, although unsworn was allowed to make unsworn statement in accordance with section 19 of the Oaths and Statutory Declarations Act (Cap 15) Laws of Kenya. This in itself did not prevent the trial court from allowing the appellant to cross-examine the complainant.

10. The only issue for determination in view of the fact that the trial was unsatisfactory is whether or not, I should order for a re-trial. The appellant was sentenced to life imprisonment on 5/7/2013. The offence carries a sentence of life imprisonment. In deciding whether or not a re-trial should be ordered, the court has to take into account the following factors. First, it must be shown according to *Kimbo v. R (1976) KLR 132* that the trial was not satisfactory or defective. Second, it must also be shown according to *Braganza v. R (1957) EA 152,* that on a proper consideration of the potentially admissible evidence, a conviction might result. Third according to *Mugema & Another v. R (1967) EA 676* the period the appellant has been in custody has also be taken into account. However, a retrial cannot be ordered according to *Manji v. R (1966) EA 343*, in order to give the prosecution an opportunity of filling in gaps in its case. In the instant appeal, I find that the trial was defective and unsatisfactory for two reasons. First, the trial court did not give the appellant the opportunity to cross examine the complainant. Second, the trial court failed to expressly make a factual finding as to whether the complainant was truthful or not. I further find that there is potentially admissible evidence that the re-trial might result in a conviction. Finally, I find that the offence carries a sentence of life imprisonment and that the appellant has been in custody for 3 years and about 10 months. I further find that in view of these factors given the

fact that this was a defective trial, I hereby allow the appeal and quash the conviction and sentence imposed against the appellant. I hereby order that the appellant should be re-tried by another magistrate excluding the one who convicted and sentenced him.

Judgment delivered in open court this 14th of March, 2017.

In the presence of Mr. Motanya for the Appellant and Mr. Mukofu for the Respondent.

J. M. Bwonwonga

Judge

14/03/2017