



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**CRIMINAL APPEAL NO. 95 OF 2014**

*(From the original conviction Criminal Case No. 1667 of 2012 at the Chief Magistrate's court at Mombasa)*

HAMISI KARISA KITSAO .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

**JUDGMENT**

The Appellant, HAMISI KARISA KITSAO was charged with two counts. In Count 1, the appellant was charged with child trafficking contrary to section 13 (a) of the Sexual Offences Act No. 3 of 2006.

The particulars being that:

“On the 9<sup>th</sup> day of August, 2008 at Mariakani Township in Kaloleni District within Coast Province, the appellant knowingly or intentionally made or organized arrangement of a child from Mariakani Township to Jomvu area within the borders of Kenya with an intention of facilitating the commission of a sexual offence against M.A a child aged 11 years.

In count II, the appellant was charged with defilement of child contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act No.3 of 2006.

The facts were that:

“On the night of 9<sup>th</sup> and 10<sup>th</sup> August ,2008, at Jomvu area in Mombasa District within Coast Province, the appellant unlawfully and intentionally committed an act which causes penetration of genital organ namely penis into the genital organ namely anus of M.A a child aged 11 years”.

The appellant was tried, convicted and sentenced to serve a life imprisonment by Honourable V. Kachuodho, Resident magistrate at Mombasa for the offence of defilement. Being aggrieved with the said conviction and sentence, the appellant preferred this appeal, premised on the following amended grounds of appeal;

(1) That that learned trial magistrate failed to consider that the charge did not meet requirements of law hence his conviction was unsustainable.

(2)That the learned trial magistrate did not bear in its judicial mind that section 19 of The Oaths and Statutory declaration Act was not adhered to;

- (3) That the learned trial magistrate did not consider there was no compliance of section 39 (2) of the Sexual Offences Act No. 3 of 2006 hence the sentence of life imprisonment was unsafe.
- (4) That the learned trial magistrate did not consider that section 109 of the Evidence Act was not met thus his conviction and sentence was not in law.
- (5) That the learned trial magistrate failed to award his defence due consideration and the same was reliable to cast doubts upon the prosecution's case.
- (6) That the learned magistrate erred in law and in fact for failing to order for an age assessment on the complainant while age was an ingredient of the offence.
- (7) Having found that complainant to have been 17 years on 7.1.2003, it follows that on 7.1.2008, the complainant was 12 years and at that date of the alleged offence on or about 9.8.2008, the complainant could not have been 11 years and the conviction under section 8 (2) of the Sexual Offences Act was unsafe and improper.
- (8) The learned magistrate erred in law and in fact in placing reliance on P3 form a secondary document without production in evidence of the initial treatment notes which were primary documents.
- (9) The conviction under section 8 (2) of the Sexual offences Act was unsafe;
- (10) The sentence imposed of life imprisonment was harsh and excessive in view of the unsafe conviction under section 8 (2) of the Sexual offences Act.
- (11) That the learned magistrate erred in law and in fact by relying on an incomprehensive medical report, where upon the medical doctor evidently failed to compare specimen of both the complainant and the accused for empirical evidence, thus casting doubt on the primary evidence produced in court which failed to meet conviction threshold.
- (12) That the learned magistrate erred in law and fact by failing to apprehend that the accused being a 1<sup>st</sup> time offender, the charge and weak evidence brought against him and the available punishment in law does not warrant harsh life imprisonment thus offending the accused's bill of rights particularly right to liberty enshrined in the Article 29 of the Kenya Constitution, 2010.
- (13) That the learned magistrate erred both in law and fact by convicting the accused upon uncorroborated evidence by allowing the prosecution to proceed without conducting conclusive investigations and failing to summon the Boda boda rider or even the mosque attendants to corroborate the allegation of Pw1 this creating doubt and offending the accused's constitutional right to fair hearing under Article 50 of the constitution of Kenya, 2010.
- (14) The learned magistrate failed to apprehend tenets of the law that whenever there is doubt in trial then the accused must be given a benefit of doubt.

It has been held over and over again that the duty of the 1<sup>st</sup> Appellant court is to revisit the evidence tendered before the trial court, analyse and re-evaluate it afresh to arrive or come to its own conclusion, while always, bearing in mind that the trial court had the advantage of observing the demeanor of witness and hearing them give evidence, hence give allowance for that. (See OKENO VRS REPUBLIC (1972) E.A 32, which set out this principle that is always referred to by the High courts in Kenya.

I will begin by setting out the evidence that was adduced before the trial court.

### **PROSECUTION'S EVIDENCE.**

The prosecution adduced evidence of four (4) witnesses.

Pw1, M A, told court that he was 12 years old in 2008 and in class 3 at [particulars withheld] Academy. He said he was living with his mother Z and Baba Mdogo. That on 9.8.2008, at around 6.00am, he had gone to the toilet which was outside the house and on returning from there, the appellant called him by whistling. Pw1 said that the appellant was near the road, behind the toilet. He identified the appellant as a person he knew by the name Hamisi Kitsao who had been employed to serve food in their kiosk but had been fired on that day. Pw1 went to the appellant who took him to his friends shop. He then returned at 2.00pm and asked him to go to Jomvu with him. They went to Jomvu where they arrived at 4.00 pm and started walking around until 6.00pm when the appellant got into a bar and came out with a bottle of whisky. They then slept in a "Kibanda" and according to Pw1, the appellant removed his pants and raped him in the night. He went on to state that in the morning the complainant left as the appellant wanted to inject him. He was taken to a mosque by a boda boda operator from where he was given fare by the same operator. He went back home to Mariakani and informed his father (herein referred to as Pw3) of what had happened. He was taken to Mariakani District Hospital for examination and then to the police where he recorded his statement.

Pw2, MWANGALA SHIGULE testified that he was a clinical officer at Mariakani District Hospital and that on 10.8.2008, he examined an 11 years old minor who was alleging that he had been sodomised by a man known to him. He found that the minor had a bruised anterior anal orifice with a clear discharge. He carried out laboratory examination of the specimen and only the rectum revealed a mobile (live) spermatozoa. He filled the P3 form on 11.8.2008 in which he concluded that there had been penetration. He produced the P3 form as exhibit P1.

Pw3, M D C, told court that on 9.8.2008 at around 6.30 am he was sleeping in the house near the hotel when he heard his wife call their son but there was no response, which was unusual. Pw3 then got up and went around asking for his son and was told that he had been seen going to the toilet. He looked for him there but did not find him. He looked for him in vain and in the evening, he met one of his former employees who is the appellant herein at about 2-3 Pm. He told him he had been with the complainant at around 1.00pm but he did not know where he had gone to. He reported the matter to Mariakani police station the following day and the police promised to search for the boy. Pw3 said that Pw1 appeared on this day and on seeing him, he started running away. This is when pw3 noticed his running was unusual. He took him home, where on interrogation, Pw1 told Pw3 what had happened to him he told him that he had been with the appellant but he had told him to hide, when Pw3 was asking him about Pw1. He took Pw1 to hospital where he was examined by a doctor who told him the son had been defiled as there was spermatozoa in his anus. He was issued with a P3 form and the appellant was later arrested.

In cross examination, Pw3 said that the man who had taken the appellant to work for him had told him that the appellant had left work saying the salary he was paying him was small and that he had found a better job. He denied that the appellant left employment because he had not paid him.

Pw4, NO 578422 Police Constable Rashid Hassan, who was the investigating officer in this case stated that on 10.8.2008 at around 8.30 pm, he was at the crime stand by section at Mariakani police station when the complainant, a boy of about 11 years old was brought there by his father, who was complaining that the appellant, his former employee had "raped" his son. He said that the said father had already taken his son to Mariakani sub- District hospital for treatment. He confirmed that his father had earlier reported a case of a missing child to the station. Pw4 issued them a P3 form to be filled by a doctor. And the following day the appellant was arrested by the said father who took him to the station where Pw4 rearrested and charged him with the offences that were before court.

## **DEFENCE CASE.**

At the close of the prosecution case, the trial magistrate found that the appellant had a case to answer and placed him on his defence. The appellant opted to give a sworn defence and called no witness.

The appellant, HAMISI KARISA, told court in his sworn defence that he used to work for the complainant's father but he left the job because of the debt he had been asking from him. He then got work elsewhere and was continuing to work when on the morning of 10.8.2008, while on his way to

work, he met the complainant's father. That he greeted and requested that he takes him to the police station to report that his son was lost and he could not see him. The appellant obliged and when they got there, the complainant's father went in while asking him to wait outside. Then he came out with a police officer who told him to go inside the police station. He was asked questions and he denied having seen the boy. He was then charged with the offences that were before court to which he pleaded not guilty. The appellant said that the complainant's family had a grudge against him because of a debt.

In his judgment at page 35 lines 15 to 16, the trial magistrate stated

“.....This evidence was not shaken at all in cross examination. I therefore find there was sufficient proof of penetration in the sense of Sexual Offences Act”.

In the same judgment at page 35 lines 20 – 23, he went on to state;

“There is nothing which suggests a possibility of mistaken identity as to the person who defiled Pw1. There is also nothing to show any grudge between Pw1 and accused. I see no reason for Pw 1 to have lied about the person who did the heinous act on him. In the circumstances, I find that the accused defiled Pw1.”

Finally at page 36 lines 7 to 10 of the judgment, the trial magistrate had this to say;

“From the above I find that prosecution has proved their case beyond reasonable doubt. Their witness testimony was reliable and truthful, with no reason to be against the accused person. Their evidence was consistent and corroborated to the extend that the accused person was the one who defiled Pw1”

## **DETERMINATION**

At the hearing of the appeal, the appellant's counsel Mr Mwanyale who had filed written submissions, highlighted the same while the state through learned state counsel M/s Kagori submitted orally.

According to Mr Mwanyale, the grounds of appeal were consolidated into three grounds, namely

- (1) whether the age of the complainant was proved?
- (2) if not, were the ingredients of the charge facing the appellant proved?
- (3) could conviction result, where an ingredient of the charge is not proven?

M/s Kagori , counsel for the state on the other hand opposed the appeal on the ground that the age of the complainant was proved to be 11 years old. She also submitted that if the court finds that the age of the complainant was not proved, then the sentence can be varied to the right category as per the provisions of section 5 (a) Sexual Offence Act where Justice Odero found that he was 12 years old.

He submitted that age of the victim was not proved and therefore conviction cannot stand.

He then submitted that if the court finds. Otherwise , then they urge the court to find the sentence that was meted against the appellant illegal and award the proper sentence while considering the period he has served in custody.

He also submitted that there was a doubt as to whether the appellant is the culprit since the specimen semen which was found in the victim was not subjected to a DNA test to confirm it belonged to him.

In their submissions, the state through M/s Kagori, submitted that the complainant's age was proved to have been 11 years at the time of the incident but urge the court to sentence the appellant under the provisions of section 5 (2) of the Sexual Offences Act, No 3 of 2006 since it would not be fatal to find so.

She submitted that the appeal has no merit and should be dismissed.

In considering the appeal as set out in the grounds of appeal, I have read through, analyzed and evaluated the evidence that was adduced before this trial court in line with the submissions by both parties, the law and cited authorities. I will consider the grounds of appeal into the following issues;

1. whether the charge against the appellant met the requirements of the law.
2. whether section 19 of the Oaths and Statutory Declaration Act was adhered to.
3. whether section 39 (2) of the Sexual Offences Act was complied with in sentencing the appellant.
4. whether the prosecution discharged its duty of proving their case beyond reasonable doubt against the appellant.
5. whether section 36 (1) (2) of the Sexual Offences Act was complied with.
6. whether it was mandatory to call all the witnesses mentioned in the case.

As regards the issues of whether the charge against the appellant met the required legal standards, the charge sheet shows that the appellant was charged with the offence of defilement of a child 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 9<sup>th</sup> and 10<sup>th</sup> August, 2012 at Jomvu area in Mombasa District of the Coast Province, the appellant unlawfully and internationally committed an act which caused penetration of genital organ namely penis into the genitalia organ namely anus of M.A , a child aged 11 years.

Legally, a charge must be clear and unequivocal and not confusing to the accused person.

Section 134 of the Criminal Procedure Code provides that;

“Every charge on information shall contain, and shall be sufficient if it confirms, a statement of the specific offence or offences with which the accused person is charged together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged”.

Further, it is imperative that the charge shall or should set out the section describing the offence and punishment it attracts.

I have looked at the charge against the appellant and find that it has complied with the law as per the provisions of section 134 of the criminal procedure code.

I have also read through the particulars of the offence and find that the same are reasonably sufficient to identify the appellant and the elements of the charge.

In essence, I find that the charge against the appellant is in conformity with the legal requirement.

With regard to the issues of complying with section 19 of the Sexual Offences Act Oaths and statutory Declaration Act, I want to state that it is the section that provides for the procedure to be followed in recording the evidence of a child of tender years. It hence provides that;

“ Where, in any of the proceedings before any court or person having by law or consent of the parties authority to receive evidence, any child of tender years called a witness does not in the

opinion of court or such person understand the nature of any oath, his evidence may be received though not given upon oath, if in the opinion of the court or such person he is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure, shall be deemed to be a disposition within the meaning of that section.”

In order for trial court to determine and form an opinion on whether a child of tender years does comprehend the nature of an oath the trial magistrate must conduct which is commonly referred to as a voire dire examination of the child.

I have gone through the trial court’s record. I find that before Pw1, MA testified, the court observed.

“Court: How old are you

Minor: Am 12 years of age

Court: Do you understand meaning of give evidence on oath

Prosecution witness: I understand

Court; Minor understands meaning of oath”

The witness thereafter, gave evidence and was cross examined by the appellant. The record shows the question and answers that were put to the witness. The witness was found to be 12 years old, which according to the children’s act is above ten (10) years, hence not classified as a child of tender years. He was therefore not subject to voire dire examination. I dismiss this ground of appeal.

I turn to the third (3) ground namely, whether the prosecution adduced sufficient evidence to sustain the conviction and sentence that was imposed upon the appellant. Here I will deal with the issues the appellant raised in his submissions being;

- (i) whether the age of the complainant was proved
- (ii) if not, were the ingredients of the charge facing the appellant proved?
- (iii) could a conviction result where an ingredient was not proved?

From the submissions by the appellant’s counsel, it appears the only issue in contention with regard to proof of the offence of defilement against the appellant is the complainant’s age. The issue of whether the act of penetration of the complainant and identity of the appellant is not contested.

According to the submissions by the appellant through his counsel, Mr. Mwanyale, there was no evidence adduced by the prosecution to prove the complainant’s age, which is material since it determines the sentence to be meted out against a culprit . The appellant’s counsel submitted the authority, Criminal Appeal No 363 of 2010, HAMISI KARISA KITSAO VRS REPUBLIC, MOMBASA HIGH COURT, where Judge Maureen Odero found that;

“whether the charge sheet showed the complainant was 11 years and his testimony showed he was 12 years old at the time of the alleged offence, the fact remains that the complainant was clearly a child of tender years”

In view of the definition of “child of tender years” under the children’s Act, the complainant is classified as a minor.

In light of any findings in this appeal, I find the same unmeritable and uphold the conviction .

However, having found that the complainant was aged 12 years old, the proper section under which the appellant ought to have been charged, is section 8 (3) of the Sexual offences Act, which provides for a sentence of twenty (20) years imprisonment if one is found guilty.

I therefore substitute the sentence of life imprisonment which had been meted against the appellant and sentence him to serve twenty (20) years imprisonment for the offence of defilement under section 8(3) of the Sexual Offences Act no 3 of 2006.

I proceed to order that the said substituted sentence against the appellant to run from the date of sentence by the trial court.

It is so ordered.

**Judgment delivered, signed and dated this 10<sup>th</sup> day of May, 2017.**

**D.O.CHEPKWONY**

**JUDGE**

In the presence of:

M/s Ocholla for the state

The Appellant in person

C/clerk- M/s/Mbithe