



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
CRIMINAL APPEAL NO. 64 OF 2013

KAZUNGU KITSAO KOMBE APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the Original Conviction and Sentence in Criminal Case No. of the Chief Magistrate's Court at
Malindi – C.M. Nzibe, RM)

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 the 15.9.2012 in Magarini District within Kilifi County intentionally and unlawfully caused his penis to penetrate anus of RKM a child aged six (6) years.

The trial court convicted the appellant and sentenced him to serve life imprisonment. The grounds of appeal as per the amendment grounds of appeal are that the conviction is unsafe as the trial court poorly conducted voir dire examination, that the case was not proved beyond reasonable doubt, that the trial court misdirected itself by sentencing the appellant to life imprisonment and that the appellant's defence was rejected yet it was strong and truthful.

The appellant relied on his written submissions. It is submitted that the trial magistrate when conducting the voir dire failed to record how he was satisfied that the child could not testify under oath. The court simply proceeded by ordering that the child gives unsworn statement. The appellant relies on the case of **JOHN MUIRURI V REPUBLIC (1983) KLR 445** where 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.”

The appellant further submit that the case was not proved beyond reasonable doubt. The specific place where the incident occurred is not clear. The complainant testified that the incident occurred in the forest while other witnesses referred to a house. It is not clear whether the complainant could not differentiate between a house and a forest. The investigating officer testified that he went to the scene and found that it was a vacant house and no one was living there. The complainant did not direct the investigating officer to the forest.

It is further submitted that the medical evidence shows that there were no injuries sustained by the complainant. The medical officer examined the complainant but he did not find any injuries. The complainant's mother alleged that she saw discharge coming from PW1's buttocks. That evidence is not supported by the medical evidence. Anal swab was done and there was no spermatozoa. Therefore, the charge was not proved beyond reasonable doubt. The complainant's mother did not bother to go and check whether the appellant was at the scene. It is alleged that the mother saw the complainant following his friend Sammy Charo to go and play. Sammy Charo did not testify. Lastly, the appellant contends that his defence which was quite strong and truthful was not considered. The appellant stated that he was acquitted on a similar case on 25.7.2012.

Mr. Fedha, prosecution counsel opposed the appeal. Counsel submitted that the complainant was six years old and therefore a child. He was sodomized by the appellant. He knew the appellant. Medical evidence and the evidence of PW2 corroborated the complainant's case. The conviction is safe.

Being the first court to handle the appeal, it is my duty to evaluate the evidence and make my own findings. PW1 was the complainant. The trial court conducted the voir dire before the witness testified. The court ruled that the witness was to give unsworn statement. PW1 told the court that he was six years old and was in [Particulars Withheld] Academy. On 15.9.2012 he was at the house of Chengo. The appellant did bad manners to him in the forest. He did bad manners inside his buttocks. The appellant told him not to tell anyone what he had done to him. He was injured and told his mother. The incident was reported at Adu police station and he was later taken to hospital. The appellant was not known to him but he gave his name as Kazungu. There was nobody else that time.

PW2 LKT is PW1's mother. She testified that PW1 was six years old as he was born on 11.10.2006. On 15.9.2012 at about 3.00 pm she was at home. PW1 went to the appellant's home who is a neighbor. PW1 was following his friend Sammy Charo. PW1 came from the appellant's home crying. Upon talking to him she was told by PW1 that the appellant had told him not to say what had happened. PW1 told her the appellant had given him honey and then sodomized him. She checked and saw some discharge coming out of PW1's buttocks. She informed other family members and PW1 was taken to Adu police station and then taken to hospital. She had no grudge with the appellant.

PW3 SCM is PW1's grandmother. On 15.9.2012 at about 4.00 pm she got the information about the incident. She went to PW2's home and talked to PW1. PW1 informed her that Kazungu had sodomized him. They took PW1 to Ramada police station and they were advised to take him to hospital. PW1 was taken to Adu dispensary and thereafter to Malindi district hospital. She checked PW1 and saw some discharge coming from his buttocks and he was crying. The appellant is their neighbor. PW1 told them that he was sodomized in the appellant's home.

PW4 JFN is a brother to PW1's father. He is a boda operator. On the material day PW2 called to inform him that PW1 had been sodomized. He went there and talked to PW1 who informed him that Kazungu had sodomized him. They decided to report the matter to the police. On their way to the police they passed through the home of the appellant's brother, PW5 and informed him. PW5 went with them to Adu police station. Later, the appellant was arrested and charged with the offence. It is his evidence that the appellant was charged with a similar offence involving a neighbor. PW5 HBY is the appellant's brother. He works with the Fisheries Department in Malindi. On the material day at about 3.00 pm he saw a motor bike approaching his home. There was PW1, SC (PW3) JF (PW4). They told him that PW1 had

been sodomized by his younger brother, the appellant. PW1 informed him that the appellant had removed his underwear and done bad manners to him from behind and that the appellant gave him honey and told him not to tell anyone what had happened. PW5 went with the other witnesses to Adu police station and the matter was reported. It is his evidence that in 2010 the appellant was also charged with a similar offence involving a three year old child.

PW6 Inspector JAMES GITAU was attached to Adu police station. He investigated the case. On 15.9.2012 at about 6.30 pm he was at the station when Sgt Ibrahim Abdi who was in charge of Ramada AP camp brought the appellant. It was alleged that the appellant had sodomized a six year old boy at about 3.00 pm. He referred PW1 to Adu dispensary. The doctor later examined PW1 and found that he had been defiled. He went to the scene and found that the incident had occurred in a house that was vacant and no one was living there. PW1 informed him that the appellant lured him into the house by giving him honey which he took. He then removed his clothes and sodomized him. There was no dispute between the appellant's family and that of the complainant. PW6 learnt that the appellant had been charged in criminal case No. 802 of 2011 and the case involved a boy of seven years. The appellant was acquitted under section 215 of the criminal Procedure Code on 25.7.2012.

PW7 IBRAHIM ABDULAHI is a clinical officer who was based in Malindi District hospital. On 19.9.2012 he examined PW1 and filled the P3 form. He saw the treatment notes from Adu dispensary. PW1 had no injuries on his body. The anal region was wet, moist and tender on touch. Lab tests were done. Anal swab was taken and there was no spermatozoa. He concluded that the victim could have been sodomized. PW8 Sgt Ibrahim Abdi Mohamed was commanding Ramada police post. On 15.9.2012 at about 4.00 pm he was at the camp when a motor cycle with four passengers went there. He was informed that PW1 had been sodomized. He saw PW1 who seemed to be frustrated. He referred them to Adu health centre. PW1 could express himself and he told him that it was Kazungu Kitsao, the appellant, who had sodomized him. PW8 knew the appellant. He decided to search for the appellant and saw him walking with his brother. He arrested him and took him to Adu police station.

In his unsworn defence, the appellant testified that he was Elisha Kithi Kombe and not Kazungu Kitsao Kombe. He runs a posho mill. On 15.9.2012 he went to drink beer at about 10.00 am. The bar was closed and he went to another place where he started drinking palm wine then he left for a funeral. On his way, he was arrested by police officers and taken to Adu police station. At the station, he saw a young boy and his family who are his neighbours. He was told that he had sodomized the boy. He was then charged with the offence. He denied committing the offence.

The issues for determination are whether PW1 was defiled, whether the medical evidence support the charge of defilement, and whether the prosecution proved its case beyond reasonable doubt.

The complainant herein was a child aged six years old. He was born on 11.10.2006 as per his child health card. The trial court noted while the complainant was testifying that his demeanor was that of fear. Section 199 of the Criminal Procedure Act allows the recording of such remark. I have noted in his evidence that the victim knew the appellant's name. However, when testifying, he said he did not know the appellant. The evidence shows that the appellant is a neighbor to the victim's home. It is also noted that the complainant gave the appellant's name to his mother and all the other witnesses whom he talked to.

PW1 informed his mother that he had been sodomised. The incident occurred at around 3.00 pm. According to PW2, PW1 had followed his friend Sammy only to come back shortly while crying. PW2 checked PW1 and found that there was discharge from his anal area. PW3, SC also checked PW1 and noticed that there was some discharge. PW1 narrated to PW5, the appellant's brother that he had been given honey by the appellant and then sodomised. The same information was given to PW6, the investigating officer.

There is the medical evidence of PW7. The appellant contends that the P3 form indicate that no injuries were noted. No spermatozoa was found after anal swab was done. PW7 testified that PW1 had no injuries on his body. That evidence is in reference to the general body outlook, that is whether PW1 had

lacerations or cut wounds on his body. PW7 further testified that the anal region was moist, wet and tender on touch. PW1 alleged that he had been sodomised.

From the evidence on record, I do find that PW1 was indeed defiled. There is no good reason as to why a six year old boy would come out to say that he has been defiled while knowing that he is lying. The evidence of PW1 is believable. Under section 124 of the Evidence Act, the evidence of a victim of a sexual offence can be sufficient to convict an accused person. The evidence of PW1 is corroborated by the medical evidence. It is not mandatory that spermatozoa be noticed upon anal or vaginal swab being taken in sexual offences. The medical evidence show that PW1's anal area was moist, wet and tender to touch. PW7 observed that sodomy was possible. Cases of sodomy take a distinct feature compared to those of defilement of female victims. There is no hymen to be broken in cases of sodomy. I am satisfied that PW1 was sodomised. The medical evidence does confirm that PW1 was sodomised. PW1 was taken to Adu dispensary shortly after the incident. The treatment notes from the dispensary did indicate that PW1's anal was wet, moist and tender on touch.

The appellant contends that PW2 did not bother to find out whether the appellant was in his house. He further contends that there is reference to a forest as well as a house being the scene of the crime. PW1 while testifying made reference to a forest. However, the evidence of PW3 is that PW1 told them that the incident occurred in a house. The same evidence was adduced by the investigating officer. What is important is whether the incident took place. It is PW1's evidence that he was told not to tell anyone. In his defence, the appellant testified that he was arrested while on his way back from a funeral. There is no reference to the defilement incident. The appellant's evidence is that he was not aware of the defilement allegations as he had gone to drink beer and then went to a funeral.

As noted herein above, PW1 gave the appellant's name. The Adu dispensary treatment notes indicate that PW1 informed those treating him that he had been sodomised by Kazungu Kithi. The victim knew his defiler. The appellant's name was given immediately after the incident. The appellant alleges that he is Elisha Kithi Kombe. No identity card was produced by the appellant to disprove that he is Kazungu Kitsao Kombe. The charge sheet gives the appellant's name as Kazungu Kitsao Kombe alias Kazungu Nzai. PW5 is a brother to the appellant. He talked to PW1 who told him that it is the appellant who had sodomised him. There is no confusion on the name of the appellant. PW5 knows the appellant as Kazungu Kitsao Kombe. He is his brother. The reference by PW1 is that of the appellant and no one else.

On the issue of voir dire; it is obvious that PW1 was a minor. He was six years old. There was no mandatory requirement that the trial court had to state the reasons as to why PW1 did not testify under oath. Section 157 of the Criminal Procedure Code requires evidence to be given under oath. However, the one taking the oath must understand its meaning. There are those witnesses who are affirmed as they do not wish to take oath on the holy scriptures. There are some Christian denominations who do not take oath on the Bible for their own religious reasons. The case involved a minor who did not understand what it was to testify under oath. No prejudice was suffered by the appellant. Section 19 of the Oaths and statutory declarations Act, Cap 15 states that where children of tender years are called to testify, the court may take the evidence though not under oath. It all depends on the opinion of the court. A six year old could not be expected to testify under oath.

I do not wish to make reference to the evidence on the appellant's character. Section 57 of the Evidence Act provides for circumstances under which evidence of the accused's character can be admitted. The appellant testified that he was acquitted of a similar offence. I do not wish to dwell on the issue of the accused's character.

Given the evidence on record, I do find that the prosecution did prove its case beyond reasonable doubt against the appellant. The appeal herein lacks merit and is hereby disallowed. It is the appellant who defiled PW1. There was no grudge between the appellant and PW1's family. According to PW2, they were good neighbours until when the sodomy incident occurred.

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

Dated and delivered in Malindi this 7th day of November, 2016.

S.J. CHITEMBWE

JUDGE