



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 45 OF 2014

MUTUKU KIMWELI APPELLANT

V E R S U S

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case No. 23 of 2013 of the Principal Magistrate's Court at Kyuso).

J U D G M E N T

The appellant was charged in the subordinate court with two main counts and two alternative counts. Count one was for defilement contrary to Section 8(1) (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on the 7th February 2013 at around 11.00 Pm at **[Particulars Withheld]** sub location Kamuthale location in Kyuso District within Kitui County intentionally caused his penis to penetrate the anus of J K a child aged 13 years. In the alternative he was charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The particulars of the offence were that on the same day time and place intentionally touched the anus of J K a child aged 13 years.

In count two he was also charged with defilement contrary to Section 8(1) (2) of the Sexual Offences Act. The particulars of the offence were that on the 2nd February 2013 at around 11.00 Pm at **[Particulars Withheld]** sub location Kamuthale location in Kyuso District within Kitui County intentionally caused his penis to penetrate the anus of K M a child aged 7 years. In the alternative he was charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The particulars of the offence were that on the same day time and place intentionally touched the anus of K M a child aged 7 years with his penis.

He denied all the charges. After a full trial he was convicted on the alternative to count 1, of indecent act with a child and of count two for defilement. He was sentenced to serve 10 years imprisonment for indecent act and life imprisonment for defilement. The sentences were ordered to run concurrently. He has now come to this court on appeal. He filed his initial grounds of appeal on 27th June 2014. Before the appeal was heard he filed amended grounds of appeal as well as his written submissions. He relied on the amended grounds of appeal which are as follows:-

1. That the learned trial magistrate erred in law and facts to convict and sentencing him without considering that the prosecution case was fabricated thus influencing the complainant to give false allegations.
2. The learned trial magistrate erred in law and facts to convict him without considering that the voire dire examination was not conducted in an appropriate manner as per the law contrary to Section 19 of the Oath Statutory Declaration Act.

3. The trial magistrate erred in law and in facts to convict him without considering that there was no positive identification.
4. The trial magistrate erred in law and fact to convict him without considering that the prosecution evidence was surrounded with mass contradictions and inconsistencies contrary to Section 163 of the Evidence Act.
5. The trial magistrate failed in law by not putting into consideration that there were no proper investigations done to ascertain the truth of the prosecution allegations.
6. The trial magistrate erred in law and fact to convict him without considering that DNA test was not done to unveil the truth of the prosecution allegations contrary to Section 36 of the Sexual Offences Act.

During the hearing of the appeal the appellant relied on his written submissions as such he did not make oral submissions. I have read and considered the written submissions.

Learned prosecuting counsel Mr. Orwa opposed the appeal. Counsel submitted that even if parents wanted to withdraw the case, under the present Constitution only the Director of Public Prosecution can request the court for such withdrawal. Counsel argued also that there is no evidence that the appellant did not understand the

language used at the court. He was using Kikamba language on appeal which was the language used at the trial court.

On contradictions counsel submitted that PW2 corroborated the evidence of PW1 and that the credible evidence of PW6 corroborated injuries suffered. Counsel relied on the provisions of Section 124 of the Evidence Act with regard to the law on corroboration in sexual offences. On non production of P3 forms counsel argued that such forms were actually produced. Counsel emphasized that there was no evidence of an existing grudge between the appellant and the relatives of the complainants. Counsel argued also that there was no law barring an arresting officer from being the investigating officer. Counsel submitted further that the mitigation of the appellant was taken into account before sentencing and that his defence was also considered before conviction. Counsel submitted also that the minor witnesses were examined on their intelligence before they testified in court. According to counsel proper investigations had been done. The ages of the complainant were proved and that if the appellant did not commit the offence then he would not have asked for withdrawal of the case.

In response to the prosecuting counsel's submissions, the appellant stated that he was wrongly charged with defilement. He emphasized that the father of the appellant did not come to court to give evidence. He stated that nothing unusual was found on any of the complainants by the doctor. He stated that the trial court was not fair to him.

During the trial the prosecution called 6 witnesses. PW1 was complainant in count 1. He stated that on the night in question, after harvesting green grams for his grandmother he was sleeping in a store together with PW2. At around 11.00 Pm the complainant whom he knew before as a worker came to the store and defiled him for 3 hours. He did the same with the 2nd complainant. He defiled him through the anus. PW2 was the complainant in the 2nd charge. It was his evidence that he had harvested green grams for his grandmother and had gone to sleep with PW1 when around midnight the appellant came and defiled him through the anus. He did the same with PW 1. In doing so he held his neck as he penetrated him through the anus.

PW3 was James Mwema the employer of the appellant. He stated that he was told by the Assistant Chief that a defilement report had been made against the appellant. When he enquired from the appellant he denied committing the offence.

PW4 was Pauline Kavuthia an Assistant Chief. It was her evidence that on 3rd February 2013 young men went to her and reported that they had been sodomised. She then went and informed the employer of the suspect.

PW5 was Police Constable Kennedy Kimathi. It was his evidence that he arrested the appellant and interrogated the complainants. The complainants narrated to him the whole story about the incident. He thus charged the appellant.

PW6 was Francis Saku of Kyuso District Hospital. He tendered evidence on the hospital notes of the two complainants as well as the P3 forms. There was no evidence of any injury in the anus of either of the complainants. No traces of spermatozoa. The complainant in count 2 however stated that he felt pain when going for a long call.

When put on his defence the appellant gave a long defence testimony. He denied the charge. He was not cross examined. It was his story that he was a beehive keeper and that his employer owned him substantial amount of money.

This is a first appeal. As a first appellate court, I am required to evaluate all the evidence on record and come to my own conclusions and inferences. See the case of **Okeno -vs- Republic (1972)EA 32**. I have evaluated the evidence on record both for the prosecution and the defence. The appellant has raised many issues on appeal.

The alleged incident occurred at night around 11.00 Pm. There is no indication from any of the complainant that there was light in the place where they were sodomised, which could make them identify or recognize the appellant. None of

them also said that he identified or recognized the appellant through the voice. Merely saying that he threatened them is not sufficient. In my view the prosecutor should have asked specific questions on how the complainants managed to identify or recognize the appellant. This court cannot speculate, as in criminal case the requirement is that the prosecution proves their case against an accused beyond reasonable doubt. Therefore in my view even if there was commission of an offence, it has not been established that the culprit was the appellant.

In addition to the above, the minors went to the hospital immediately after the incident. In view of what they stated, one would expect that some indication would come out medically that they were recently molested through the anus. The medical tests showed nothing unusual. The fact that the 2nd complainant stated that he felt pain while going for a long call is not sufficient evidence that he was sodomised. There could be various reasons why one would feel pain when going for a long call.

In my view, the totality of the evidence on record does not establish that the complainants or any of them was sodomised. The evidence also does not establish that the appellant was the culprit. As a result, I find merits in the appeal. I allow the appeal quash the conviction and set aside the sentences. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and signed at Garissa this 14th day of July 2015.

GEORGE DULU

JUDGE