



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 16 OF 2011

JEREMIAH MUNYOKI MWANGANGI.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in Kitui Senior Principal Magistrate's Court Criminal Case No. 26 of 2007 by Hon. B.M. Kimemia, SRM on 19/1/2011)

JUDGMENT

1. The appellant was charged with the offence of unnatural offence contrary to **Section 162(a)** of the **Penal Code**. The particulars of the offence being that on different dates between **1st May** and **12th June, 2010** at unknown time at [*particulars withheld*] in **Kitui District** of the **Eastern Province** had carnal knowledge with **W.M.B** a boy child aged **13 years** against the order of nature.
2. He was tried, convicted and sentenced to **serve 21 years** imprisonment. Being aggrieved by the conviction and sentence, he appeals on grounds that the trial magistrate erred and misdirected herself :-
 - i. When he failed to test and question the prosecution evidence tendered by PW1 and PW2 that was contradictory, inadequate and flouted the defence of being framed up.
 - ii. By delivering a judgement when there was no evidence of medical report (P3 form) thereby being no evidence of anal penetration or spermatozoa.
 - iii. By reaching a verdict without evidence of crucial witnesses, namely the mother and pastor mentioned by PW1 and PW2.
 - iv. By believing the boy's confession in court that he was sodomized which was untrue as he did not tell his mother or PW2.
 - v. When she sentenced him to 2 years which is excessive and harsh.
3. The facts of the case are that PW1, **W.M.B**, a minor aged **13 years** old was sent by her mother **G.B** to the appellant's (*their pastor*) house to get some items which she did not disclose. Having delivered the message he asked him to go to his bedroom. Inside the bedroom was a bed. He told him to remove his pants. He complied. The appellant removed his pair of trousers and made him lie on his abdomen and he sodomized him for about **5 minutes** without uttering a word. He threatened to strangle him if he told anyone. He dressed up, went home but did not tell his mother who was at home. This happened on the **21st April, 2010**.
4. On the **1st May, 2010** he was told by his mother to go and sleep at the appellant's house. He

- found him at home. They went to purchase bread and dry cells from **Kilonzo** then went back home. At the time of going to bed he gave him a piriton tablet to swallow. He slept till morning. He woke up and noted some discharge on the bed and believed he had been taken advantage of. When he went to the toilet, he was in pain. When he left going home, he reminded him that he would kill him.
5. On the **6th May, 2010** his mother sent him to the appellant. He made him get into bed with him. They played about with the phone prior to the appellant telling him to remove his trousers. He had carnal knowledge of him through the anus. He later returned home.
 6. On the **21st May, 2010** at **4.00pm**, his mother sent him to the appellant's home. The act of indecency was committed upon him as usual. On the **28th May, 2010** his mother asked him to get some body oil, paraffin and cooking fat from the appellant. He had carnal knowledge of him prior to giving him oil, except paraffin.
 7. On **12th June, 2010** his mother sent him to the appellant to collect some paraffin and soap. They went to purchase at **Kilonzo** market. They went to his house. He had carnal knowledge of him. This time round he was in pain. The pain was in the anus and buttocks area generally. His father went home on **20th June, 2010**. He divulged the information to him. It was his evidence that his mother used to pray with the pastor. She used to go to his house in the day but he never used to go to their home.
 8. PW2, **B.K.M** the father to the complainant who resided and worked in **Nairobi** went home on **20th June, 2010**. He was visited by his cousin and a pastor. They prayed at his house and the pastor told him his son had a problem. He had also noticed the child was withdrawn. The complainant told them that he had been sodomized by the appellant. He went to see the school teacher of the complainant as advised and learned of the child's poor performance and demeanour while in school. He reported the matter to the police. PW3 No. **20090407 APC Tsuma Mwavuo** arrested the appellant.
 9. PW4, **Mary Paul** a clinical officer at **Kitui District Hospital** examined the complainant. Per her findings the child's anus was tender when passing stool. There were no tears. She formed an opinion that the child had been sodomized several times. PW4, **P.C (w) Monica Aoko** investigated the case and charged the appellant.
 10. In his defence the appellant stated that he was arrested on **24th June, 2010** and taken to the police station. He was released on bond. He met PW2 who vowed to ensure he was imprisoned. He chased away his wife. He denied having defiled the complainant. He denied the allegation that the complainant went to his house.
 11. This being the first appeal, this court has the duty to re-evaluate all the evidence adduced at trial and come to its own independent conclusions. This court must bear in mind that it neither saw nor heard witnesses who testified and make such an allowance. (*see Okeno versus Republic [1972] E.A 32*), (*Kariuki Karanja versus Republic 1986*) *KLR 190*).
 12. Issues to be determined are ; -
 - i. Whether the appellant had carnal knowledge of the complainant.
 - ii. Whether it was against the order of nature.
 13. The only evidence on record as to what befell the complainant was of a single witness, the complainant himself. The complainant was a child aged **13 years old**. It is trite law that in sexual offences where evidence adduced is for a child; corroboration is not a requirement – (*vide the proviso to Section 124 of the Evidence Act, Cap 80 Law of Kenya.*)
 14. The only requirement is for the court to record in proceedings reasons why it believes the child. The court must be satisfied that the child is telling the truth. This per se would mean that the court must be cautious prior to reaching its verdict.
 15. Medical evidence adduced proved that the complainant had tenderness of the anus. The clinical officer formed an opinion that he had been sodomized. The examination was done on the **21st June, 2010**. The complainant said he had been defiled severally, on five (5) occasions.
 16. According to the findings of the clinical officer he was sodomized severally.
 17. It was his evidence however that the person who sexually violated him on the said dates was the appellant. According to him it used to happen whenever his mother would send him to the

appellant. He never reported to him what had befallen him because of alleged threats to kill him. PW2, his father discovered what happened after some prayers were conducted by some pastors. PW1 said he used to be seized by some power and he would shake; an act that prompted his father to seek spiritual intervention. The pastor that he opened up to was not called as a witness. Similarly his mother who allegedly used to send him was not called as a witness to confirm the allegation. No reason was given why they were not called to confirm what the child stated considering the fact that the child used to be seized by some spiritual power per his allegation.

18. In reaching her decision the trial magistrate stated thus:-

“The child witness was very clear in his evidence and was not shaken during cross-examination, for 9 years old; I do not see how he can make up such a story”

19. This was the basis upon which she convicted the appellant. What she failed to appreciate was some other circumstances that surrounded the issue. It is stated that the complainant's father had to undergo medical examination at the same time. No cogent reason was given why it so happened. This brings us to the question whether the complainant's mother's evidence had she testified would have been adverse to the prosecution's case. The prosecution is usually under an obligation to call witnesses who help in establishing the truthfulness of case. Where the witness is not called the court can conclude that the evidence would have been adverse. (see ***Bukenya & others versus Uganda [1972] E.A. 549.***)

20. The trial magistrate faulted the appellant. She stated thus:-

“I note that in the defence the accused, he did not counter the evidence of the diverse dates mentioned by the complainant and he only states that he did not do it. I also find it, very strange that a pastor would give an unsworn statement and if indeed he was God fearing and truthful. I do not see any reason why he refused to call a sworn statement. If he was telling the truth...”

21. What the learned trial magistrate did was shift the burden of proof to the appellant. The prosecution bore the burden of proof. The onus was upon the prosecution to prove beyond a reasonable doubt that the appellant had committed the offence. There was no legal duty upon the appellant to exonerate himself from the allegations.

22. The evidence adduced fell short of proving beyond reasonable doubt that it is the appellant who sexually violated the complainant against the order of nature on the five (5) occasions. In the premises the appeal is meritorious. I do allow it, quash the conviction and set aside the sentence imposed. The appellant shall be released forthwith unless otherwise lawfully held.

23. It is so ordered.

DATED, SIGNED and DELIVERED this 13TH day of MAY, 2014.

L.N. MUTENDE

JUDGE