REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO. 229 OF 2010

JAMES MAINGI MUTHONI.....APPELLANT

versus

REPUBLIC.....RESPONDENT

(arising from the judgment of Hon. B.M. Nzioka Resident

Magistrate Othaya in Criminal Case No. 109 of 2010)

JUDGMENT

The Appellant was charged with the offence of defilement contrary to section 8(1)(3) of the Sexual Offences Act the particulars of which were that on the 17th day of March 2010 in Nyeri South District within Central Province unlawfully and intentionally caused his penis to penetrate into the anus of PNW a boy aged 14 years.

He faced an alternative charge of indecent act contrary to section 11(1) of the Sexual Offences Act no. 3 of 2006 the particulars of which were that on the 17th day of March 2010 in Nyeri South District within Central Province did commit an indecent act with PNW a child aged 14 years by rubbing his penis against PNW's anus.

The appellant pleaded not guilty to the charges was tried convicted of the offence of indecent act contrary to section 11(1) of the Sexual Offences Act and sentenced to ten(10) years imprisonment.

Being aggrieved by the conviction and sentence the appellant through the law firm of Njuguna Kimani & Co. advocated filed this appeal and raised the following ground of appeal.

> ***1. The learned Resident Magistrate erred in law and in fact in admitting the sworn evidence of PW1, PW2, PW3, PW4, PW5, PW6 & PW7 who are minors without first enquiring if they were possessed of knowledge of what an oath is and the purpose of being sworn. A miscarriage of justice was occasioned to the appellant.***
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> ***2. The learned Resident Magistrate erred in law in admitting and relying on hearsay evidence from PW8 and PW9 hence arriving at an erroneous decision. Prejudice was occasioned to the appellant.***
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> ***3. The learned Resident Magistrate erred in law and in fact in not appreciating that vital witnesses were never called in support of the prosecution and no explanation offered thus***

arriving at an unlawful and erroneous decision. A miscarriage of justice was occasioned to the appellant.

The learned Resident Magistrate erred in law and in fact in convicting the appellant on insufficient, contradictory and uncorroborated evidence. A miscarriage of justice was occasioned to the appellant.

At the hearing of the appeal Mr. Njuguna Kimani appeared for the appellant while Mr. Njue the learned State Counsel appeared for the DPP and opposed the appeal.

SUBMISSIONS

On behalf of the appellant it was submitted that the evidence of PW1 to PW7 who were minors were taken without voir dire in violation of Oaths and Statutory Declaration Act. The trial magistrate it was submitted did not comply with section 19 of the Act to confirm whether they could testify in support thereof the case of PATRICK WAMUYU WANJIRU v R NYERI HIGH COURT CRIMINAL APPEAL NO. 6 OF 2009 was submitted.

It was further submitted that the trial court relied on the hearsay evidence of PW8 and PW9 and that vital witnesses including the watchman, the doctor and the person who took blood samples from the appellant and the victim were not called to testify. It was therefore submitted that the only inference is that their evidence would have been adverse to the prosecution case as per the holding in JUMA NGODIA v R (1982 -88) IKAR.

It was submitted that the trial magistrate acquitted the appellant on the count of defilement because of lack of medical evidence to prove penetration and therefore there was also no evidence to support the alternative charge, It was finally submitted that since the trial court released the appellant on bond pending appeal where one of the test to be applied is that there is an overwhelming chances of success of the appeal the trial court was therefore not convinced of his judgment.

On behalf of the state Mr. Njue submitted that the appellant was released on bond under section 356 of CPC which allows the accused to make an application since the trial court did not record the reasons for releasing the appellant it was submitted that no negative reference should be attributed to the same. It was submitted that failure was not fatal since the appellant was not convicted on only the evidence of a child of tender age since none of the prosecutions witnesses was below the age of ten it was not necessary to conduct voir dire and the case of SAMSON OGINGA AYIEYO v R (2006)eKLR to support the definition of tender age was submitted.

It was submitted that though some of the evidence were hearsay the appellant was not convicted on the said evidence. It was submitted that the witnesses who were not called were not necessary including the medical evidence since the appellant was convicted on the alternative charge.

This being a first appeal, the court is required to reassess the evidence tendered afresh and to come to its own conclusion though taking into account the fact that it did not have the advantage of hearing and seeing witnesses.

P.W.1 PNW minor aged 14 years stated that on 17th March 2010 at around 10pm the appellant came to inspect the dormitory and put his hand onto his blanket and started to touch his private parts. When the resisted the appellant told him to follow him to his house locked the door and took the complainant to his bed room where he applied oil into his anus and defiled him. The appellant there after licked his penis and told him to return to the dormitory where he found everybody asleep.

It was his further evidence that the next morning the appellant called him to his office and asked whether he had told anybody. He subsequently told Peter Kagicha and Miss Mathenge that the appellant had been trying to sodomise him before he was taken to the hospital where he was treated and later recorded his statement with the police who carried away a mattress belonging to the appellant and two pockets of

oil.

Under cross examination the witness confirmed that the appellant's house was the 3rd in a row of teachers house and that he had earlier given his juice to the appellant so when he told him to follow him he thought he was going to give him the juice. He stated that the appellant pretended to be his friend.

P.W.2 P.K. Minor aged 12 confirmed that the appellant came to their dormitory on 17th March 2010 and took away P.W.1 who used to sleep on the upper bed while he was on the lower bed PW.3 DM minor aged 13 years testified that he saw the appellant pass outside with P.W.1 and the following day P.W.1 told him that he had pain in his anus. They reported to the teacher on duty P.W.4 EKM aged 14 years under cross examination confirmed that he was with HN. DM and PN when they went to inform the teacher on what PN had told them. P.W.5 HN stated that they approached PW1 who told them that he was feeling pain in his anus and that he had been sodomised by the appellant.

P.W.6 PN aged 16 testified that P.W.1 told him that he had been sodomised and that they reported to Miss Mathenge and another teacher P.W7 SK minor aged 12 years testified that he was in the dormitory when the appellant called PW1 who followed him out of the dormitory.

P.W.8 Pius Mathenge testified that on 18th March 2010 at 5 pm some four boys came to him and informed him that PN had told them that he had been sexually assaulted by a teacher the previous night. P.W.9 the Deputy head teacher testified that he learnt of an allegation of a teacher harassing a pupil sexually P.W. 10 Nancy Wambui testified that she talked with P.W.1 who confirmed to her what had happened and that she signed the inventory of the items that had been taken from the appellant's house. Under cross examination she stated that the doors are locked by the watchman who was on duty on 17th March 2010.

P.W.12 Pius Ngila visited the dormitory where PN used to sleep recovered a brown pair of shorts and grey underpants and collected some items from the appellant's house. P.W.13 Francis Wambua prepared a memo for the government chemist for analysis. P.W.14 Albert Kithiru Mwaniki a government analyst carried analysis and made a finding that the blue underpants of the complainant had seminal stains of group AB and formed the opinion that the seminal stains on the underpants of hate complainant could have originated form the appellant.

When put in his defence the appellant gave sworn statement and stated that on 17th March 2010 Wednesday he had a maths lesson in class 6 and stayed with Madam Monica during evening upto 9.35 pm when he escorted the boys to the dormitory. He left the watchman locking the gate to the dormitory and proceeded to his house. On 18th March 2010 attended mass and did his lessons upto evening at about 6.10 pm. the watchman told him that there was a visitor to the head mistress who was not available who he attended to and she wanted to see her brother but the headmistress refused because there was a disciplinary case against the said pupil. On 19th August after mass he left for Nyeri and at around. 7.30 pm was called by the directors and told about the sexual assault case.

He further testified that he had previously discovered that the complainant had Ksh. 1000/- against school regulations. The complainant also had another disciplinary case over some money D.W. 2 Patrick Mureithi Ndirangu under cross examination testified that he only saw the appellant on 17th March 2010 during the day and did not see him during the night neither did he see Madam Monica.

In convicting the appellant the trial court had this to say

> "***The complainant told the court that the accused person penetrated his anus using his penis at the accused house. This evidence is denied by the accused person. Nobody else actually saw the accused person defiling the complainant except the complainant himself. However the evidence by the complainant that the accused person went to his dormitory and ordered him to follow him to his house is well corroborated by that of P.W.2 and P.W.3... There was no medical evidence produced to prove that the complainant anus was penetrated although the complainant was taken to hospital and treated. The doctor who treated him was never called. This leaves the***

court with the evidence of the Government analyst Mr. Albert Kathuri who produced a report after analysis. Items collected from the accused person and the complainant. The blood of hate accused person was found to be of group AB while the seminal stains on the light blue/grey underpants alleged from the complainant revealed that they emanated from the person with the same blood group or the accused...

However evidence by the complainant together with the evidence adduced by P.W.2 and P.W.3 proved that the accused person's penis did get into contact with the buttocks and anus of the complainant. Although there is no proof that penetration occurred this court does not have any doubt of the credibility of the complainant P.W.2 and P.W 3. The evidence adduced by the complainant was consistent and clear and without contradictions. The accused person was clearly seen by P.W.2 and P.W.3 leaving standard 7 dormitory in the company of the complainant. This was a strong circumstantial evidence that the accused person proceeded to his house together with the complainant.."

From the proceedings and submissions herein the court has identified the following issues for determination:

a. Whether the appellant was prejudiced by the evidence of minors being received without voir dire being conducted.

b. Whether the prosecution case against the appellant was proved beyond reasonable doubt.

From the proceedings herein it is clear that the evidence of the minors were received without voir dire being conducted. However the requirement of section 19(1) of Oath and Statutory Declaration Act is as regards the child of tender age. In the case of SAMSON OGINGA AYIEGO v R COURT OF APPEAL AT KISUMU CRIMINAL APPEAL NO. 165 OF 2006 "where a child of tender age was defined as a child under the age of ten years"

I would therefore agree with the submission by Mr. Njue for the state that none of the prosecution witness was a child of tender age and further as stated in case of R v SSUGROUR 1940] 2 ALLER 249 where it was held that a voir dire examination was necessary for the benefit of the presiding officer of the court I find that the appellant was not prejudiced since in convicting the appellant the trial court said that he did not have any doubt of the credibility of the complainant and P.W2 and P.W.3.

I therefore find that the omission to conduct voir dire was not prejudicial to the appellant and did not affect the prosecution case against the appellant.

Having dismissed the case against the appellant on the main count, the appellant was convicted on the alternative charge on purely circumstantial evidence which were that he was seen by P.W.2, and P.W.3 together with the complainant leaving the dormitory and in his evidence in chief the appellant confirmed that he was indeed in the said dormitory to make sure that the boys were asleep.

There is also the evidence of the government analyst P.W. 14 Albert Kathiru Mwaniki whose finding was that the complainant blood group was 'O' while the appellant was AB which matched the seminal stains found on the backside of the complainants under pants. There is also the evidence of P.W.2 the watchman which contradicted the appellants evidence in chief.

I am therefore satisfied that the evidence tendered meets the threshold for safe conviction on circumstantial evidence as stated in the following line of cases.

1. MWITA v R [2004] 2KLR60 at page 66 where the court of appeal state

"It is trite in a case depending exclusively upon circumstantial evidence the court must before deciding upon a conviction find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than the guilt"

2. ***<u>R v</u> TAYLOR WEAVER AND DONOVAN [1928]21cr 20 APP R 20***

> *"Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which has intensified examination is capable of proving proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial."….*

I therefore find that the conviction of the appellant on the alternative charge was safe and must point out as stated by the trial court that the appellant misused his position of trust as a teacher of the complainant and having gained his trust abused the same.

I therefore find no merit on the appeal herein which I hereby dismiss and order that the appellant service ten years imprisonment as imposed by the trial court.

Signed, dated and delivered at Nyeri this 15th day of October 2014.

J. WAKIAGA

JUDGE

Court: Judgment read in open court in the presence of Mr. Njuguna for the appellant and Mr. Njue for the state.

The appellant to serve his sentence. The case same 14 days to right of appeal.

J. WAKIAGA

JUDGE