REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 106 OF 2013

GEOFREY KIMEU KANGALE.....….APPELLANT

VERSUS

REPUBLIC…….…….....…RESPONDENT

(From original Conviction and Sentence in Criminal Case No. 3904 of 2010 of the Chief Magistrate's Court at Mombasa – **Hon. Kimanga - RM**)

JUDGMENT

GEOFFREY KIMEU KANGALE hereinafter referred to as the Appellant in this case was Sentenced to seven (7) years imprisonment.

On the second Count of defilement contrary to section 8(1) as read with section 8(2) off the Sexual offences Act No. 3 of 2006 he was Sentenced to life imprisonment. It was further ordered that the Sentences were to run concurrently.

The particulars on the first Count were that:-

> ***"On the 17th day of December, 2010 at about 7:00 pm at [particulars withheld] Mombasa County he caused DM to be secretly confined by abducting him".***

On the second Count of defilement it is alleged that:_

> ***"Between the night of 17th and 18th December, 2010 at [particulars withheld] he unlawfully and intentionally caused his penis to penetrate the anus of D M a boy aged ten (10) years".***

The prosecution in this case called six (6) Witnesses to buttress their case whereas the Defence called one.

The grounds for the appeal are that:-

1. The learned trial magistrate erred in law and in fact by failing to consider the sworn evidence of the appellant.
2. That the learned trial magistrate failed to warn himself that he had not heard the evidence of the Witnesses himself and therefore he did not observe their demeanour.

3. The learned magistrate failed to properly anaylse the evidence on record.
4. That there was no corroboration.
5. That he shifted the burden of proof to the appellant.

A perusal of the record of proceedings do show that the case was part heard before Hon. Mwangi – Senior Resident Magistrate.

Section 200(3) of the Criminal Procedure Code was complied by Hon. Gacheru – Principal Magistrate and the Accused told the Court that the case could proceed from where it had reached.

The Appellant had already testified and what was remaining was his submissions. No submissions were proferred and the Defence case was closed and Honourable Kimanga rendered his Judgment on 4th June, 2013.

At page 37 line 25 of his judgment the trial observes,

> ***"I must remind myself that evidence led by the prosecution as against the Accused by and large circumstantial evidence that the Accused was sen by the Landlord in the company of the complainant entering his house and was seen the following morning with the Accused …."***

The trial magistrate seems to have forgotten that the complainant himself did testify in Court and explained his ordeal which was caused by the appellant and also explained his role in causing his arrest.

A Voire dire examination was carried out by Honourable Mwangi–Senior Resident Magistrate who was satisfied that the child who was aged eleven (11) years at the time and who was in class five (5) understood the meaning of an oath. He allowed the Witness to give a sworn statement.

In the Court of appeal case of ***Johnson Muiruri –Vs- Republic 1983 KLR page 445*** it was held,

> ***"Where in any proceedings before a Court a child of tender years is called as a Witness, the Court is required to form an opinion on a voire dire examination whether the child understands the nature of an oath in which even his sworn evidence may be received. If the Court is not so satisfied, his unsworn evidence may be received if in the opinion of the Court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an Accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him.***
>
> ***(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 that 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".***

Section 124 of the Evidence Act on evidence of children provides,

> ***"Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declaration Act where the evidence of the alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the Accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.***
>
> ***Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offence, the Court shall receive the evidence of the alleged victim and proceed to convict the Accused person if, for reasons to be recorded in the proceedings, the***

Court is satisfied that the alleged victim is telling the truth".

In the present case the complainant was a child aged eleven (11) years. Section 2 of the children's Act defines a child of tender years to mean a child under the age of ten (10) years. The learned trial magistrate in receiving the child's evidence did note that the child understood the nature of an oath. It is also noted that this was a class five (5) pupil.

In his sworn statement he testified of how he met the Accused who was riding a motor cycle. After a brief chat he was offered a ride but instead of being taken near his home he was taken to the house of the Accused after they had stopped at a shop where the Accused bought a packet of cigarettes, a packet of condoms and two bottles of some medicine. At the gate of the Accused house, they were opened by an old man and upon entering the room of the Accused he was left there only for the Accused to return later with two of his colleagues who appeared very drunk.

At page 18 line 18 the Witness had this to say,

"Then he switched off the lights and he went to sleep. I then started feeling a person touching me repeatedly that was shortly after accused had switched off the lights. I asked him why he was touching me. I started shouting. I shouted so loudly, accused was the one sleeping next to me. I had slept with my clothes. He tried to pull down my shorts but I pulled it down, he did it in the anus".

He further testified of how in the morning the Appellant dropped him near pastor Lais church and he was given Ksh. 10/=. Later he went home and explained of what had taken place the previous night. He was taken to Hospital and later he pointed the Accused to police who arrested him.

The complainants father (PW 1) did testify of how the complainant went missing on 19th December, 2010 at 6:00 pm. They looked for him the whole night. The following day they received a call from a neighbiour who had seen the complainant walking along a road.

They went and found him looking confused, after interrogating him he narrated of what befell him. He took them to the house of the Accused whom they found missing but found his colleague upon checking the house they recovered a packet of condoms, penicillin tablets and body lotion.

PW 2 is the Doctor who examined the child. Upon examining he found bruises on the anal orifice posterior aspect, Anal splinter was loose.

PETER KARISA KITI (PW 3) had seen the Accused (who is his tenant) arrive at the gate. He went to open the gate and saw the Accused in the company of a boy aged about nine (9) years. In the morning he saw him leave in the company of the same boy who is the complainant.

The evidence of the Doctor (PW 2) and the Accused Landlord (PW 3) did afford corroboration to that of the complainant.

It is not correct to state that the evidence adduced before the Court was circumstantial in nature when the complainant did testify of how the Accused took him to his house at night and later inserted his male genital organ into his anus.

The appellant did not deny having taken the complainant to his house at night but states that he did so on grounds of sympathy. This complainant has working parents. PW 1 who is his father is a police officer, there is no evidence to the effect that the child was in need of care and protection.

Counsel for appellant contends that the particulars in charge are inconsistent with the facts adduced in that the charge sheet reads that the offence was committed on the night of 17th and 18th December, 2010 whereas all the prosecution Witnesses testified that the incident took place on 19th December, 2010. A perusal of the original record of proceedings do show that the original charge sheet which showed the

dates between 17th and 18th December, 2010 was substituted with another dated 22nd December, 2010 which showed the date as 19th December, 2010.

Whereas there could be contradictions here and there I find same do not go in the root of this case like whether the Accused used condoms or not or whether the Landlord heard noises at night or not. The evidence by the Doctor is categorical that there was penetration at the anal orifice.

Section 2 of the sexual offences Act defines genital organs to,

> ***"Include the whole or part of male or female genital organs and for purposes of this Act to include the anus".***

After a careful analysis of the evidence on record I am satisfied that the Conviction was safe and the Sentence was legal. I find no good reason to disturb it. The appeal has no merit and is disallowed.

Judgment delivered dated and signed this **11th** day of **November, 2014.**

….....

M. MUYA

JUDGE

11TH NOVEMBER, 2014

In the presence of:-

Learned Counsel for the prosecution Mr. Masila

Learned counsel for the defence Mr. Wachira

Court clerk Musundi

M. MUYA – JUDGE

Court:

Certified copies of the records and judgment to be furnished to both the defence and prosecution.

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M. MUYA

JUDGE

11TH NOVEMBER, 2014