



IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO.12 OF 2012

JOAB WASHONGO JEHOAPPELLANT

VERSUS

REPUBLICRESPONDENT

(An appeal arising out of the conviction and sentence of K.W Kiare C.M RM in Busia Cr. Case No.1434 of 2010 delivered on 10/2/2012)

J U D G M E N T

1. Joab Washongo Jeho (**the Appellant**) is serving a ten (10) year prison term upon conviction on the offence of Attempted Defilement contrary to Section 9(d) of The Sexual Offences Act. The Appellant is aggrieved by both conviction and sentence and prefers this Appeal.
2. It had been alleged that on 8th October 2010 at [particulars withheld] in Busia County he attempted to commit an act which could have caused his penis to penetrate the anus of N J a male juvenile aged 8 years. In support of its case, the Prosecution called 4 witnesses.
3. At the material time, N J (PW1) and C O (PW4) were friends and classmates at [particulars withheld] Boys Primary School. They used the same route to and from school. At about lunch time of the said day, PW1 said it was about 1.00p.m, the two friends were walking home from lunch when a man emerged from the bush. The man chased PW1 and pulled him into a bush near [particulars withheld] Hotel. He put leaves into the boys' mouth so as to gag any screams.
4. That he knocked the boy to ground, removed his own trousers and then removed the boys' trouser. He thereby defiled him by pushing his penis through into his anus. PW4 says he witnessed all this as it unfolded. Although the man was unknown to him, the victim says that he saw him well. He recalled that the man was wearing a Bob Marley T-shirt and a "military like trouser". He also wore a black woolen hat with a cartoon at the front. As for PW4, he says that the assailant was known to him as Ben. He knew that Ben lived in Majengo and at the time of the crime, Ben had long hair.
5. When PW1 got home, he was distressed and in tears, he told his mother R W G (PW2) about the misfortune he had suffered. In turn, she reported the matter to the Police and later took the boy to hospital. That the boy described the man who had breached him. That he had dreadlocks and a knitted black hat. She was present when Ben was arrested. At the time of arrest he was still wearing the black hat but had changed the rest of the clothes.
6. PC Charles Keter (PW3) was the officer at Busia Police Station who investigated PW1's complaint. The Accused was arrested at about 5.00p.m of the same day by members of the public. Later on visiting the scene he was able to recover some leaves that the victim says were used by the assailant to cover his mouth. These leaves were produced in Court. That the time of his arrest, the Accused had dreadlocks.
7. Invited to make his defence, the Appellant gave a sworn statement and called one witness. That 8th October 2010 was a Friday. Part time, he trains mechanics and did so on this day up to 12.00

o'clock. He went for Friday prayers at the Mosque at 12.30p.m where he stayed until 2.30 p.m. He ate lunch at home and returned to the garage at 2.00p.m. At around 4.00 p.m, a PSV driver who is known to him and a customer asked him to assist him with some work. But it was a dupe because he drove him into Busia Police Station where he discovered that he had been framed for the offence he was to face.

8. His witness, Tabitha Mbone (DW 2) is his mother. Although she was not with her son on 8th October 2010 and was unable to account for his whereabouts and movement on that day, she was confident that her son could not commit such an Act.
9. That is an abridged version of the evidence heard by the Trial Court. This evidence must be evaluated in greater detail by this Court so as to draw its own conclusion. That is the duty of a first Appellate Court but aware that unlike the Trial Court, this Court did hear and see the witness testify and due allowance must be given for that handicap (**Republic-vs- Okeno [1932]E.A 32**).
10. The Petition of Appeal raises 8 grounds but they can be clustered into two. First, that the evidence adduced did not support the Charge. Secondly, that the prosecution evidence was a false, inconsistent and weak. In his written submissions, the Appellant spent considerable energy pointing out what he saw as inconsistencies in the prosecution case. This Court shall weigh these arguments as it evaluates the evidence.
11. Mr Owiti appearing for the state thought the prosecution evidence to be overwhelming. He submitted that the Appellant was properly identified by two eye witnesses. That in fact, one of them (PW4) recognized him because he was well known to the witness. Counsel further argued that the evidence of the eye witness was consistent as to how the crime was committed.
12. PW1 and PW4 are said to be the eye witnesses to the offence. PW1 being the victim. Both are children, PW1 was 9 years while PW4 was 10 years at the time they testified in the year 2011. The evidence of PW4 was that on the material day they were holding hands with the victim when the Appellant pulled the victim away into a coffee farm and defiled him. This was how he described the defilement;

“Ben removed Ns shorts, put leaves in his mouth and sodomised him. I stood behind them. After Ben finished he gave N (N) sugarcane. We then left. ”

later he adds;

“I saw you putting leaves on his mouth and did bad things to him.”

13. PW1 told court that the Appellant chased both him and PW4, caught him and as he started to scream put leaves into his mouth. Then he says of the events that followed;

“The man knocked me to the ground after tripping/kicking my leg. I fell on the ground. He removed his long trouser. He then removed my long trouser and he defiled me through my anus. He pushed his penis into my anus. When he finished he dressed up and ordered me to leave the place. He warned me of dire consequences if I informed my father.”

14. PW4 was not consistent about the time of the incident. In his examination in chief, he says it was 1pm while in cross-examination he said it was 4.00pm. Although the Appellant asks this court to take it as a serious discrepancy, the significance of that discrepancy would diminish if the other evidence was consistent and overwhelming. So to that evidence. While the two eye witnesses give a common story that they were confronted by the Appellant as they were walking home, PW4 says that:

“The man called Ben pulled N away into a coffee farm.”

PW1's version was he was caught by his assailant after a chase. Notably, PW4 says nothing about them running, having been chased by the Appellant. Again if taken on its own this apparent inconsistency could well be insignificant.

15. PW4 says that after the Appellant finished defiling PW1, he gave him (**the victim**) sugarcane. The victim himself makes no mention of this. Perhaps the victim forgot this evidence or omitted it as immaterial because of passage of time. Again, PW1 says that the assailant wore a military like trouser while PW4 says he wore a white coloured trouser.
16. Up to here, this court would still be willing to hold that these disparities are diminished by some consistent evidence of the two witnesses. Both were agreed as to the place of attack, both were agreed as to the gagging of the victim using leaves. Both told court that the Appellant forced the victim to ground. Both told Court that the Appellant removed the clothes of PW1. Both told Court that the Assailant wore a woven/woolen hat. This consistency can be said to be remarkable for a story told by two children aged 9 and 10 years. It can be argued that it is so consistence that it can only be true.
17. But there is an aspect of the prosecution case that intrigued this Court. PW1 says that the Appellant defiled him in the anus by pushing his penis into his anus. PW4 supports this when he says that “Ben” removed N’s’ shorts, put leaves in his mouth and sodomized him. R W G (PW2) who saw her son a few minutes after the alleged violation says his son told him that there was penetration. Her evidence, in part;

“I reported the matter to the police because the boy said that the man used his penis to penetrate him.”

The victim was taken for medical examination and a P3 Form completed. As the Appellant did not object, that report was produced without calling its maker. Its findings were that there were no obvious per anal injuries and no discharge found around the anus. The date of examination was 9th November 2010, a day after the alleged incident.

18. Is it possible that the penetration of a penis into the anus of a 9 year old would not cause the victim some anal injuries? The Trial Court received the medical evidence without the maker producing it and explaining its contents. Is there merit in the submission by the Appellant that it is because of the lack of medical evidence that prosecution framed him for an offence of attempted defilement? This Court has agonized over this because the evidence of the two eye witnesses is strong. Is it really possible that such young minds could concoct this horror and tell it in a consistent manner? If so, what would be the motive when there was no evidence of bad blood between the accused person and the two young boys or their parents? I reach a decision that although penetration was not complete, the Appellant clearly manifested his intention to defile and indeed attempted to defile the victim by the following acts:-
 - a. Knocking the victim to ground.
 - b. Removing the victim’s trousers.
 - c. Removing his own trousers.
 - d. Attempting to force his penis into the anus of the victim.

This Court, in the face of the corroborative evidence of the two young witnesses, is willing to accept that although there was no defilement, there was an attempt to defile.

19. On another aspect, the Appellant had submitted that since the witnesses had variously referred the assailant as “Johny” and “Bena”, it could not be him because his name is Joab Washongo Jeho. Before the incident, the Appellant was unknown to PW1. It was the testimony of PW1 that it was the Appellant who introduced himself as “Johny”. As for PW4, he told Court that (of the Appellant):-

“Ben is the accused in the dock. He shaved the long hair. He know(sic) me very well.”

The Appellant was well known to PW4 because he was at one time a neighbour. PW4 was firm and did not falter when asked questions in respect to whether and how he knew the Appellant. It would not really matter that he referred the assailant as “Ben” because that is how he knew him. What matters more, is that he was able to accurately describe the assailant and to recognize him.

20. The Appellant further criticized the Prosecution for not calling as witnesses, the members of public who arrested him. Does this failure weaken the Prosecution case? The circumstances of the arrest of the Appellant were not in contention. PW3, a Police officer, told Court that the Appellant was arrested by members of the public. In his defence, the Appellant concedes that he was duped into the arrest by his own customer who drove him into the Police Station. Since the circumstances of the arrest were not in issue, it was not essential for the Prosecution to summon detailed evidence of that arrest. The Prosecution concentrated its efforts on the eye witnesses whose accounts this Court has already analyzed. What is critical is the quality and not the quantity of the evidence presented (Section 143 of the Evidence Act).

21. This Court on its own evaluation of the evidence comes to the conclusion that the Learned Magistrate correctly convicted the Appellant for the offence of Attempted Defilement contrary to Section 91 of the Sexual Offences Act (No.3 of 2006). An offender under this Section is liable to a minimum sentence of ten (10) years. The Sentencing Court imposed this minimum sentence and there would be no basis for this Court to interfere with it. The result is that the Appeal is dismissed in its entirety.

F. TUIYOTT

J U D G E

DATED, DELIVERED AND SIGNED AT BUSIA THIS 12TH DAY OF NOVEMBER 2014.

IN THE PRESENCE OF:

KADENYICOURT CLERK

PRESENT IN PERSONAPPELLANT

OWITI..... FOR STATE