



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 254 OF 2011

DAVID KAHUGA WANGARI ACCUSED

VESUS

REPUBLIC RESPONDENT

(From original conviction and sentence in criminal case Number 2303 of 2010 in the Chief Magistrate's Court at Thika - Before L.M. Wachira on 29th September, 2011)

J U D G M E N T

The appellant was charged with the offence of defilement contrary to Section 8 (1) (2) of the Sexual Offences Act No. 3 of 2006. It was alleged in the particulars of the charge that on 29th June 2010 at **[particulars withheld]** area of Ruiru District, Central Province, he intentionally and unlawfully committed an act which caused penetration with the genital organs of D M a child of 10 years.

In the alternative, he was charged with the offence of indecent act with a child contrary to Section 11(1) of the Sexual offences Act aforesaid.

In the particulars, it was alleged that he intentionally and unlawfully touched the genital organs of the complainant child aged 10 years. He denied the offence but after a full trial, he was convicted and sentenced to 15 years imprisonment.

Aggrieved by the said conviction and sentence, he lodged this appeal. In his grounds of appeal, he faulted the learned trial magistrate for failing to note that the case was not investigated to the required standard of the law and also for failing to find that essential witnesses were never called.

The learned trial magistrate was also faulted for not effectively analyzing and re-evaluating the entire evidence and also that she failed to comply with Section 169 (1) of the Criminal Procedure Code.

At the commencement of the hearing of the appeal, the learned counsel for the Republic served the appellant with a notice to enhance sentence. That notice provided that the respondent shall at the hearing of the appeal, request that the sentence of 15 years meted on the appellant on 29th September 2011 be enhanced from 15 years to life imprisonment to be commensurate with the offence of defilement contrary to Section 8 (1) as read with 8 (2) of the Sexual Offences Act. The service of the said notice notwithstanding, the appellant told the court he understood the consequences of the notice served upon him and that if his appeal does not succeed he shall be jailed for life.

The appellant filed written submissions to which the state replied. The appellant was given an opportunity to file a response in writing to the respondent's submissions. In what he termed amended supplementary

grounds of appeal, the appellant introduced some other grounds of appeal namely that, the learned trial magistrate made a crucial error both in law and fact and misdirected herself in relying on the evidence of a clinical officer PW4 as a basis for his conviction, whereas that evidence was unsatisfactory and invalid because a clinical officer is not a medical officer.

He also stated that the charge sheet was defective in so far as it failed to describe the means of penetration. Further, his conviction was not sound and was manifestly unsafe because the prosecution did not prove the origin of the seminal stains found on the shorts of PW1 the complainant.

The Republic opposes the appeal and as the first appellate court, it is my duty to go through the entire record of the lower court, evaluate the evidence and arrive at independent conclusions.

The complainant was a minor and the learned trial magistrate conducted a preliminary examination of him and concluded that he should be sworn as he understood the duty to be truthful. He told the court that he was at his home alone where he lived with his father as his mother had passed on. While at home, he heard a knock at the door and thought it was his father. On opening the door he found it was Dave the appellant herein.

Dave was a resident in the same plot and he told him (the complainant) to go and see a toy car he had made for him. Earlier the appellant is said to have told the complainant that he could make a toy car for him and so the complainant provided the wires to do so.

The complainant went to the appellant's house and saw the toy car. The appellant then walked out leaving the complainant in the house but returned shortly thereafter. He then got hold of the complainant who wanted to scream but his mouth was blocked. He was forced onto a bed and his shorts removed. He did not have an underwear. He was then told to lie on the bed and thereafter the appellant lowered his trouser and defiled him. He could not scream as his mouth was blocked.

Thereafter he was given some food which he ate and told to go away with a warning that if he revealed what had transpired he would be beaten. He then went to his home. When his father came, he found him crying and on asking what had happened, he told him. The appellant is then said to have gone to the complainant's home where he was questioned by the father.

On failing to answer, he was knocked down and revealed what he had done to the complainant. Neighbours came to see what was happening and then the matter was reported to Ruiru police station before the complainant was taken to Ruiru Sub-district hospital. There he was treated and a P3 issued. Later, the appellant was arrested.

The appellant had been going to the complainant's home when the father was present. He was emphatic that the appellant defiled him. The appellant subjected the complainant to cross examination but he remained firm as to the occurrence.

The father of PW1 the complainant, also gave evidence and confirmed what his son had told the court. He added that the doctor confirmed that the appellant had sodomized his son.

PW3 is the police officer who took over the matter leading to the charging of the appellant. PW4 is the clinical officer at Ruiru Sub-district Hospital who examined the complainant on the day of the alleged offence. She filled the P3 form which she produced.

She confirmed that the appellant had been sodomized. PW5 is the officer who effected the arrest of the appellant.

In his defence, the appellant merely denied the offence after giving an account of his movements on the date of the alleged offence. In convicting the appellant, the learned trial magistrate had this to say:

“evidence on record is that the accused person and the minor knew each other very well as they

were resident in the same plot and the accused person would even visit the father to the minor in his house and they would watch television together. The minor was clear that the accused person was even married but his wife was not resident at the plot at the time. I find that it is unlikely that the minor would have mistaken the accused person for any other person. In any event, evidence on record is that they even had been talking and he had promised him a toy car which he handed over to him and then sodomized him.... I will conclude that the evidence on record clearly indicates that the minor was sodomized and the assailant was the suspect herein.”

I note that the appellant was unrepresented in the lower court but he participated in the trial fully by cross examining the witnesses called by the prosecution. At no time did he specifically raise the issues that he has now raised in his petition of appeal. I have no doubt in my mind that he understood the charge laid against him although it may appear that the particulars of the charge were vague in the circumstances of the case. However, no prejudice was occasioned to him on account of that vagueness.

The account given by PW1 the complainant and the evidence of PW4, the clinical officer, made it clear even to the appellant the nature of the offence and what transpired. The medical card exhibit 2 and the P3 form exhibit 3 placed the age of the complainant at 10 years. It is rather late in the day for the appellant to challenge that evidence.

PW4 is a clinical officer but there is nothing in law that prevented her from examining the complainant and producing the report that she did. Indeed, the **Court of Appeal in Criminal Appeal No. 198 of 2008, Raphael Kivoi Kiilu – Vs – Republic** dealt with the same issue now raised by the appellant. The Court of Appeal found that the clinical officer testified on his area of competence under the Clinical Officers (Training, Registration and Licensing) Act.

The learned Judges also said they had examined the provisions of Sexual Offences Act and there was no requirement that a P3 form must be produced only by a medical doctor. The evidence of the complainant was corroborated by that of the clinical officer who found that the anal sphincter was torn and reduced and that there were small tears around the anal region. She concluded that the complainant had been sodomized.

At the end of it all the evidence adduced by the prosecution confirmed that the complainant had been sodomized and that it was the appellant who was responsible. The learned trial magistrate complied with the requirements of Section 169 of the Criminal Procedure Code and did not in any way breach Section 150 of the same Code. The offence was proved beyond any reasonable doubt.

The Sexual Offences Act provides that a person convicted of the offence under Section 8 (2) shall be jailed for life. The sentence of 15 years imprisonment imposed by the learned trial magistrate was therefore below the statutory provision.

As observed earlier, the appellant was served with notice of enhancement of sentence and understood the consequences if his appeal were to fail. Having upheld the conviction against the appellant, it follows that the sentence of 15 years imprisonment should and is hereby set aside. In place thereof, I impose the sentence of life imprisonment as provided by statute. The end result is that this appeal is dismissed.

Orders accordingly.

SIGNED DATED and DELIVERED in open court this 3rd day of October, 2013.

A. MBOGHOLI MSAGHA

JUDGE