Case Number:	Criminal Appeal 295 of 2011
Date Delivered:	16 Oct 2013
Case Class:	Criminal
Court:	High Court at Nakuru
Case Action:	Judgment
Judge:	Roseline Pauline Vunoro Wendoh
Citation:	Ibrahim Samuel Kimani v Republic [2013] eKLR
Advocates:	Ms Idagwa for the State
Case Summary:	-
Court Division:	Criminal
History Magistrates:	none
County:	Nakuru
Docket Number:	-
History Docket Number:	none
Case Outcome:	Appeal dismissed
History County:	-
Representation By Advocates:	One party or some parties represented
Advocates For:	none
Advocates Against:	-
Sum Awarded:	none

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 295 OF 2011

IBRAHIM SAMUEL KIMANI……..APPELLANT

VERSUS

REPUBLIC……..……..RESPONDENT

JUDGMENT

Ibrahim Samuel Kimani, the appellant herein, was charged with two counts of defilement contrary to **Section 8(1)** as read with Section **8(2)** of the **Sexual Offences Act No. 3 of 2006**. In the alternative, he was charged with the offence of indecent act contrary to **Section 11(1)** of the **Sexual Offences Act**. After the trial, the appellant was convicted of the offence of both counts of defilement and sentenced to life imprisonment on each count.

The appellant is aggrieved by both the conviction and sentence and preferred this appeal based on grounds in his petition of appeal. The grounds on which he relied on are as follows:-

1. **That the trial court erred by relying on the evidence of PW1, PW2 and PW4;**

2. **That the magistrate erred by failing to consider the fact that no medical evidence was adduced as against him;**

3. **That the trial court failed to comply with Section 169(1) of the Criminal Procedure Code;**

4. **The court failed to consider the appellant's defence;**

5. **That the sentence is harsh and excessive.**

The appellant totally relied on the said grounds and urged the court to allow the appeal, quash the conviction and set aside the sentence.

Ms Idagwa, the Learned State Counsel, opposed the appeal for reasons that PW1 and PW2 testified as to how they were sodomised by the appellant until they were rescued by PW4 and PW5; that the medical evidence supported PW1 and PW2's evidence. Counsel urged the court to uphold the conviction and sentence.

This being the first appellate court, this court has a duty to analyse and evaluate the evidence adduced in the lower court afresh and arrive at its own conclusions both on matters of fact and law. I also bear in mind that I did not have occasion to see the witnesses to assess their demeanour. See **Okeno v Rep (1972) EA 32.**

The case before the trial court as I understand it is as follows:- PW1 PK who said he was aged 10 years and PW2, CM who claimed to be 8 years were examined by the court (voire dire) and found to understand the meaning of the oath and they gave their evidence on oath. They told the court that they met the appellant who took them to his house and sodomised them. It was not once but several times. They explained that they would sleep in his house on a mattress on the floor where the appellant would insert his penis in their anuses in turns.

PW5, RWK, the mother of CM said that her son disappeared from home on 25/10/2010. Acting on information, she went to K with PW4 JW where they found the child C, PW2 with the appellant and with him was also a minor, PW1, PK. With help of the public they took the appellant, PW1 and PW2 to BPS where a report was made. PW6, PC Joseph Owaka Observed the boys and noticed that they were indeed sodomised and that CM was badly injured. The two minors were examined by Dr. Samuel Onchere (PW3) at Nakuru Provincial Hospital on 23/11/2010 who found that both PW1 and PW2 had injuries to their anal regions. He produced the P3 form and post rape forms as PEx.1(a & b) and 2(a & b). He formed the opinion that the minors had been sodomised.

The accused gave a sworn defence which was a mere denial of the charges against him.

The trial court conducted a voire dire examination on PW1 and PW2. Both PW1 and PW2 gave evidence on oath after the court was satisfied that they understood the meaning of the oath. Their testimony was vivid and unshaken. They knew the appellant, they said they were sleeping in his house. Each of them vividly explained what the appellant did to them, **'bad manners'** which was by the appellant inserting his male organ, which they described as **'organ for urinating'** into their anuses. He did not do it once but severally. PW4 and PW5 testified that they actually found the two complainants in appellant's house on 25/11/2013.

I have no doubt that PW1 and PW2 were truthful. Their testimonies were not shaken even on cross examination. The appellant had the opportunity to commit the said acts as he was actually found with the two complainants.

The testimony of PW1 and PW2 was corroborated by the findings of PW3 that both had inflammation of their anal regions, evidence of their having been sodomised.

The appellant claimed that he was arrested for no apparent reason. There is totally no reason why PW1 and PW2 would make such serious accusations against him. PW4 and PW5 denied knowing the appellant before. They found the appellant with the two subjects. Although in cross examination of PW4 and PW5, the appellant tried to allege that PW4 was a former girlfriend and PW5 owed him money, he said nothing of those allegations in his defence. I believe the said allegations had no basis.

The appellant complained that he was not examined by any doctor. Under **Section 124** of the **Evidence Act**, there is no longer mandatory requirement for corroboration in sexual offences. There is no requirement that the appellant be examined by a medical doctor for that evidence to support the minor's evidence. It is enough that the court believes the minor to be truthful and the court record the reasons for so doing. In my view, the court actually considered the appellant's defence when the court said that the defence did not cast any doubt on the prosecution case. This is because the appellant's defence was but a brief bare denial.

Did the court comply with **Section 169** of the **Criminal Procedure Code**" That section requires the court to give a concise statement of the case, the points for determination, the decision thereon and the reasons for the decision. In my view, the court did comply with **Section 169** of the **Criminal Procedure**

Code because the court set out the brief facts of the case, the law applicable and the issues that arose and drew conclusions that it is the appellant who defiled the two minors who knew him and were in his house at the time of arrest.

In the end, I find no merit in any of the grounds raised by the appellant. The conviction on both counts of defilement was based on sound and cogent evidence. I dismiss the defence as a bare denial. I dismiss the appeal and confirm the conviction.

On sentence, PW1, on examination by PW3, was estimated to be 8 years old though he told court he was 10 years old. PW2 said he was 8 years. His mother, PW5, said PW2 was born in 2000 meaning in 2010 he was 10 years old. Under **Section 8(2)** of the **Sexual Offences Act,** where the victim is aged between 1-11 years, the offender is liable to be sentenced to life imprisonment upon conviction. In my view, the **Sexual Offences Act** is a statute of strict liability. The court has no discretion to interfere with it and that court has no discretion. The sentence of life imprisonment was lawful. However, the trial court erred in sentencing the appellant to life imprisonment on both counts. For that reason, I set aside the sentence on the 2nd count and hold it in abeyance. I, however, confirm the sentence of life imprisonment on the 1st count. The appeal against sentence is also dismissed. It is so ordered.

DATED and DELIVERED this 16th day of October, 2013.

R.P.V. WENDOH

JUDGE

PRESENT:

The appellant in person - present

Mr. Chirchir for the State

Kennedy – Court Assistant