REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO 6 OF 2019

DAVID ODHIAMBO OCHIENG.....................APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(Being an Appeal from the Judgment of Hon R.

Kipngeno (SRM) delivered at Maseno in the Senior Resident

Magistrate's Court in Criminal Case No 20 of 2018 on 12th February 2019)

JUDGMENT

INTRODUCTION

1. On 22nd March 2021, this court delivered a Ruling rejecting the Appellant's application to call additional evidence. The facts of this case were that the Appellant herein was charged with the offence of defilement contrary to Section 8(1) and (4) of the Sexual Offences Act No 3 of 2006. The particulars of the offence were that on the 25th day of April 2018 at 2200hrs at Sunga Sub location, Kisumu West Sub county within Kisumu County unlawfully and intentionally caused his penis to penetrate the vagina of MAN, a child (hereinafter referred to as PW 1) aged sixteen (16) years.

2. He had also been charged with an alternative offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The particulars of the offence were that on 25th day of April 2018 at 2200hrs at Sunga Sub location in Kisumu West Sub county within Kisumu County, he intentionally touched PW 1's vagina.

3. He was acquitted on the main charge but convicted of the alternative count and by Hon R. Kipngeno, Senior Resident Magistrate who sentenced him to serve ten (10) years imprisonment.

4. Being dissatisfied with the said Judgement, on 25th February, 2019 he lodged this appeal. In his Petition of Appeal dated 25th February 2019, he set out six (6) grounds of appeal challenging both conviction and sentence. His Written Submissions dated 2nd December 2019 were filed on even date. Notably, the State's Written Submissions were dated 26th November 2019 and filed on even date.

5. Both parties relied on their respective Written Submissions in their entirety. This Judgment is therefore based on the said Written Submissions.

LEGAL ANALYSIS

6. This being a first appeal, it is the duty of this court to evaluate afresh the evidence adduced before the Learned Trial Magistrate in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

7. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd [1968] EA 123** and **[1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

> **"It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses…But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion…"**

8. Having looked at the Appellant's and State's Submissions, it was this court's considered view that the issues that have been placed before it for determination were:-

> **a. Whether or not the Learned Trial Magistrate erred in law and in fact in refusing the Appellant's application to recall witnesses;**
>
> **b. Whether or not the Prosecution had proved its case beyond reasonable doubt.**
>
> **c. Whether or not, in the circumstances of this case the sentence meted upon the Appellant by the Learned Trial Magistrate was lawful and or warranted**.

9. The court dealt with the said issues under the following distinct and separate heads.

I. RECALL OF WITNESSES

10. The Appellant had submitted both on Ground of Appeal Nos (1) and (2) together. However, this court took the view that Ground of Appeal No (1) ought to be dealt with separately under this head for the reason that Ground of Appeal No (2) related to the evidence that was adduced by the Prosecution.

11. In this regard, the Appellant submitted that having been denied the opportunity to recall witnesses for cross examination and having failed to determine the case at the no case to answer stage considering the evidence that had been adduced by the Prosecution occasioned him an injustice that violated his constitutional right to fair hearing.

12. On its part, the State argued that all along his case the Appellant was actively involved in cross examination of prosecution witnesses and only got legal representation when the last witness was called to testify. It argued that the Learned Trial Magistrate balanced all competing interests and declined to order the recall of the witnesses who had already testified.

13. The Learned Trial Magistrate declined to allow the Appellant's application to recall the witnesses who had testified on the ground that the Appellant was already aware of the charges that he faced having been supplied with witness statements and medical documents that were to be tendered in evidence, that there were financial implications of recalling such witnesses and further, the said recall would cause a delay in the determination of the matter.

14. While this court agreed with the Appellant that he was entitled to a fair trial, it observed that he slept on his rights to seek legal representation through the entire trial. Seeking legal representation on the day the last witness was to be called and demanding a recall of all the other witnesses would definitely have caused a delay in the hearing and determination of the case and great inconvenience to the witnesses and court.

15. Had the Appellant applied to recall witnesses in the middle of the trial, this court would have found the same to have been tenable. This court therefore found and held that the Learned Trial Magistrate exercised his discretion judiciously in having declined the Appellant's application to recall the witnesses who had already testified.

16. In the circumstances foregoing, this court found and held that Ground of Appeal No (1) was not merited and the same be and is hereby dismissed.

II. PROOF OF PROSECUTION'S CASE

17. Grounds of Appeal Nos (2), (3), (4) and (5) were dealt with together under this head as they were all related.

18. The Appellant submitted that the Learned Trial Magistrate made conclusions based on conjecture and speculation. It was his contention that it is trite law that an alternative charge fails if the main charge fails, more so if they are intertwined as the two charges herein. He submitted that the Learned Trial Magistrate lacked any basis to convict him upon the alternative charge of indecent act being that he unlawfully and intentionally touched PW 1's vagina with his penis. He argued that the alternative charge failed the moment the Learned Trial Magistrate determined that there had been no evidence of penile penetration.

19. He contended that the Learned Trial Magistrate made conclusions founded on conjecture and speculation and not on evidence. It was his assertion that the Learned Trial Magistrate concluded that the parties seemed to have had actual sex without evidence of proof. He added that although the court found that PW 1 wiped herself with his shirt, the said shirt was not produced in court as evidence. It was his contention that the Learned Trial Magistrate's finding that she had had sex before which resulted in vaginal birth 2 years 9 months away thus emboldening her to have sex with him and that he struggled with the police during his arrest thus connecting him to the alleged sexual act was unnecessary.

20. The State was categorical that age of the Complainant was proved beyond all reasonable doubt for the reason that a letter from [Particulars Withheld] Primary School and a birth certificate were produced to prove the age.

21. It argued that indecent act on the part of the Appellant was proven in that PW1 testified that she had sex with him and he ejaculated outside whereafter she used his shirt to wipe herself. It asserted further that she stated that the Appellant was her boyfriend.

22. It pointed out that Jacob Modiwa, the Assistant Chief of Sunga Sub location (hereinafter referred to as "PW4") who testified that on 25th

April 2018 at 10pm he was doing routine security duties in the area accompanied by Administration Police when he was told that an underage girl had been seen entering the Appellant's house. It added that PW 4 and S/No 248580 APC Ingati Robert (hereinafter referred to as "PW 5") found the PW 1 in the Appellant's house and that at the time, she was hiding under a mattress.

23. It argued further that though the P3 form showed no physical injuries so as to form the crucial ingredient in defilement as per the required standard, the Prosecution was able to establish that the Appellant and PW 1 had sex at 10.00pm.

24. It pointed out that identification was proven since PW 1 knew the Appellant as he had approached her for friendship and they lived in the same village.

25. PW1, the Complainant, testified after *voire dire* examination that she was sixteen (16) years of age having been born in 2001 and was in class 8 in [Particulars Withhel] Primary School. She said that on 25th April 2018 she took supper at her home and went to sleep at the Appellant's mother's house 25m away from her home. She told the court that the Appellant was her boyfriend. She further told the court that she went straight to the Appellant's house and they had sex. She testified that she knew what she was saying as she had been taught Sex Education in school. She further stated that then there was a knock on the door and she hid under the mattress as the Appellant went to open the door. She stated that she was fished out from where she was hiding and they were taken to Maseno Police Station where the Appellant was booked and she was taken to Coptic Hospital for examination and treatment.

26. CNO (hereinafter referred to as PW2), the Complainant's father, testified that on 25th April 2018 after they had taken supper her daughter left to sleep at the Appellant's mother's house. He told the court that he was later approached by the Appellant's mother saying they had been attacked and when they went back they found a group of people including the Area Assistant Chief and police officers.

27. He told the court that the Appellant and his daughter were then extracted from the Appellant's house and that's when he understood what was happening. He told the court that in the morning he took her daughter to Chulaimbo Hospital where the P3 form was filled. He stated that he took the documents to the police station where he recorded his statement.

28. Christine Omia (hereinafter referred to as "PW 3") RCO, Chulaimbo Hospital, testified that on 27th April 2018 she was asked to examine the Complainant who came to the hospital with a history of defilement. She testified further that the Complainant was fairly normal on physical examination. On genital examination she told the court that there were no physical injuries sustained, and noted that the hymen was broken. The lab tests turned out negative and epithelial cells were seen. She produced the P3 form and the PRC (Post Rape Care) form.

29. Jacob Modiwa (hereinafter referred to as PW4), Assistant Chief Sunga Sub location testified that on 25th April 2018 he was in his normal security duties at around 10.00pm when he was informed that an underage girl had been seen entering the house of the Appellant. He averred that when they knocked the house the Appellant opened claiming that he was alone but they went in and found PW 1 hiding under the mattress. The Appellant told them that they were friends.

30. PC Robert Ingati (hereinafter referred to as PW5) was the arresting officer. He corroborated PW 4's evidence and testified that the Appellant became wild and resisted arrest. Together with PW 4, they took the Appellant to Maseno Police Station while PW 1 was taken to Coptic Hospital.

31. CPL Rael Ambasa (hereinafter referred to as "PW 6") was the Investigating Officer. She testified that she was on duty at Maseno Police Station when PW 1 was brought and she escorted her to Coptic Hospital. She stated that PW 1 told her that she voluntarily went to the Appellant's house and they had unprotected sex. PW 1 told her that the Appellant ejaculated outside and she wiped herself with his shirt.

32. Her further evidence was that she went to the Appellant's house on 26th April 2018 but did not find the shirt PW 1 was said to have wiped herself with. She also confirmed that PW 1 was aged sixteen (16) years. She then charged the Appellant with the aforesaid offences.

33. The Appellant adduced sworn evidence. He testified that on the material day, he was down with malaria when PW 1 visited him. They talked for a short while then police came knocking. He stated that PW 1 was his friend but denied having slept with her. He also stated that he was never examined to establish if he had had any sexual contact with her.

34. DW2 testified that the Appellant was unwell that night and asleep in his house and denied that PW 1 slept in her house that night.

35. Notably, the Appellant was convicted of the offence of committing an indecent act with PW 1. Section 11(1) of the Sexual Offences Act under which he was convicted stipulates that:

> "**Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.**"

36. To prove this charge, the Prosecution had to demonstrate that the person who was purported to have committed an indecent act was identified, that the person had committed an indecent act and that the indecent act was with a child.

37. It was not necessary to interrogate if the Appellant's identification by PW 1 had been proven for the reason that they were both known to each other. The Appellant himself admitted that the police came to his house while he was talking to PW 1.

38. PW 2 tendered in evidence a letter from [Particulars Withheld] Primary School dated 18th May 2018 confirming that PW 1 was a student in the school in Standard 8 and the Certificate of Birth showing that PW 1 was born on 10th December 2001. As the incident purportedly

occurred on 25th May 2018, she was aged about seventeen (17) years old. In the absence of any other contrary evidence by the Appellant, this court was satisfied that PW 1 was still a child within the meaning of the law.

39. Notably, the Appellant argued that because penetration was not proven then the Learned Trial Magistrate ought to have also acquitted him on the alternative charge of indecent act. PW 1 testified that they had had sex on the night he visited the Appellant.

40. In Section 2(1) of the Sexual Offences Act, indecent act is defined in as being:-

> **"an unlawful intentional act which causes-**
>
> **a. Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.**
>
> **b. Exposure or display of any pornographic material to any person against his or her will."**

41. Based on the above definition, it is then possible for a person be convicted of the alternative charge of an indecent act where penetration was not proven. The Appellant's arguments that the Learned Trial Magistrate erred in law and fact in having convicted him of the offence of committing an indecent act with PW 1 despite having found and held that there was no penile penetration thus fell by the wayside. Whether he was guilty of the offence or not was a different matter.

42. Undoubtedly, it is easier to prove a case of penetration than the offence of committing and indecent act because it would ordinarily be one person's word against the other. Even where the Appellant was said to have ejaculated outside, it would still not have been able to prove contact because ejaculation can also occur without any contact with any apart of the body of a victim.

43. However, proof of ejaculation would have displaced the Appellant's evidence that at the time he was arrested, he was only talking with PW 1. He would have appeared to have a person who was not credible. As the Appellant was arrested on the same night of the alleged offence, nothing would have been easier than for the Investigator to have secured the scene and obtained the shirt she said PW 1 told her she wiped herself with, for analysis in the laboratory. There was definitely a lapse in the investigations in this regard as this was very crucial evidence.

44. It is also important to note that PW 1 never told the court that the Appellant ejaculated outside. This evidence was introduced by PW 6. It would not then have been unreasonable to assume that the Appellant ejaculated inside when PW 1 and the Appellant had sex and for which it would have been evident on being medically examined. In this case, this evidence in this case was missing as PW 3 testified that no semen was found.

45. Going further, it was not clear to this court whether PW 1's evidence that she had sex with the Appellant was for the first time or if it was her first time to have sex. Be that as it may, PW 3 testified that PW 1 had given birth two (2) years and nine (9) months earlier. PW 1's missing hymen could not therefore attributable to the Appellant with certainty as it could not be determined from the evidence on record if he was the father of her child and/or if he was the person who caused the hymen to break.

46. Whereas the Appellant's arrest was not in contention as he PW 1 was found in his house, there is no evidence that he committed an indecent act with her. The Learned Trial Magistrate based his conviction on belief. He stated that he believed that the parties actually had sex. As the Learned Trial Magistrate rightly observed, the Appellant and PW 1 may have had sex. However, he did not explain what persuaded him to find that the Appellant had committed an indecent act with PW 1 so that this court could establish if he had arrived at the correct conclusion. When convicting a person, it must never be a case of "**it must have been"** but rather it should be an issue of that **"it was."**

47. Where there is no evidence to corroborate the evidence of a victim of a sexual offence, the trial court must record reasons in the proceedings explaining why it was satisfied that the alleged victim was telling the truth considering that the offences attract very stiff penalties that have the potential of depriving an innocent person his freedom of liberty enshrined in the Constitution of Kenya, 2010.

48. Section 124 of the Evidence Act Cap 80 (Laws of Kenya) stipulates that:-

> **"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is 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."**

49. In the absence of any reasons recorded in the proceedings showing why the Learned Trial Magistrate believed PW 1 and not the Appellant, this court agreed with the Appellant that this conclusion was based on speculation. It was the finding and holding of this court that the Prosecution's evidence was not cogent as it was for the Prosecution to prove that he unlawfully and indecently touch PW 1.

50. The burden could not be shifted to the Appellant to prove that he did not unlawfully and indecently touch PW 1. The defence he offered was probable that the police came before he had engaged in sex with PW 1. If he had engaged with sex as PW 1 had contended, there was no

evidence to that effect that was presented before the court. In a nutshell, this court found and held that the Prosecution did not prove their case to the required standard, which in criminal case, was proof beyond reasonable doubt as it entertained doubt as to what transpired on the material night. Indeed, it is best to err and allow a guilty person to go scot free and not err and convict an innocent person on shaky evidence.

51. In the premises foregoing, Grounds of Appeal Nos (2), (3), (4) and (5) were merited and the same be and are hereby allowed.

III. SENTENCE

52. The Appellant's Ground of Appeal No (6) was dealt with under this head.

53. As the court had found that the Prosecution had not proven its case to the required standard, the submissions on the appropriateness of the sentence were rendered moot.

54. Having said so, had the Appellant been found guilty to have committed an indecent act with PW 1, the sentence of ten (10) years imprisonment that had been imposed on him by the Learned Trial Magistrate would not have been harsh and/ or excessive warranting any interference and/or disturbance by this court.

DISPOSITION

55. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 25th February 2019 was merited. The effect of this decision is that the judgment of the Learned Trial Magistrate be and is hereby set aside and the conviction and sentence set aside as it was unsafe.

56. It is hereby directed that the Appellant be released from custody unless he be for any other lawful cause be held.

57. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 26TH DAY OF OCTOBER 2021

J. KAMAU

JUDGE