



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

HCCRA NO. 48 OF 2018

GEORGE OUMA OYUGI....APPELLANT

VERSUS

REPUBLICRESPONDENT

[Being an appeal against the conviction and sentence of the Senior Principal Magistrate's Court at Maseno (Hon. C. Oruo RM) dated the 29th April 2018 in Maseno PMCCRC No. 901 of 2014]

JUDGMENT

The Appellant, **GEORGE OUMA OYUGI**, was convicted for the offence of **Defilement** and he was then sentenced to 20 years Imprisonment.

1. In his appeal, he submitted that the evidence tendered by the Complainant was inconsistent and flimsy. In particular, he submitted that the learned trial magistrate did not comply with the provisions of **Section 19 (1)** of the **Oaths and Statutory Declarations Act**.
2. The Appellant expressed the view that the Complainant did admit that she had been coached by her mother, about the evidence she was to give in court.
3. In any event, the Appellant submitted that the evidence tendered was wholly insufficient to sustain a conviction.
4. As far as the evidence of **PW2** was concerned, the Appellant described it as nothing more than suspicion.
5. In his view, the evidence lacked coherent or material evidence.
6. He wondered why **PW2** did not tell the trial court whether or not she checked the Complainant's clothing and physical appearance.
7. The Appellant faulted **PW2** for failing to interrogate the Complainant, concerning how she got to the scene where the offence was committed.
8. It was the Appellant's understanding that **PW2** had simply brought pressure to bear on the Complainant, on the basis of the suspicions which the witness had.
9. None of the witnesses saw the Appellant with the Complainant, either before or after the alleged incident: that is the Appellant's contention.
10. The other issue raised by the Appellant was that the medical evidence adduced by the Clinical Officer was completely insufficient.
11. He believes that there ought to have been blood-sampling, to enable the medical officer ascertain whether or not the Appellant had any connection with the Complainant.
12. The reading of the Appellant showed him that all the tests conducted at the laboratory, yielded negative results.
13. Therefore, as there were no tears or bruises detected on the Complainant's vagina; and because no spermatozoa was detected, the Appellant reasoned that the conviction was without any foundation.

14. Furthermore, the Appellant construed the investigations which were carried out by **PW5**, as having been shoddy.
15. As an example, the Appellant noted that the Complainant was apparently taken to 2 different hospitals, bearing the same name; Kombewa Sub-County Hospital.
16. He described the hospital as being two, because **PW5** said that from one hospital, there were treatment notes, whilst from the other, the Complainant was not treated.
17. At any rate, observed the Appellant, the treatment notes were never provided as evidence during the trial.
18. Finally, the Appellant submitted that the learned trial magistrate erred, in law, when he held that the Appellant had the onus of proving his alibi.
19. Being the first appellate court, I will re-evaluate all the evidence on record, and I will draw my own conclusions therefrom.
20. However, I will bear in mind the fact that, unlike the trial court, I did not have the benefit of observing the conduct of the witnesses when they were giving their evidence.
21. The first issue that I will look at is the process of *voire dire* examination of the Complainant.
22. The learned trial magistrate conducted the said examination at length. It was then determined that the Complainant would give unsworn evidence, because she did not appear to comprehend the meaning of taking an oath.
23. The said *voire dire* examination took place on 22nd July 2014. Thereafter, **PW1** testified and was also cross-examined.
24. However, the trial magistrate was then transferred from Senior Principal Magistrate's Court, Maseno, giving rise to a fresh start to the trial.
25. On 17th November 2016, the trial started afresh.
26. On that date, the Complainant said, *inter alia*;

“I have come with my mother. She has told me what to say. I don't know the *difference between stating the truth and lying.*

I will today state the truth.”
27. The learned trial magistrate then directed that the Complainant would give unsworn evidence.
28. The Complainant testified that the Appellant met her at the foot of a hill, as agreed, after he promised to give her some money.
29. Once they linked up, after using different routes, the Appellant had sex with the Complainant.
30. Thereafter, the Appellant left the place ahead of the Complainant, having instructed her to first pretend that she had been fetching firewood.
31. As the Complainant was leaving the place, **PW2** saw her.
32. **PW2** inquired what had happened, and the Complainant informed her that the Appellant had “*raped*” her.
33. **PW2** corroborated the evidence of the Complainant. She said that she had become suspicious after seeing the Complainant and the Appellant go towards a thicket, where the two stayed for about an hour.
34. As the Complainant was leaving from the thicket, **PW2** asked her about what had transpired; and the Complainant described to **PW2** how she and the Appellant had had sex.
35. **PW3** is the mother of the Complainant. She testified that her daughter did tell her that the Appellant had defiled her.
36. **PW3** produced the Birth Certificate for the Complainant, which showed that the Complainant was born on 8th November 2001.
37. It was the evidence of **PW3** that she first took the Complainant to Kombewa, but the Complainant was not accorded any treatment there.
38. Later, the Complainant was taken to Chulaimbo Health Centre.
39. **PW4** is a Clinical Officer based at Chulaimbo Sub-County Hospital. He examined the Complainant on 21st July 2014.

40. On examination, **PW4** noted a Whitish Discharge on the Complainant's genitalia.
41. However. There were no bruises or tears.
42. Epithelial Cells were present; but there was no spermatozoa.
43. The Clinical Officer concluded that there had been sexual intercourse.
44. **PW5** was the Investigating Officer. She testified that the parents of the Complainant had Treatment Notes from the Kombewa Sub-County Hospital.
45. **PW5** further testified that she escorted the Complainant to the Chulaimbo Hospital, where the **P3** Form was filled.
46. After **PW5** testified, the Prosecution closed its case. And when he was put to his defence, the Appellant gave sworn testimony.
47. He said that on the material date, he attended church, as it was a Sunday. Thereafter, he went home, and stayed there, in the company of his wife.
48. The Appellant attributed the charges against him, to the problems he had had with Caren (**PW2**). He said that he and Caren had lived together, when he first arrived at Osiri. However, the 2 of them ceased to live together, when he left her.
49. Having re-evaluated the evidence and the record of the proceedings, I find that the Complainant was 14 years old, as at the time the offence was committed, on 20th July 2014.
50. Her age was proved through the Birth Certificate.
51. I also find that in the **P3** Form, the Clinical Officer had made the following remarks (at paragraph 6);

“Penetrative Sexual Intercourse.”

52. That piece of evidence, coupled with the presence of epithelial cells was proof of penetration.
53. Given the fact that the Appellant did not challenge the Complainant's evidence about how he went to their home, and persuaded her to meet up with him, later; and also because the Appellant did not suggest to Caren (**PW2**) that there was any grudge between the two of them: I find that both the Complainant and **PW2** had recognized the Appellant.
54. The suggestion that **PW2** had a grudge against the Appellant because he had stopped living with her, is an afterthought.
55. The physical evidence on the Complainant was not a concocted story: it was real.
56. And the person who had sexual intercourse with the Complainant was positively recognized as the Appellant.
57. The absence of tears or bruises on the Complainant's genitalia does not negate the epithelial cells and the Whitish Discharge, which the Clinical Officer said, constituted proof of penetrative sexual intercourse.
58. Although, I initially felt uncomfortable about the statement made by the Complainant during voire dire examination (when she said that she did not know the difference between the truth and lies), I find that the evidence she tendered was corroborated in every material particulars.
59. Accordingly, I hold that the conviction and the sentence are not only lawful, but are founded on solid grounds.
60. Therefore, the appeal is dismissed.

FRED A. OCHIENG

JUDGE

DATED, SIGNED and DELIVERED at KISUMU This 29th day of January 2020

T. W. CHERERE

JUDGE