REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 86 OF 2018

TCO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal against the conviction and sentence of the Principal Magistrate's Court at Winam (Hon. J. Mitei R. M) dated the 10th August 2018 in Winam PMCCRC No. 914 of 2012]

JUDGMENT

The Appellant, **TCO**, was convicted for the offence of **Defilement** Contrary to **Section 8 (2)** of the **Sexual Offences Act**.

1. He was then sentenced to Life Imprisonment.

2. In his Petition of Appeal filed in Court on 24th August 2018, the Appellant raised 5 grounds of appeal, which can be summarized as follows:-

(1) The case was not properly investigated.

(2) There was no medical evidence linking the appellant to the offence.

(3) The evidence tendered by the prosecution was not well corroborated to support a conviction.

(4) The Defence was not accorded due consideration.

(5) The appellant wished to attend the hearing of the appeal.

3. When canvassing the appeal, the Appellant submitted that his right to a fair trial had been violated, as he was neither provided with a lawyer to represent him at the trial, nor was he informed of the fact that he had a right to choose whether or not to be represented by an advocate.

4. The second issue that he raised was based on his medical condition. The Appellant said that he had been **HIV** Positive from the time of his birth.

5. Therefore, if he had had sexual contact with the Complainant until she sustained a tear to her vagina, the Appellant believes that the victim ought to have contracted **HIV**. Therefore, because the Complainant was found to be **HIV** Negative, the Appellant submitted that that fact alone was sufficient to earn him an acquittal.

6. Furthermore, he noted that the doctor who examined the Complainant had indicated that there was a tear *"on"* her vagina, as opposed to *"in"* her vagina. In the circumstances, the Appellant submitted that the medical evidence did not prove penetration.

7. He emphasized that because the doctor found the hymen to be intact, that was further proof that there had been no penetration of the Complainant's vagina.

8. Another issue raised by the Appellant was in relation to Identification.

9. He submitted that whether he was allegedly identified or recognized by the victim, the evidence tendered left reasonable doubts. His reason for so submitting was that the Complainant testified about a person called *"Daddy"*, who had defiled her.

10. In his view, if he was so well known as *"Daddy"*, then the mother of the Complainant should have known him too. However, the Complainant's mother **(PW2)** is said to have told the court that she did not know the Appellant.

11. Meanwhile, the Community Policing Member, named Ibrahim Ochola Kibwana **(PW4)** is said to have told the court that the Appellant was called **T C**, **Alias J**.

12. In other words, **PW4** did not know the Appellant as Daddy.

13. Accordingly, the Appellant submitted that the person who defiled the Complainant was a stranger to him and to **PW4**.

14. The other point taken up on appeal was that the prosecution appears to have hidden a medical record relating to the Appellant. It was his case that the medical records which the Investigating Officer had allegedly misplaced, would have shown that the Appellant was **HIV** positive.

15. In the light of the failure by the prosecution to provide the trial court with the said medical records, the Appellant made a decision to *"proclaim in this Hon. Court"* that he was born **HIV** Positive.

16. As regards the defence which he tendered during the trial, the Appellant submitted that the trial court failed to give it due consideration. In his opinion, the defence was plausible, and ought to have led to an acquittal.

17. The record of proceedings shows that the trial was conducted by more than one magistrate.

18. Therefore, the Appellant said that the succeeding magistrates ought to have strictly complied with **Section 200** of the Criminal Procedure Code.

19. The Appellant submitted that the succeeding magistrate erred by rejecting his application to have the trial start de novo. The learned trial magistrate limited the Appellant to cross-examining the witnesses who had already testified earlier, before the magistrate who had heard the first part of the case.

20. Furthermore, the Appellant believes that the trial court was under an obligation to direct that **DNA** testing be carried out, so as to gather evidence which would ascertain whether or not the Appellant was connected to the offence in question.

21. Finally, the Appellant submitted that his constitutional rights, pursuant to **Article 25 (c)**; **(26 (1)** and **50 (2)** of the Constitution, were violated.

22. In answer to the appeal, the Respondent submitted that the prosecution had proved all the ingredients of the offence of Defilement, and had linked the Appellant to the offence, as the person who committed it.

23. I was therefore asked to dismiss the appeal.

24. Being the first appellate court, I am under an obligation to re-evaluate all the evidence on record, and to draw my own conclusions. In other words, the submissions made before this court are not to be regarded hypothetically; but must be given due consideration within the context of the evidence on record.

25. I am alive to the fact that this court did not have the opportunity to observe the witnesses when they testified.

26. This appeal arises out of a re-trial of the Appellant.

27. The first trial was before Hon. J. Sala, Resident Magistrate, who convicted the Appellant on 19th December 2014.

28. Following an appeal, the High Court ordered that the Appellant be tried afresh.

29. The process commenced on 22nd July 2016, when the prosecution sought Witness Summons whilst the Appellant sought Witness Statements.

30. Once the prosecution had traced the witnesses, the Appellant took plea on 26th September 2016.

31. Immediately after he had pleaded *"Not Guilty"*, the Appellant confirmed that he had received the Witness Statements. However, he did not have a copy of the new Charge Sheet. After the Appellant was given the Charge Sheet, together with the **P3** Form and the Investigation Diary, the trial commenced on 25th January 2017.

32. **PW1, Z A O**, was the Complainant. She testified that on the material day, she entered into the bathroom, so as to take a shower as she had been instructed by her mother, **PW2**.

33. **PW1** said that the Appellant followed her into the bathroom, and that he inserted his body part which he uses to urinate, into her body part which she uses to urinate.

34. **PW1** said that the Appellant was their neighbour, and she knew him as Daddy.

35. **PW1** pointed at the Appellant, in court, when she said;

> ***"That man followed me."***

36. He carried her up and inserted his penis into her vagina.

37. Whilst violating the Complainant, the Appellant warned her against screaming, threatening to kill her.

38. When **PW1's** mother noticed that the Complainant was having difficulties when walking, she checked her private parts.

39. **PW2** noticed sperms all over the thighs of the Complainant.

40. When **PW2** sought to know what had happened, the Complainant told her that Daddy had defiled her when **PW1** had gone to take a bath.

41. **PW2** reported the incident at the Kondele Police Station, and she thereafter took the Complainant to the hospital.

42. **PW2** testified that she knew Daddy, as he was their neighbour.

43. And whilst testifying, **PW2** pointed at the Appellant, when showing the trial court that that was the person known to her as Daddy.

44. During cross-examination, **PW2** said that she lived in *"Door 1"*, whilst the Appellant lived in *"Door 2"*.

45. The Appellant suggested to **PW2** that the reason why the Complainant was taken to hospital, was because of an injury to her leg. However, **PW2** was categorical, that she had not taken the Complainant to hospital to be treated for a leg injury.

46. **PW4**, Ibrahim Ochola Kibwana, was a member of the Community Policing at Kolwa Central Location in the Kibos area.

47. After he had been notified about what had happened to the Complainant, he led his team to arrest the Appellant.

48. The arrest was made at the house of the Appellant, when he had returned to the house, to sleep.

49. After **PW4** had arrested the Appellant, he handed him over to **PW3**, PC Sebastian Mweresa, at the Police Station.

50. **PW3** re-arrested the Appellant and later charged him with the offence of defilement.

51. After **PW3** testified, the Appellant declined to cross-examine him, insisting that the case needed to start afresh.

52. The reason given by the Appellant for demanding that the trial should start afresh was that he had been forced to proceed with the case when he was not ready.

53. The Appellant's further explanation was, that if the case started afresh, he would be able to ask the Complainant some questions which he had not previously asked.

54. The demand for the case to start afresh was made at the stage in the proceedings when the Appellant had said to Hon. B. Kasavuli SRM that;

> ***"I have no faith in this court. I wish to be given another court. This court declined my request to have this case to start afresh. That is all."***

55. The learned trial magistrate noted that although the Appellant had no valid basis for the court to recuse himself, he would hand over the further hearing to Court No. 2, so that justice could be seen to have been done.

56. Hon. J. Mitey RM was the succeeding magistrate. When he took over the case, the Appellant renewed his application to have the trial commence afresh.

57. After giving due consideration to the application, the succeeding magistrate expressed the view that whereas the rights of the accused must be protected, it was equally important to be fair to the witnesses, so that they would not be;

> ***"…… subjected to any indignified or degrading experience, that could amount to psychological or emotional trauma or even mental torture as they would, in the process, perceive that they are being punished every time and state the same facts and no progress is made."***

58. In the circumstances, although the succeeding magistrate rejected the application to have the whole trial start afresh, the court ordered that the witnesses would be recalled for cross-examination.

59. In my considered view, the succeeding magistrate had exercised his discretion judiciously. I so hold because the record of the proceedings showed that the Appellant was never compelled to proceed with the case when he was not ready. If anything, the learned trial magistrate granted time to the Appellant to prepare for the trial, after he had been given the Witness Statements.

60. The trial started after the Appellant confirmed that he was ready.

61. Secondly, when the Appellant asked for the trial to start afresh, he said that that would enable him ask the questions which he had not previously asked.

62. By ordering that the witnesses be re-called for cross-examination, the succeeding magistrate gave to the Appellant the opportunity to ask the questions which he had not previously asked. Therefore, I hold the view that the rejection of the application for a fresh start of the trial, was not in any way prejudicial to the Appellant.

63. When the Complainant was recalled for further cross-examination, she reiterated that the Appellant lived within the same plot as the Complainant's family. She said that he was their neighbor.

64. On her part, the mother of the Complainant said that she did not know the Appellant.

65. During re-examination, the mother explained that when she said that she did not know the Appellant, she meant that she did not know him *"deeply"*, from his original home.

66. However, the Complainant's mother made it clear that the Appellant was their neighbor.

67. When analyzing the evidence I note that after the Complainant had been defiled, she continued to have her bath.

68. The Appellant reasoned that after she had a bath, it was improbable that sperms would be visible all over the Complainant's thighs, as her mother alluded to.

69. Logically, if a person has a bath, it would be expected that sperms which were on her thighs would be washed-off.

70. However, the Complainant said that after her ordeal;

> ***"My mother came back after I had left the bathroom and realized I was dirty, so she took me to hospital at Russia at night."***

71. When the Complainant's mother testified, she said;

> ***"I decided to do so myself, and I checked her private part. I noticed sperms all over her thighs."***

72. It is worth noting that the Complainant's mother had first asked the Complainant's elder sister to check, after the mother noticed that the Complainant had difficulty in walking.

73. However, the Complainant's elder sister saw nothing. It is then that the Complainant's mother checked her.

74. If the sperms were all over the Complainant's thighs, it would have been expected that the Complainant's elder sister would have been able to see the same.

75. It is curious that the elder sister did not notice the *"dirt"* on the Complainant's thigh.

76. Was the dirt, sperms?

77. The Complainant's mother testified that she saw sperms.

78. However, when the Complainant was examined at the hospital, the doctor expressly noted that;

> ***"HVS:- Pus cells ++ seen, No Spermatozoa,***
>
> ***No Rbs seen, HIV – non reactive."***

79. The first impression I got was that the evidence of the medical doctor was inconsistent with the evidence tendered by the Complainant's mother.

80. It appeared that the mother *"saw"* something which was not actually there.

81. However, when I gave consideration to the testimony of the medical doctor **(PW5)**, it became clear that although there were no sperms;

> ***"There was copius whitish vaginal discharge. It could be an indication of infection for a minor. Some specimen there collected on HIV (High Vaginal Swab).***
>
> ***Pus cells seen ++.***
>
> ***There was no spermatozoa and no red blood cells. Pus cells indicated an infection."***

82. In my considered view, the Complainant's mother may have been convinced that the whitish vaginal discharge was spermatozoa.

83. In effect, the testimony of the mother is consistent with the medical evidence.

84. Indeed, even the quantity of the whitish substance is consistent; in other words, there was a substantial quantity of it.

85. Therefore, the evidence was consistent and corroborative.

86. But, if the Appellant is **HIV** positive, and he is the person who defiled the Complainant, how is it possible that the Complainant is **HIV** negative?

87. First, it must be emphasized that throughout the trial, there was no indication that the Appellant was **HIV** positive.

88. It is during the hearing of this appeal that the Appellant decided to make a *"proclamation"*, that he was born **HIV** positive.

89. I hold the considered view that the Appellant cannot raise at the appellate stage, and use that issue to find fault with the decision which the learned trial magistrate arrived at, without having had the benefit of such issue.

90. In any event, there is no factual basis upon which the court could make a finding that the Complainant ought to have tested **HIV** positive if the Appellant was **HIV** positive.

91. Although I do not profess any learning in the medical field, I am aware of the existence of discordant couples. It would therefore appear to me that there is no automatic conclusion, that if a person who is **HIV** positive has sexual intercourse forcefully with a person who was **HIV** negative, the status of the latter would forthwith transform to **HIV** positive.

92. On the issue of Identification, it is noted that the Appellant is Tobias Clinton Odera.

93. Ordinarily, when an accused person has an Alias, the Charge Sheet would usually indicate the name which was an Alias.

94. The Community Policing Member **(PW4)** testified that the Appellant was also known as **J**. **PW4** did not make reference to the Appellant also being called *"Daddy"*.

95. The Appellant submitted that he was thus not the person who committed the offence.

96. I note that both the Complainant and her mother referred to the Appellant as *"Daddy"*.

97. The Appellant did not suggest that he was not the said person.

98. Considering that the Appellant and the Complainant's family lived literally next door to each other, this was definitely a case of recognition.

99. Indeed, the Appellant was arrested at his house.

100. The prosecution's case was that the Appellant had returned home, to sleep.

101. However, the Appellant's case was that he had come back home (in Kibos), from his home in Chiga.

102. One thing is clear; that the Appellant was not at his house in Kibos from 23rd June 2012 until 25th June 2012. During those two days he says that he had visited Chiga.

103. He said that he played cards until about 2 a.m.

104. I find that the defence corroborates the prosecution case, about the Appellant having only come back to his house, to sleep on 25th June 2012. He had not simply gone to pay a visit at Chiga. I find that the Appellant was keeping a low profile, trying to evade arrest.

105. As regards the position on the Complainant's body, where there was a tear, the Appellant pointed out that it was **ON** the vagina, but Not **IN** the vagina. Therefore, he submitted that there was no proof of penetration.

106. He also indicated that the hymen was still intact, thereby confirming that there had been no penetration.

107. The law is well settled, that the offence of defilement is committed when there has been penetration; whether or not it be partial or complete.

108. The presence of a tear in the vagina introitus would, as the doctor explained, be sufficient proof of penetration.

109. Dr. Joyce Omondi explained that the tear was at the entrance to the vagina; on the skin surrounding the entrance of the vagina.

110. I find that the evidence was sufficient proof of penetration.

111. Incidentally, the medical notes and the doctor who testified, did not state that the hymen was intact.

112. However, even assuming that the hymen was intact, that would not necessarily imply that there was no penetration.

113. And although the medical records did not specify the nature of the tool that was used for penetration, the Complainant made it clear that the perpetrator used the tool which he uses to urinate; and that he inserted it into her part of the body which she uses to urinate.

114. The evidence confirmed the particulars of the charge; which in turn constitute the ingredients of the charge of defilement.

115. Meanwhile, the age of the Complainant was proved through the evidence given by her mother, when she produced the Complainant's Birth Certificate.

116. Finally, pursuant to **Article 25** of the **Constitution of Kenya**, the right to a fair trial is a fundamental right. It is so fundamental that the Constitution pronounces that it shall not be limited.

117. **Article 50 (2) (5)** of the Constitution states that every accused person has the right to choose, and be represented by an advocate, and to be informed of this right promptly.

118. I have carefully perused the record of the proceedings, but did not find any record to show that the trial court had informed the Appellant that he had a right to be represented by an advocate. In effect, the Appellant was not informed that he had a right to choose, and be represented by an advocate.

119. It is important to note that the right of an accused person to choose, and be represented by an advocate means that if he wishes to be represented by an advocate, he can choose the particular advocate. When he makes that choice, it is the obligation of the accused person to agree with advocate on issues of payment for legal fees.

120. Therefore, the fact that the trial court informs an accused person about his right to be represented by an advocate of his choice, does not guarantee that the accused will secure the services of the advocate of choice.

121. Accordingly, I find that when the trial court fails to inform an accused person of his right to choose, and be represented by an advocate, does not of itself render the trial fatally defective.

122. In this case, I have noted that the Appellant conducted cross-examination effectively. The Appellant also asserted his various rights, such as the right to obtain Witness Statements prior to the start of the trial, as well as the right to apply for the trial to commence de novo.

123. I found not a single instance during the proceedings when the fact that the Appellant did not have an advocate, can be deemed to have occasioned him any prejudice.

124. In the result, I find that the trial was conducted with fairness in every respect.

125. I further find that the evidence adduced by the prosecution proved all the ingredients of the offence of defilement, and also proved that the Appellant was the perpetrator of the offence.

126. The learned trial magistrate held that the Appellant's defence was an afterthought.

127. Upon my re-evaluation I find that the Appellant was placed squarely at the scene of crime, and was recognized by the Complainant, as he was defiling her. Therefore, it is not possible that the Appellant was elsewhere, attending the funeral of his brother, at the time when he was at Kibos.

128. The learned trial magistrate was right to have rejected the Appellant's defence, as it was not possible for the Appellant to be both at Kibos and at Chiga, at the same time.

129. I find that the conviction was based on solid evidence, which was consistent and appropriately corroborated.

130. Therefore, the conviction, which is well-founded, is upheld.

131. I also note that prior to handing down the sentence, the trial court granted to the Appellant, an opportunity for mitigation.

132. I find no reason to warrant any interference with the sentence of Life Imprisonment, which was handed down by the trial court.

133. In a nutshell, there is no merit in the appeal; it is therefore dismissed.

FRED A. OCHIENG

JUDGE

DATED, SIGNED and DELIVERED at KISUMU This 28th day of January 2020

T. W. CHERERE

JUDGE