REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL APPEAL NO. 19 OF 2019

IBRAHIM ODHIAMBO ..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(From the original conviction and sentence in S.O.A case No.96 of 2014 of the Chief Magistrate's Court at Busia by Hon. S.O Temu– Principal Magistrate)

JUDGMENT

1. Ibrahim Odhiambo, the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) (4) [sic] of the Sexual Offences Act No. 3 0f 2006.

2. The particulars were that on diverse dates between 14th and 17th day of September 2014 at **[particulars withheld]** shopping centre, in Busia County, he caused his penis to penetrate the vagina of **SA,** a girl aged sixteen years.

3. The appellant was sentenced to serve fifteen years imprisonment. He appeals against both conviction and sentence.

4. The appellant was represented by the firm of J.K Birir & Company Advocates. He raised five grounds of appeal which can be summarized as follows:

a. That the learned trial magistrate erred in law and in fact by convicting the appellant without him calling two crucial witnesses.

b. That the learned trial magistrate erred in law and in fact by convicting the appellant without factoring his medical evidence.

c. That the learned trial magistrate erred in law and in fact by not appreciating the contradictory evidence by the prosecution.

d. That the learned trial magistrate erred in law and in fact by failing to consider his evidence.

5. The appeal was opposed by the state through Mr. Gacharia, learned counsel who contended that the prosecution proved its case to the required standards.

6. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32.**

7. There is no in existence section 8 (1) (4) of the Sexual Offences Act. The charge to that extent was erroneously drafted. It ought to have read:

… contrary to section 8 (1) as read with section 8 (4) of the Sexual Offences Act …

Since the appellant fully participated in the trial, I find that he was not in any way prejudiced and the error is curable under section 382 of the Criminal Procedure Code.

8. The record shows that on 8th May 2019 and 20th June 2019 the case was adjourned twice at the instance of the appellant to enable him to

call his witnesses. On 24th Ju7ne 2019 he informed the court that he was not going to call any witnesses. He cannot turn around and accuse the trial court for the failure. This ground therefore lacks merit.

9. The investigating officer Corporal Lopoyek Alfred (PW4), testified that they did not take the appellant for medical examination in a private hospital but took him to Busia District Hospital. In spite of this testimony, no results were produced in court. The trial court acted on the medical evidence at its disposal. It would be unfair to blame the court for failure to act on what was not availed to it. When the prosecution failed to produce this report, the appellant had a duty to inform the court of its existence and seek the court's intervention so that it could be availed in court. This he did not do and cannot at this juncture blame the court.

10. The complainant (S.A) and her mother TCN (PW2) gave the reasons for the complainant running away from home was threatened punishment for her staying away from home until late. According to the evidence of PW2, she went to assist her grandmother to mill. She left her grandmother's home at about 7 p.m. but did not return home. She started looking for her and when they met, she told her she was going to be disciplined. She ran away until on 17th September, 2014 when she returned and said that the appellant had defiled her.

11. On her part, the S.A testified that when she ran away, she slept at a verandah at [particulars withheld] shopping Centre. On the following day, she met the appellant who took her to his home and promised to later take her to her parent's home.

12. At this point we start to see variance between her evidence and her statement to the police. According to her statement, the appellant found her at the verandah where she was sleeping, looked at her and went away. The following morning at about 5 a.m. the appellant found her still at the verandah. He interrogated her and after she had informed him that she was running away from home for fear of punishment, he invited her to his home and promised to take her back to her parents.

13. The statement of the complainant's mother is that she had been away the whole day and that was the reason she was told she was going to be disciplined. A red flag ought to have been raised at this point. The girl had not only lied that she was away for a short while but contradicted by her mother's statement, but also lied as to how the she met the appellant. The court of Appeal in the case of **Ndungu Kimanyi vs. Republic [1979] KLR 283** (Madan, Miller and Potter JJA) held:

> **The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.**

S.A, in whose evidence the prosecution heavily relied on did not impress the trial court as a truthful witness. The learned trial magistrate did not interrogate the evidence further to establish whether the complainant was looking for ways to escape punishment from her parents.

14. There were other contradictions in the evidence of S.A. She testified that she slept in the house of the appellant on Thursday and that they had sex. At the time of her testimony she was 17 years and cannot be described as a person who could not tell days of the week. She was school going and at the time of her testimony, she was in class seven. Her mother's evidence was that she met with her at 9 a.m. when she (S.A) was returning home. Her contradictions were not reconciled.

15. The medical evidence ought to have put the learned trial magistrate on alert. James Waswa (PW3) testified that the hymen of SA was not freshly torn. If her evidence was that the appellant had sex with her up to the morning of the day she escaped, this evidence could not have escaped the medical examination.

16. Though the complainant said she felt a lot of pain, her actions do not support her contention the appellant had sex with her. Sexual intercourse that is not consensual is very painful and crying out would be an involuntary action. There was no evidence to support her contention.

17. The proviso to section 124 of the Evidence Act states:

> **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.**

18. The learned trial magistrate did not say why he believed SA was telling the truth. The defence of the appellant is very plausible. It is very possible wherever SA had spent the entire Sunday to kindle the wrath of her parents is likely to be the place where she may have engaged in sex. It was unsafe to rely on her evidence to convict when there were glaring contradictions.

19. From the foregoing analysis of the evidence on record, I find that the conviction cannot stand. I accordingly quash the same and set aside the sentence. The appellant is set at liberty unless if otherwise lawfully held.

DELIVERED and **SIGNED** at **BUSIA this 23rd Day** of January**, 2020**

KIARIE WAWERU KIARIE

JUDGE