



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. 41 OF 2018

BETWEEN

AMOS ODHIAMBO OBIERO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against judgment, conviction and sentence in Maseno Criminal SO Number 1765 of 2015 by Hon. C.Oruo (SRM) on 21st February, 2018)

JUDGMENT

Background

1. **AMOS ODHIAMBO OBIERO** (*Appellant*) herein has filed this appeal against conviction and sentence on a charge of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006 (*the Act*). The offence was allegedly committed on 12th October, 2015 against CA a girl aged 05 years.

2. The prosecution called 6 witnesses in support of the charges. **PW1** the complainant herein stated that on the material day while she was in company of one L, they met Appellant who offered to buy them mandazi but instead he pulled them into a thicket and defiled her and was arrested by one Dick at the scene of crime. **PW2 L** who was in company of the complainant similarly stated that the Appellant pulled them into a thicket where he defiled the complainant. **PW4 Dr. Romphosia Kevin** examined complainant on 12.10.15 and found her with bruises around the vulva, bloody discharge in vagina and tender hymen but intact. He produced complainant's P3 form, treatment notes and PRC form as PEXH. 1, 2 and 3 respectively. **PW5 PA**, complainant's mother upon receiving complainant's report escorted her to hospital. **PW6 Susan Omuse**, the investigating officer recorded witness statements and later charged the Appellant.

3. In his unsworn defence, the Appellant denied the offence. He stated that on the 12.10.15, one Dickson who Appellant allegedly blamed for separating with his wife, together with others assaulted him. That both were arrested and taken to the police station but Dickson was arrested and he was charged with an offence that he did not commit.

4. In a judgment dated 21st February, 2018, the Appellant was convicted and sentenced to life imprisonment.

Appeal

5. Being dissatisfied with the sentence, the Appellant lodged the instant Appeal on 17.04.18 mainly on the ground that the prosecution case was not proved.

6. The state submitted that the prosecution case was proved and urged that the appeal be dismissed.

Analysis

7. The duty of the 1st appellate court was explained by the Court of Appeal in the case of **Kariuki Karanja Vs Republic [1986] KLR 190** that: -

"On first appeal from a conviction by a judge or magistrate, the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. The court has a duty to rehear the case and reconsider the material before the judge or magistrate with such materials as it may have decided to admit."

8. From the evidence on record, the complainant's evidence that she was defiled is corroborated by medical evidence. The issue in question is whether it was the Appellant that defiled the complainant.

9. It has been alleged that the Appellant was arrested in the act by one Dickson. Appellant denied the prosecution case and stated that he was arrested for fighting with Dickson. Of interest to note is that Dickson and the other persons that arrested the Appellant were not called as witnesses. More surprising, the investigating officer did not even bother to explain how the Appellant was arrested.

10. Given the seriousness of the offence that Appellant was charged with, it would have been prudent to call Dickson and others that allegedly arrested the Appellant in the act to confirm the events of that day. The prosecution's failure to call the said Dickson and others that allegedly arrested the Appellant in the act leads the court to make an inference that their evidence, if adduced would have been adverse to the prosecution case. See **Bukenya & Others v Uganda [1972] EALR 549 at 551.**

11. From the foregoing, I find that the Appellant's evidence concerning the reason for which he was arrested has not been controverted and he ought to have been given the benefit of doubt.

12. Accordingly, and for the reasons set out hereinabove, this appeal succeeds. The conviction is quashed and the sentence set aside. Unless otherwise lawfully held, it is ordered that the Appellant shall be set at liberty. It is so ordered.

DELIVERED AND SIGNED AT KISUMU THIS 27th DAY OF February 2020

T. W. CHERERE

JUDGE

In the presence of-

Court Assistant - Amondi & Okodoi

Appellant - Present in person

For the State - Maureen