



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 30 OF 2019

JOSAM OKONDA OYOMBE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal against the conviction and sentence of the Senior Principal Magistrate's Court at Maseno (Hon. C. Oruo SRM) dated the 30th April 2019 in Maseno PMCCRC SOA No. 9 of 2017]

JUDGMENT

The Appellant, **JOSAM OKONDA OYOMBE**, was convicted on 2 counts of **Defilement**. The trial court held him culpable of defiling 2 young girls, **MAC** and **DA**.

1. The Appellant was sentenced to 20 years imprisonment, in respect to the defilement of **MAC**, who was said to have been 12 years old at the time when the offence was committed.

2. In respect to the offence committed on **DA**, who was said to have been 10 years old at the time when she was defiled, the trial court sentenced the Appellant to Life Imprisonment.

3. In his appeal, the Appellant raised 5 substantive grounds, which can be summarized as follows;

(a) The charge sheet which led to his being convicted and being sentenced to Life Imprisonment, was defective.

(b) The prosecution failed to make available some essential witnesses.

(c) The trial court deprived the Appellant an opportunity to cross-examine the complainants, thus contravening Section 208 of the Criminal Procedure Code.

(d) The evidence adduced by the prosecution was full of contradictions and inconsistencies; and should not have been relied upon.

(e) Article 50 (2) (j) of the Constitution was not complied with.

4. When he was canvassing the appeal, the Appellant submitted that the Charge Sheet was defective because the particulars thereof did not contain the time when the offence was committed or the names of the witnesses.

5. The charge sheet indicated that the 2 Complainants were both defiled on 5th January 2013.

6. The hour when the offences were allegedly committed, was not specified in the charge sheet.

7. I find that the failure to specify the exact hour of day (or of night) when the offences were committed, did not render the charge sheet defective.

8. Pursuant to **Section 134** of the **Criminal Procedure Code**;

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences

with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”

9. I find that the particulars of the charge sheet provided herein, were sufficient, as it contained reasonable information as to the nature of the offences with which the Appellant was charged.

Essential Witnesses

10. According to the Appellant, his father was an essential witness.

11. So too, was the Appellant’s niece, whom the Complainants used to go looking for: the said niece is named A.

12. **PW2** testified that the father of the Appellant had gone to her house, and had informed her that he had seen the Complainants go into the house of the Appellant.

13. It is that report which prompted **PW2**, (who is the mother of **PW1**), to go to the Appellant’s house.

14. Upon arrival at the said house, **PW2** found the door locked.

15. She testified that the Appellant had, initially, refused to open the door.

16. And when he eventually opened the door, the Appellant denied the assertion that the Complainants were inside his house.

17. Nonetheless, **PW2** testified that the Complainants were seen as they were running away from the Appellant’s house. **PW2** testified that the Complainants exited from that house through a hole in the wall.

18. However, the children were pursued and brought back to the home.

19. The Appellant’s father did not testify. Considering that he is the person who had seen the Complainants entering the Appellant’s house, his testimony could have given information about the said entry.

20. However, I hold the considered view that because both **PW2** and **PW3** went to the Appellant’s house, from where the Complainants were seen running away, the absence of evidence from the Appellant’s father did not weaken the case against the Appellant.

21. The first Complainant testified that she recognized the Appellant. Therefore, this was a case of recognition.

22. As regards the Appellant’s niece, (A), she was not present at the Appellant’s house when the incidents took place.

23. Therefore, A was not an essential witness.

Date of the Incident

24. The charge sheet specified that the offences were committed on 5th January 2013.

25. The Appellant submitted that because the prosecution witnesses testified about incidents which occurred on 13th January 2013, the said evidence was inconsistent with the particulars of the charge sheet.

26. **PW1** testified that she was defiled on 5th January 2013, as well as on 3 other occasions.

27. **PW2** said that the children had been seen entering the Appellant’s house on both 5th and 12th January 2013.

28. **PW3** is a grandmother of both the Complainants. She testified that after the Appellant was arrested, she escorted him with the Complainants to the sub-chief.

29. **PW4** was the Assistant Chief of Emaloba. On 13th January 2013, at about 5.00pm, he received **PW2**, **PW3**, together with the 2 Complainants, at his office. He advised **PW2** and **PW3** to report the case of the alleged defilement, at the Luanda Police Station.

30. The Assistant Chief also testified that he handed over the accused to the police at Luanda Police Station.

31. During cross-examination, the Assistant Chief told the court that the Complainants had told him that it was the Appellant who had defiled them.

32. **PW4** further testified that the Appellant had, reportedly, defiled the Complainants more than once.

33. However, it was not until 13th January 2013 when **PW4** first received a report about the defilements.
34. After **PW4** testified, the trial court ordered that **D.A.**, who was one of the Complainants, should undergo mental assessment at the Jaramogi Oginga Odinga Teaching & Referral Hospital, in order to ascertain if she had the mental capacity to testify.
35. The said order was granted after it was asked for by the prosecution, and when the Appellant told the court that he had no objection to it.
36. However, there is nothing in the Court records to show whether or not **DA** ever underwent mental assessment.
37. I am unable to ascertain why there had been a need to have the mental capacity of that Complainant verified.
38. But it is clear that **DA** did not testify at the trial. Her failure to testify was not explained to the court.
39. In my considered opinion, the Complainant, **DA**, was an essential witness.
40. When she failed to give evidence at the trial, and in the light of the fact that her said failure was not explained, I find that the Appellant was deprived of the opportunity to cross-examine her.
41. I appreciate that **PW1** testified that **DA** was defiled in her presence.
42. I also appreciate the presence of medical evidence that appeared sufficient to prove that **DA**. was defiled. However, that is not, in my considered opinion, an acceptable substitute for the evidence which the Complainant could have tendered.
43. More significantly, the failure by the Complainant (**DA**) to testify had deprived the Appellant of his right to test her evidence through cross-examination. To that extent, the Appellant's right to a fair trial was violated.
44. Accordingly, I find that the conviction on Count 2 cannot be sustained.
45. But in relation to Count 1, there is sufficient and compelling medical evidence, proving that **MAC** was defiled.
46. The Complainant recognized the Appellant as the perpetrator.
47. And the age of the Complainant was proved through the Clinic Card. I find that the said Clinic Card was a document that had been issued in the ordinary course of business, when **MAC** was receiving medical attention.
48. It is not a document that was created for the purposes of the case.
49. The document is an official record, which was made in the discharge of official duty, by the medical personnel who were providing medical attention to the Complainant in question. Therefore, pursuant to **Section 38** of the **Evidence Act**, the Clinic Card was admissible in evidence.
50. In the result, the conviction on Count 2 is quashed.
51. However, the conviction and sentence on Count 1 are upheld.

DATED, SIGNED and DELIVERED at KISUMU This 11th day of March 2020

FRED A. OCHIENG

JUDGE