



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CRIMINAL APPEAL NO. 11 OF 2018

GEORGE ODHIAMBO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from conviction and sentence in the Chief Magistrate's Court at Kajiado (Hon. M Kasera, P M), dated 3rd August, 2017 in Criminal Case No. 14 of 2017)

JUDGMENT

1. The appellant was charged with attempted defilement contrary to Section 9(1) (2) of the Sexual Offences Act (No. 2 of 2006). Particulars were that on the 6th day of April, 2017 at [particulars withheld] Isinya Sub-County within Kajiado County, he attempted to cause his male organ to penetrate the female organ of AW, a child aged 13 years.
2. The appellant also faced an alternative count of committing an indecent act with a child contrary to Section 11(1) of the Act. Particulars being that on the same day, 6th April, 2017 at [particulars withheld] Isinya Sub-County within Kajiado County, he intentionally touched the breasts of AW a child aged 13 years with his hands.
3. The appellant denied both the main and alternative counts and after a trial in which the prosecution called 4 witnesses and the appellant's defence, he was convicted on the alternative count and sentenced to 10 years' imprisonment.
4. The appellant was aggrieved with both conviction and sentence and filed this appeal raising the following grounds, namely:
 1. That the learned trial magistrate erred in law and fact by holding that the offences were proved against the appellant to the required standard of proof beyond reasonable doubt.
 2. That the learned trial magistrate erred in law and fact by failing to protect the appellant's rights to fair trial as enshrined in article 50 of the constitution.
 3. That the learned trial magistrate erred in law and fact by putting reliance to the prosecution evidence when the same was inconvenient and contradictory.
 4. That the learned trial magistrate erred in law and fact by failing to take into account the appellant's defence adequately.
5. During the hearing of the appeal, the appellant relied on his grounds of appeal filed together with the petition of appeal.

Appellant's submissions

6. The appellant submitted through his written submissions that the prosecution did not prove its case beyond reasonable doubt. According to the appellant, PW1 told the court that someone touched her breast from behind as she walked after he inserted his hand in her cloth and touched her. However, in cross-examination, she told the court that the distance between her and the appellant was two meters apart. He argued that it was not possible to touch the complainant's breasts at that distance. He also argued that since it was along the road at 11 a.m., there must have been other people given that Isinya-Kiserian highway is a busy road.
7. The appellant further argued that the prosecution evidence was contradictory. According to him, PW1 said that he called her "baby" but later in cross-examination, she said he did not call her. He also argued that PW1 told the court that her friend witnessed the action but she

was not called as a witness. He relied on Nganga v Republic [1981] KLR 483 for the submission that when the prosecution fails to call a material witness, they do so at their own risk, and adverse inference will be drawn that the evidence of the material witness, if called, could have been adverse to the prosecution.

8. The appellant also argued that although PW1 told the court that she had earlier warned him not to talk to her, she stated in cross-examination that she had never talked to him, creating further contradiction.

9. He also argued that the evidence of PW2 was full of falsehoods and exaggerations, which was clear that the case against him had been made up. He relied on Pius Arap Maina v Republic [2013] eKLR for the submission that any contradictions; inconsistencies; inadequacies and discrepancies, should be resolved in favour of the accused.

10. The appellant again relied on Pandya v Republic [1957] EA 336 for the argument that where prosecution evidence is inconsistent or contradictory, such evidence should not be relied upon as true.

11. On grounds 2, 4 and 5, the appellant submitted that the trial court based its judgment purely on circumstantial evidence. He argued that it was not enough to conclude that since he was walking behind PW1, and had a small chat, and since PW1 was crying, he must have touched her breast. He also argued that if he had committed the offence, he could not have waited until they reached the police roadblock.

12. The appellant contended that there was no iota of evidence to form the basis of his conviction. He relied on Abanga Onyango v Republic CRA No. 32 of 1990 on circumstantial evidence. He relied on many other decisions and urged the court to allow the appeal, quash the conviction and set aside the sentence.

Respondent's submissions

13. Mr. Meroka learned prosecution counsel conceded this appeal. He submitted, first, that the trial court did not indicate the language in which the plea was read and explained to the appellant. Second; that the trial court did not indicate whether PW1 gave sworn or unsworn testimony. Third; that there were inconsistencies in the prosecution evidence. According to counsel, whereas PW1 testified that she was touched while walking along the road, evidence of PW3 was that they were in the bush.

14. On fair trial, he agreed with the appellant that Article 50(2) was not complied with. According to Mr. Meroka, the proceedings of 13th June 2017 show that the appellant indicated that he could not reach his witnesses but the trial court proceeded to fix the matter for judgment without making a ruling on whether or not to accord the appellant an opportunity to call his witnesses.

15. Regarding sentence, Mr. Meroka argued that the sentence was lawful although they do not support the conviction. He also did not urge for a retrial.

Determination

16. I have considered this appeal; submissions and the authorities relied on. I have also considered the trial court's record and the impugned judgment. The prosecution has conceded this appeal. However, the fact of concession does not mean the appeal must be allowed. The court has a duty to reconsider the evidence and come to its own conclusion.

17. In Odhiambo v Republic [2008] KLR 565, the court said:

“[T]he court is not under any obligation to allow an appeal simply because the state is not opposed to the appeal. The court has a duty to ensure it subjects the entire evidence tendered before the trial court to clear and fresh scrutiny and re-assess it and reach its own determination based on evidence.” (See also Norman Ambich Mero & Another v Republic (Nyeri Criminal Appeal No. 279 of 2005))

18. This being a first appeal, it is the duty of this court as the first appellate court to reconsider and reevaluate the evidence afresh and come to its own conclusion on it. The court should however bear in mind that it did not see witnesses testify and give due allowance for that. (See Okeno v Republic [1972] E A 32.)

19. In Kamau Njoroge v Republic [1987] eKLR, the Court of Appeal stated:

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and to make due allowance in this respect.”

20. PW1 AW aged 13 years testified after *voire dire* examination that on 6th April, 2017 at 11 a.m, she was at Isinya when she was sent by a neighbour called Mama Ann to buy for her vegetables from her mother along Isinya-Kiserian Road. Her mother did not have vegetables and therefore she bought vegetables from another neighbour. On her way back, as she approached Multipurpose school the appellant inserted his hand into her dress and touched her breast from behind. He said to her “Baby to day I must go to your house.” She cried and when she saw a police officer she told him what the appellant had done to her. The police officer went after the appellant who was running away and arrested him with the help of members of the public. The appellant was placed in police vehicle while she was left with another police officer. She went with the police officer to her mother who accompanied them to the police station where she recorded her statement. She identified the

appellant as the person who had touched her.

21. **PW2 FG**, mother to PW1, testified that on 6th April, 2017 at 11 a.m., PW1 went and told her that she had been sent to buy vegetable for a neighbour. She did not have vegetables and asked her to buy from another neighbour and left. After about 20 minutes, PW1 went back with a police officer crying. She said the appellant wanted to rape her. The appellant had just been with her and had bought food from her. She did not know he had followed PW1.

22. **PW3 No. 54424 CPL David Mwangi Mijuga** attached to Isinya Traffic Base testified that on 6th April, 2017 he was on the Kitengela-Kajiado Road at Isinya performing traffic duties with the Base Commander Irora. He saw PW1 leave the bush waving her finger and shouting to them that the appellant wanted to do something bad to her. She was running towards their direction. The appellant was following her. He stopped the appellant and asked him what he was doing but he ran away. The witness gave chase, blew a whistle and members of the public arrested the appellant. He rescued him from agitated members of the public and PW1 identified him.

23. **PW4 No. 88875 CPL. Grace Munga** attached at Isinya police station performing general duties, testified that on 6th April, 2017 she was called by Deputy OCS IP Obegi and assigned the case involving PW1. She went to the report office and found PW1 and PW2. CPL Mwangi was booking a case of attempted defilement. She interrogated PW1 and PW2, recorded their statements, interrogated the appellant and charged him with the offence. She produced PW1's Birth certificate of as PEX 1.

24. When the appellant was put on his defence, he gave an unsworn testimony and told the court that on the material day, he was on duty as a matatu conductor. They ferried passengers to Isinya and after alighting, he went to look for change for a customer. He got change and gave the customer. He then went to eat githeri at Isinya stage at PW1's mother. Thereafter, he went to the police station to see colleague. He found the vehicle at the station but the driver was not there. He went to the stage and saw PW3 at the roadblock with the driver of his motor vehicle. He crossed the road and saw PW1 ahead of him. He asked her about her younger brother he used to see with her mother. She told him that she left him with a neighbour. She was 3 metres ahead of him. He warned her that there were many incidences of defilement and she should not be walking alone to such a distance.

25. PW1 stopped near PW3 who had arrested his driver and told the officer that he was telling her bad manners. PW3 went and stopped him and frog matched him to the vehicle and took him to the police station where he was charged. He told the court that he had been framed up with the charges.

26. After his testimony, he informed the court that he wished to call a witness and the matter was set for further hearing on 20th May 2017. On that day, the appellant informed the court that his witness had informed him that he was on his way to court. The matter was adjourned to 13th June 2017. On that day, the appellant told the court that he had not seen his witness in court and that he could not reach him on phone. The court set the matter for judgment. He was convicted and sentenced to 10 years prompting this appeal.

27. The appellant argued that the prosecution did not prove its case beyond reasonable doubt. According to the appellant, the complainant stated that he was walking some two metres behind her and touched her breast after inserting his hand in her cloth.

28. There was no other eye witness except the complainant. The proviso to section 124 of the Evidence Act allows the court to convict on the basis of evidence of a single victim of sexual assault if it believes that the witness is telling the truth. The section provides:

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

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.” (Underlining)

29. In this case, the trial court believed the complainant's evidence and stated:

“The accused was walking behind the complainant when they approached the police. It is the evidence by (sic) the accused he was with the complainant and they had a small chat as they walked towards road block. It is therefore that accused was put at the scene by PW1 and PW3. PW2 said accused had been warned by her neighbour not to talk to complainant or else he would be reported to police.

The circumstantial evidence by both PW3 that complainant was crying when she made a report to the police. PW4 also said she exposed (sic) anger when she demonstrated how accused inserted his hand in her clothes and touched her breast. PW2 also confirmed that complainant was crying when she saw her...I do not think the complainant was pleased with what accused did to her that is why she cried. The accused was with her all the while as per evidence on record. I am satisfied that accused touched complainant's breast a fact which did not please her.”

30. The complainant told the court that the appellant touched her breast from behind. No other witness was present except her and the appellant. They were walking along the road when this is said to have happened. The appellant on his part said he only talked to the complainant and warned her not to be walking alone all that distance due to prevailing cases of defilement.

31. On the other hand, PW3 told the court that he saw the appellant and the complainant in the bush. This evidence could not obviously be

true given that both the appellant and complainant were clear that they were walking along the road and none of them made reference to the bush.

32. I have considered the appeal and reviewed the evidence on record. As already alluded to, there was no other eye witness in the case before the trial court. The evidence was that of the appellant against that of the complainant. The trial court made reference to the proviso to section 124 of the Evidence Act, considered the evidence and concluded that the appellant must have touched the complainant's breast and that is why she was crying because she must have not been happy with what he did.

33. The trial court heard the case and observed witnesses as they testified. An appellate court should give allowance for that when considering an appeal and reviewing evidence. The trial court however stated it did not think the complainant was pleased with what accused did to her and that was why she cried. The complainant must have not been happy of course but could touching of the breast be the only thing to make her cry?

34. The trial court stated in its judgment that PW2 had testified that the accused had been warned by her neighbour not to talk to the complainant or else he would be reported to the police. It was not clear when the neighbour warned the appellant and whether it was on the same day. Could this be the reason why the complainant decided to report the matter to the police if the appellant had been warned previously not to talk to the appellant?

35. The prosecution had the burden of proving its case against the appellant beyond reasonable doubt. And as the Supreme Court of Nigeria stated in *Bakare v State* (1987) 1 NWLR (PT 52) 579:

“Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability”. (emphasis)

36. In *Pius Arap Maina v Republic* [2013] eKLR, the Court of Appeal also stated that the prosecution must prove a criminal charge beyond reasonable doubt and any evidential gaps in the prosecution's case raising material doubts must be in favour of the accused.

37. Even where like in the case before the trial court reliance is on circumstantial evidence, the circumstantial evidence must be incapable of any other explanation but that the accused is guilty.

38. In *Abanga alias Onyango v Republic* (Criminal Appeal No. 32 of 1990), the Court of Appeal stated regarding circumstantial evidence:

“It is settled that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is to be drawn must be cogently and firmly established (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else.”

39. Similarly, in *Joan Chebichii Sawe v Republic* [2003] eKLR, the Court of Appeal stated that:

“In order to justify on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.”

40. Flowing from the above principles, I do not think the prosecution proved its case beyond reasonable doubt either through direct or circumstantial evidence.

41. The appellant also argued that his right to a fair trial guaranteed under Article 50(2) of the constitution was violated. He argued that he was not given adequate time to prepare his defence. Mr. Meroka also conceded this ground of appeal.

42. Article 50(2) provides that every accused person has the right to a fair trial, which includes the right-(c) ***to have adequate time and facilities to prepare a defence.*** After the appellant gave his defence, he informed the trial court that he wanted to call a witness. The matter was adjourned and set for further hearing on 20th May 2017. On that day, the appellant told the court that his witness had informed him that he was on his way to court. The matter was adjourned to 13th June 2017 when the appellant was to present his witness. On that day, the appellant informed the court that he had not seen his witness in court and that he could not reach him on phone. The trial court set the matter for judgment without inquiring from the appellant whether he still wanted to call the witness or was closing the case.

43. The prosecution having closed its case, it was the appellant's time to present his defence and call witnesses if he wished. The constitution guarantees every accused person the right a fair hearing. This included the right to have sufficient time to prepare for his/her defence and call witnesses. The trial court was bound to observe this constitutional guarantee and afford the appellant time to call his witness.

44. There was no reason for the trial court to act the way it did without the appellant confirming that his witness would not come to testify at all. The witness could have very well been on the way to court or was prevented by good reason. There was no indication that the appellant was delaying the matter in which case the trial court could have warned him and given him a last adjournment.

45. In *Jago v District Court (NSW)* [1989] HCA 46: (1989) 168 CLR 23 (12 October 1989), *Deane, J.* stated that:

“It is fundamental to the legal system that an accused be given a fair trial according to the law. The accused has ‘a right not to be tried unfairly or as an immunity against conviction otherwise than after a fair trial’.”

46. In the circumstances of the appellant’s case, I agree with the appellant that the trial court violated his right to a fair trial which is none derogable under Article 25 of the Constitution thus vitiated the trial itself. Mr. Meroka properly conceded this ground.

47. The other issue I find necessary to address is language. Mr. Meroka gain conceded the appeal because the trial court did not indicate the language in which the plea was read and explained to the appellant. Indeed, the trial court’s record does not show the language in which the plea was read and explained to the appellant.

48. As already alluded to, Article 50(2) guarantees an accused person the right to a fair trial which includes the right (m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial.

49. In *Jason Akhonya Makokha v Republic* [2014] eKLR the Court of Appeal dealt with the issue of language and stated:

“[19]The cardinal principles that we can draw from the above case law propositions are that, one, any Court of law taking a plea from an accused person has to ensure that the language of the Court and the language the accused person wishes to use to communicate with the Court is indicated on the record and where an accused person is not conversant with the language of the Court, he should be afforded the services of an interpreter; two, an unexplained violation of a constitutional right to language would normally result in an acquittal irrespective of the nature and strength of the evidence which might be adduced in support of the charge; save that each case has to be determined on its own facts and circumstances; three, that there was a reciprocal duty on the part of an accused person to indicate to the Court, for instance that he was not able to understand the language of the proceedings although this does not however lessen the duty of the Court of being satisfied that the accused was able to follow the proceedings; four, that where some doubt exist as to whether or not an accused person was accorded the services of an interpreter, the doubt must be resolved in his favour.”

50. In the present appeal, the appellant’s trial went to a full hearing where witnesses testified. In such a situation, this court sitting on appeal has to scrutinize the record and satisfy itself whether the appellant understood the trial or was in anyway prejudiced by the trial court’s failure to indicate the language in which the plea was taken and the trial conducted.

51. According to the trial court’s record, *voire dire* on the complainant was done in Kiswahili. The complainant testified and was cross examined by the appellant. PW2 also testified in Kiswahili and the appellant cross examined her. PW3 testified in Kiswahili and the appellant again cross examined him. PW4 again testified in Kiswahili and the appellant cross examined by the appellant. However, when put on his defence, the appellant testified but the record does not indicate the language he used when giving unsworn testimony.

52. The record therefore shows that the appellant fully participated in the trial to the end and cross examined witnesses which meant he understood the offence he faced and put questions to witnesses in cross examination. He also gave his own testimony even though the language he used was not indicated. In the circumstances, I do not think the lapse on the part of the trial court not to indicate the language in which the plea was taken and the appellant used to testify caused him prejudice or resulted into a miscarriage of justice.

53. In the end, having considered the appeal submissions and the law, the conclusion I come to is that he prosecution did not prove its case against the appellant beyond reasonable doubt. Further, the trial court fell into error when it denied the appellant the opportunity to call his witness thus violated his right to a fair hearing. Mr. Meroka therefore properly conceded this appeal.

54. Consequently, this appeal is allowed, conviction quashed and sentence set aside. The appellant is hereby set at liberty forthwith unless otherwise lawfully held.

Dated, signed and delivered at Kajado this 23rd day of October, 2020.

E.C. MWITA

JUDGE