REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 34 OF 2018

STEPHEN OCHIENG ODHIAMBO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal against the conviction and sentence of the Senior Resident Magistrate's Court at

Maseno (Hon. R.S. Kipngeno SRM) dated the 26th February 2018 in Maseno SRMCCRC No. 1151 of 2014]

JUDGMENT

Having been convicted for the offence of Defilement, the Appellant, **STEPHEN OCHIENG ODHIAMBO**, was sentenced to 20 years imprisonment.

1. The Appellant was dissatisfied with the conviction and the sentence, and he therefore lodged an appeal to the High Court to challenge the same.

2. He described the sentence as being unconstitutional and excessive in the circumstances.

3. As regards the Charge Sheet, the Appellant said it was incurably defective and thus incapable of being the basis for a sound and lawful trial.

4. The trial court was faulted for failing to take into account the fact that the Complainant only named the Appellant as the person who defiled her, after she had been beaten up. In other words, the Complainant did not volunteer the information.

5. The prosecution was said to have failed to call crucial, competent and compellable witnesses to testify at the trial.

6. The Appellant contended that there was no compliance with **Section 197** of the **Criminal Procedure Code.**

7. In the opinion of the Appellant, the judgment, decision and the findings of the trial court were against the weight of the evidence tendered.

8. The Appellant also expressed the view that the trial court failed to take into account the conduct of the Complainant in the light of the **Statutory Defence** set out in **Section 8(5)** of the **Sexual Offences Act.**

9. When canvassing the appeal, the Appellant first pointed out that the evidence tendered by the prosecution failed to prove the date when the offence was committed.

10. According to the Appellant, there were 3 possible dates, stemming from the evidence on record. First, the Complainant said that she was defiled on 3rd September 2014.

11. Secondly, **PW3** said that the Complainant was defiled on 12th September 2014.

12. Thirdly, when the Clinical Officer examined the Complainant on 10th September 2014, and she said that the Complainant had been defiled some 6 days and 16 hours earlier, a calculation would indicate that the incident was on 4th September 2014.

13. The Appellant also pointed out that it was not until 7th September 2014 when the Complainant reported to **PW2** that she had been defiled. If the defilement was on 3rd September 2014, it would mean that the report was made 4 days later.

14. And the Appellant wondered why the Complainant was not taken to the hospital on 7th September 2014.

15. In any event, when the Complainant was examined at the hospital, the Appellant pointed out that the first written remark was that the hymen was *"intact."*

16. However, that first entry was crossed out and was then replaced with the remark,

> ***"hymen broken."***

17. As the Medical Officer who first examined the Complainant was not called as a witness, the Appellant reasoned that the prosecution failed to provide the trial court with a proper explanation for the change in the note made concerning the Complainant's hymen.

18. In regard to the judgment written by the learned trial magistrate, the Appellant submitted that the court failed to set out the burden of proof, the standard of proof as well as the incidence of proof.

19. In any event, the Appellant was of the view that the medical evidence produced did not prove that there was any contact between the sexual organ of the Appellant and the sexual organ of the Complainant.

20. The Appellant also submitted that there were several contradictions in the evidence adduced by the prosecution. In the light of the said contradictions, the Appellant urged this court to find that the conviction was unsafe.

21. In a brief answer to the appeal, the Respondent noted that the Appellant had never indicated that the Complainant had presented herself to him as being someone who was over 18 years of age.

22. I believe that the Respondent, in that respect, was responding to the contention that the court had failed to associate the conduct of the Complainant with the statutory defence set out in **Section 8(5)** of the **Sexual Offences Act**. The said section provides as follows;

> ***"It is a defence to a charge under this section if –***
>
> ***(a) it is proved that such child, deceived the accusedperson into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and***
>
> ***(b) the accused reasonably believed that the child was over the age of eighteen years."***

23. I have carefully perused the record of the proceedings. However, there is not a single suggestion by the Appellant that the Complainant had deceived him that she was over 18 years old.

24. There is also nothing on the record, that suggests that the Appellant did reasonably believe that the Complainant was over the age of 18 years.

25. In the circumstances, I find no basis upon which the trial court could be criticized for allegedly failing to give consideration to the defence pursuant to **Section 8(5)** of the **Sexual Offences Act**.

26. The Appellant never adopted that statutory defence and he therefore cannot have expected the court to take into account something that had not been raised.

27. When the Appellant was put to his Defence, he said that at the time when the offence was committed, he was away in Nairobi. In effect, his Defence was an alibi.

28. He also said that the case had simply been fabricated against him, with a view to extorting money from him.

29. Finally, he said that there was a perennial land quarrel between his brother and his sister in-law.

30. From the evidence on record, I find absolutely no linkages between the alleged perennial land quarrels between the Appellant's brother and his sister in-law. The Appellant did not lead any evidence to show that there was any bad relationship between him and the Complainant's family.

31. If anything, the Appellant was said to have been a friend to the sister of Molly. The said Molly was a sister in-law of the Complainant.

32. Being the first appellate court, I am obliged to re-evaluate all the evidence on record, and draw my own conclusions.

33. Of course, I am alive to the fact that, unlike the learned trial magistrate, I did not have the benefit of observing any of the witnesses when they testified.

34. PW1 is the Complainant. She had known the Appellant for about a year prior to the incident. She knew him as a friend to Molly's sister.

35. On 2nd September 2014**, PW1** met the Appellant when she was going to the market. He complimented her for her beauty. He then invited her to go to his house on the next day, so that he would buy her mandazi.

36. PW1 said that the Appellant told her that he would be seated under a tree.

37. On 3rd September 2014, **PW1** went home from school, and changed from school uniform. She then went and met the Appellant, under the tree.

38. PW1 testified that the Appellant had a sack which was spread on the ground. He also had condoms.

39. He told **PW1** to lie on the sack and she complied. He then removed her skirt and panty as well as his trousers and his boxer.

40. Thereafter, the Appellant lay on top of **PW1** and he inserted his penis inside her vagina.

41. PW1 felt pain and wanted to scream, but the Appellant closed her mouth with his hands. The Appellant also threatened **PW1** with a knife, saying that he would kill her if she did not keep quiet.

42. After the incident, **PW1** went home. Molly asked **PW1** if anything was wrong but **PW1** did not tell her or anyone else about the incident.

43. During cross-examination, the Complainant explained that she had feared to tell anybody about the incident because the Appellant had threatened to kill her if she disclosed what had happened.

44. She further explained that she felt a lot of pain during the incident.

45. After the incident, the Complainant walked differently from how she used to walk prior to the said incident. It is because of the change in her way of walking which prompted **PW2** to conclude that there was something wrong.

46. As the Complainant did not say what had happened to her, **PW2** beat her up.

47. However, I find that the Complainant was not forced to disclose the identity of the person who had defiled her. The beatings were intended, and had the effect of causing the Complainant to disclose that she had had sexual intercourse.

48. PW2 testified that it was at about 3p.m on 7th September 2014 when the Complainant owned up about what had transpired.

49. However, it was not until the next day when **PW2** first took the Complainant to school.

50. At the school, **PW2** was advised by a teacher to take the Complainant to the hospital.

51. The treatment notes show that the Complainant was attended to at the Kombewa District Hospital on 9th September 2014.

52. The Appellant asked, in his submissions before me, why **PW2** did not take the Complainant to hospital on 7th or on 8th September 2014.

53. If the Appellant deemed that delay to be significant, he ought to have raised the question during cross-examination of **PW2**. As the issue was not raised at that time, we cannot know what explanation **PW2** could have given.

54. Nonetheless, I find that **PW2** was not on trial, concerning the delay in taking the Complainant to hospital.

55. At the hospital, the Complainant was attended to by **RCO** Hellen.

56. However, it is **RCO** Gladys Biwott who testified in court, about the medical examination of the Complainant.

57. In his submissions, the Appellant said that **RCO** Hellen was an essential witness because she is the person who first treated the Complainant.

58. More significantly, the Appellant pointed out that in the treatment notes, the first entry showed that the hymen was intact. But that entry was later replaced with the words;

> ***"hymen broken."***

59. I appreciate that the first part of the treatment notes were recorded by **RCO** Hellen. If **RCO** Gladys Biwott had sought only to produce records which were made by her colleague, there could have been a gap in her ability to talk about the actual findings recorded, if she had not personally examined the Complainant.

60. I am not suggesting that a medical officer cannot produce medical records prepared by a colleague. Provided that the set requirements

governing the admissibility of documentary evidence are met, it is perfectly in order for one medical officer to produce documentary evidence prepared by another person.

61. The point I am making is that if there were issues arising about the facts, it could be difficult for the person to offer explanations, if that person had not attended to the patient.

62. In this case, **RCO** Gladys Biwott made it crystal clear that she did examine the Complainant. Therefore, she was not just relying on the notes recorded by her colleague. She was also testifying on the strength of her own first-hand examination of the Complainant.

63. She said that the vagina was normal; there was some whitish discharge; there were no bruises; and the hymen was not present.

64. From the testimony of Gladys, it was concluded that the Complainant had been defiled.

65. However, there still remains the question about why **RCO** Hellen had first indicated that the hymen was intact.

66. Although that first entry was crossed and replaced with an entry which indicated that the Complainant's hymen was broken, the prosecution did not tender evidence to enable the court appreciate why **RCO** Hellen appears to have changed her mind.

67. Another disturbing aspect of this case is with regard to the date when the Complainant was defiled.

68. Her testimony is that she was defiled on 3rd September 2014. That is therefore the date cited on the Charge Sheet.

69. On 7th September 2014, the Complainant confessed to **PW2**, that she had been defiled.

70. On the treatment notes, it is similarly indicated that the offence was committed on 3rd September 2014.

71. The Complainant and **PW2** testified that the Complainant was first taken to the hospital on 9th September 2014.

72. The Medical notes from Kombewa District Hospital show that the Complainant was attended to at that facility on 9th September 2014.

73. PC SAMUEL ORANDI (PW3) was a police officer who was attached to the Kisumu Police Station.

74. He said that **PW2** and **PW1** reported the incident of defilement on 13th September 2014, and that they said that the incident took place on 12th September 2014.

75. It is therefore, on 13th September 2014 that PW3 booked the report at the police station.

76. According to **PW3**, he asked **PW1** and **PW2** to go for medical treatment, after he had booked their report.

77. During cross-examination **PW3** reiterated that the Complainant was defiled on;

> ***"12/9/2014 and not 9/9/2014 as per the witness statement. I speak the truth."***

78. As **PW3** was the Arresting Officer, and because he arrested the Appellant on the basis of an incident of defilement which took place on 12th September 2014, his evidence is at variance with the particulars of the Charge Sheet.

79. PW5, **PC JOSEPH EMURUON**, was attached to the Kombewa Police Station at the material time. He testified that on 10th September 2014, he was tasked with the responsibility of investigating a case of defilement.

80. He testified that the Complainant was accompanied by her aunt, when they reported the case.

81. The **P3** Form which was produced in evidence by **PW4,** showed that it was issued on 10th September 2014, which is consistent with the evidence of **PW5**, about the date when the Complainant and **PW2** reported the incident at the police station.

82. However, **PW5's** evidence was that the Complainant was defiled on the "material date". The said "material date" was not defined by **PW5**.

83. This witness also said that the Complainant was dragged by her assailant, to a nearby bush under a mango tree.

84. That piece of evidence is inconsistent with what the Complainant said, as she had made it clear that the assailant never forced her to lie down on the sack which was spread out under the mango tree.

85. PW5 also testified that it took 8 days;

"……..to discover the normal walking style had changed."

86. If, as the Complainant said she had been defiled on 3rd September 2014, the 8 days would fall on 11th September 2014. Yet the Complainant and her mother had reported the incident on 10th September 2014.

87. That would imply that the defilement must have taken place on 2nd September 2014. And if that were the position, it means that the evidence was at variance with the Charge Sheet.

88. In the considered opinion of the learned trial magistrate;

"……the Complainant was clear about being defiled by the Accused in a particular place and time."

89. However, a re-evaluation of the evidence on record reveals that it is not clear on which date the alleged incident took place.

90. It is not even clear about the date on which the incident was reported at the police station.

91. In the circumstances, although the bulk of the evidence appears to point at the Appellant as the perpetrator of the offence which was committed on the Complainant, I hold the considered view that it would be unsafe to sustain the conviction.

92. Accordingly, I allow the appeal, quash the conviction and set aside the sentence.

93. In the event, the Appellant shall be set at liberty forthwith unless he is otherwise lawfully held.

DATED, SIGNED and **DELIVERED** at **KISUMU**

this **23rd** day of **January** 2019

FRED A. OCHIENG

JUDGE