



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. 42 OF 2016

ALFRED BOGONGO ONGERA.....APPELLANT

=VRS=

THE STATE.....RESPONDENT

[Being an Appeal from the Conviction and Sentence of Hon. N. Kahara (RM) Keroka Law Courts dated 18th September 2015 in Keroka Principal Magistrate's Court Criminal Case No. 431 of 2014]

JUDGEMENT

The appellant was sentenced to life imprisonment for defilement of a child contrary to Section 8 (1) as read with 8 (2) of the Sexual Offences Act.

The particulars of the charge were that on 25th April, 2014 at in Borabu District within Nyamira County he intentionally caused his penis to penetrate the vagina of MN a child aged 4 years. The appellant pleaded not guilty to the charge.

Being aggrieved by the conviction and sentence he preferred this appeal. The grounds of appeal are: -

- “1. THAT, the learned trial Magistrate erred in both points and Law to have not realized that I did not plead guilty of offence.**
- 2. THAT, your honour the learned trial Magistrate erred in both facts and Law to have not considered that I did the case without prosecution statements to defend myself.**
- 3. THAT, your honour the trial Magistrate erred in both sides and Law to have convicted and sentenced me harshly without considering the conspiracy the mother of the complainant had as a worker in the family.**
- 4. THAT, the learned trial Magistrate failed in both points and Law to have convicted me over a fabricated defilement with medical documents from Borabu Medical which is a private hospital.**
- 5. THAT, your honour the trial Magistrate erred in both facts and Law to have convicted me without having any absolute proof to convict me.**
- 6. THAT, your honour the learned trial Magistrate did not warn herself that I was demanding accumulated salary dispute with the mother as a worker.”**

The appeal was canvassed by way of partly written submissions and orally. In his written submissions the appellant stated that he was not given the statements of the witnesses; that the clinical officer who testified in court was not the one in the charge sheet; that the evidence of Pw4 was that the child was born on 1st November 2009 which means that the child was five years but not 4 years. He also wondered how he could have defiled the child at Riamakogoti village yet she stayed at Nyanchwa. The appellant stated that the complainant contradicted herself by stating that the incident occurred at 2pm and at the same time stating that he, the appellant arrived home at 2.30pm. He pointed out what he said was another contradiction between the evidence of Pw3 who said that he (appellant) was identified by the complainant upon being apprehended and Pw2 who stated that the child had been taken to hospital. He further submitted that the police officer (Pw5) said he was taken to the police station on 26th April 2014. The evidence of the witness is that he was arrested on 25th April. He paused a question as to where he was and further submitted there was a contradiction in the date between the P3 Form and the charge sheet. He urged this court to allow the appeal.

Mr. Ochieng, Prosecution Counsel vehemently opposed the appeal and submitted that the case against the appellant was proved beyond

reasonable doubt. He stated that the victim positively identified the appellant who was known to her and that her evidence was corroborated by the doctor who testified that she had injuries in her private parts. Counsel submitted that the victim's evidence was also corroborated by Pw3's testimony that she told him that their herdsman had defiled her. As for her age, Counsel submitted that that was proved through a birth certificate. Counsel contended that all the ingredients of the evidence were produced. On the issue of the statements, he stated that once the court directed the prosecution to supply the appellant with statements, the appellant did not pursue the issue and his raising it at this stage is an afterthought. Counsel submitted that the allegation of conspiracy is not borne by evidence. Counsel urged this court to dismiss the appeal.

In reply, the appellant urged this court to give him a sentence which he could serve; that he wanted the life sentence reduced. I have considered the rival submissions carefully but as is my duty as the first appellate court, I have evaluated the evidence in the trial court so as to arrive at my own conclusion. It is my finding that the charge against the appellant was proved beyond reasonable doubt. Although there was no documentary evidence to prove the complainant's age, the medics who examined her at Borabu District Hospital put her apparent age at between 4/12 and five years old. This confirms that she was a child aged below 11 years and that is what was material to the charge against the appellant. She vividly narrated what the appellant did to her and it was confirmed by the examination at Borabu District Hospital that she had been defiled. There were lacerations in her genitalia and also presence of spermatozoa. This evidence offered corroboration to her evidence even though no corroboration is required – **see Section 124 of the Evidence Act**. The complainant knew the appellant well as he had worked in their home for two years. In his defence the appellant stated that there were no differences between him and the witnesses. They therefore had no reason to lie against him. The child was defiled and there is proof beyond reasonable doubt that it was the appellant who defiled her.

The appellant raised the issue of statements. **Article 50 of the Constitution** provides that the accused person has a right to be supplied with all the evidence that the prosecution intends to rely on. This is essential to his right to a fair trial. The right to a fair trial is one of the rights that cannot be limited – **see Article 25 of the Constitution**. The omission to supply witness statements is a violation of this right. It would however appear that the appellant was supplied with statements because after the court made the order the appellant indicated he was ready to proceed. The record also shows that he robustly participated in the trial and there is nothing to show that his right to a fair trial was violated.

The sentence meted is the minimum prescribed by the law. It was therefore lawful. Accordingly, this appeal has no merit. It is dismissed and the conviction and sentence are upheld.

Signed, dated and delivered in Nyamira this 29th day of March 2019.

E. N. MAINA

JUDGE