



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

(CORAM; CHERERE-J)

CRIMINAL APPEAL NO. 180 OF 2016

BETWEEN

OSCAR NAIBEI TUTEI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal against Conviction and Sentence imposed in Criminal Case Number 80 of 2013 in the Principal Magistrate's court at Kimilili by Hon. C.Menya (M) on 05.08.16)

JUDGMENT

The trial

1. **OSCAR NAIBEI TUTEI** (*hereinafter referred to as the Appellant*) has filed this appeal against his conviction and sentence on a charge of defilement of a girl contrary to section 8(1) as read with section 8 (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge are that

On 26th August, 2013 at around 04.00 pm at Chongeywo sub-location in Cheptais District within Bungoma County intentionally and unlawfully caused your genital organ namely penis to penetrate the genital organ namely vagina of T.N.S a girl aged 14 years

THE PROSECUTION'S CASE

2. The prosecution called 8 witnesses in support of the charges. **PW1 T. N** the complainant recalled that on the material date, she was going to the posho mill when she met the Appellant who she referred to as Moi and he defiled her. **PW2 PS**, the complainant's mother stated that complainant was born in November, 1998. She recalled that on the material date, the complainant returned from the posho mill crying and said that she had been defiled by Moi. She stated that the Appellant Oscar Naibei was normally referred to as Moi and that his home was about a kilometer from hers. **PW3 J S W** the complainant's father received the defilement report from his wife PW2 and accompanied complainant, PW2 and **PW8 W W S** to the police station and to hospital where complainant was examined and was issued with a P3 form. **PW4 F N N** stated that she saw the Appellant emerge from a maize plantation from where complainant emerged and told her that the Appellant had defiled her. She stated that she is the one that reported the incident to complainant's mother PW2. **PW5 EMMANUEL EMAKA** the investigating officer received complainant's report on 27.08.13 and after investigations caused Appellant to be charged. **PW6 GEORGE KEYA**, a clinical officer examined complainant on 28.08.13 and found that she had downs syndrome. She had tenderness on the labia majora with lacerations and her hymen was broken. He produced complainant's P3 form as **PEXH. 1**.

THE DEFENCE CASE

3. When the appellant was put on his defence, he denied the offence

4. The learned trial magistrate considered the evidence and finding the charge proved sentenced appellant to 20 years' imprisonment.

The Appeal

5. Aggrieved by the conviction and sentence, the appellant lodged the instant appeal on 22nd August, 2016. From the 8 grounds of appeal and written submissions filed by the appellant on 24th July, 2019, I have deduced two main issues: -

1. Complainant's age was not proved

2. Complainant was not cross-examined

6. Together with the grounds of Appeal, it is important to remind myself of the key ingredients necessary to establish a sexual offence under the Sexual Offences Act which are age of the victim, identity of the offender and penetration.

7. When the appeal came up for hearing on 06th August, 2019, Appellant submitted that he was wholly relying on submissions. Mr. Akello, learned Counsel for the state opposed the appeal and submitted that the complainant was not cross-examined because she was mentally challenged. It was additionally submitted for the state that the sentence of 20 years was lawful.

Analysis and Determination

8. 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."

9. I have considered the appeal in the light of the evidence on record, the grounds of appeal and submissions by the Appellant and on behalf of the State. I wish to start with the right of Appellant's right to a fair trial envisaged under the provisions of Article 50 of the Constitution which provides as hereunder:

(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

(2) Every accused person has the right to a fair trial, which includes the right—

(k) to adduce and challenge evidence; (Emphasis added)

10. Every witness whether minor or adult is supposed to be cross-examined by the accused person. It is a Constitutional right accorded to an accused person and it is upon the accused to decide either to cross-examine or not. There is a difference between an unsworn witness and the unsworn evidence of an accused person. (See Lawrence Iria v Republic [2017] eKLR)

11. In the case of Nicholas Mutula Wambua V. Republic, Mombasa Criminal Appeal No. 373 of 2006 (C.A), it was held that: -

"The second point we wish to discuss is whether or not a child witness, who gives evidence not on oath is liable to cross-examination. There appears to be a widespread misconception that a child witness who is allowed to give evidence without taking oath because of immature age, should not or cannot be cross-examined.....It would appear that misconception arises from a view that because accused persons are not cross-examined whenever they make unsworn statements in the defence, child witnesses who did not take the oath should be treated in the same way. Such a view is obvious of the peculiar protection given to an accused person in the form of a right to make an unsworn statement with no liability to be cross-examined.....Accordingly, all prosecution witnesses are liable to be cross-examined in order to test the credibility and the veracity of the witness. The Trial Courts should always observe that requirement of the law in criminal trials to obviate an otherwise stable case from being lost on that omission."

12. It is on record that when the complainant who is a minor testified, she was not cross-examined. No doubt the trial court adopted a wrong procedure. The issue which arises is whether the appeal should be allowed on account of failure by the trial Court to allow the complainant to be cross examined. It is true there is a violation of the appellant's constitutional right under Article 50 (k) of the Constitution to challenge the evidence of the minor witnesses. The evidence of the complainant implicates the Appellant. My view is that the court has to evaluate the other evidence independently without that of the complainant who were not cross examined and make its own finding. Failure to subject a minor witness to cross examination should not be an automatic licence to quash a conviction.

13. Concerning the age of the complainant, it is trite that the *penalty for various offences under the Sexual Offences Act, 2006 is determined by the age of the complainant*. An accurate assessment of the age of the child is a material factor in charging, convicting and sentencing.

14. In the case of Richard Wahome Chege v Republic [2014] eKLR, the Court of Appeal held as follows:

"On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth" It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 [the doctor] who examined the complainant, and the complainant herself".

15. Complainant's mother stated that complainant was born in November, 1998 and was therefore 14 years and 10 months when she was allegedly defiled. This fact was corroborated by the P3 form which shows that complainant was 14 years. The trial court found as a fact that

the age of the complainant was not formally proved and relied on the age of 14 years indicated on the P3 form. *On this, I agree with the finding by the trial court that the age of the victim was proved to be 14 years.*

16. Concerning the question of penetration, the law under **Section 2 of Sexual Offences Act** defines penetration to entail: -

“partial or complete insertion of a genital organ of a person into the genital organ of another person.”

17. The P3 form **PEXH.1** produced by **PW6 GEORGE KEYA**, who examined the complainant on 28.08.13 which was 2 days after the incident found that she had tenderness on the labia majora with lacerations and her hymen was broken. Clearly penetration was established.

18. Concerning the identity of the assailant, the only other witness who testified as to the identity of the assailant was **PW4 F N N** who stated that she saw the Appellant and complainant emerge from a maize plantation and that complainant told her that the Appellant had defiled her. She stated that she is the one that reported the incident to complainant’s mother PW2. Of interest to note however is that the complainant’s mother stated that the incident was reported to her by the complainant herself. The evidence by PW4 lacks corroboration and is insufficient to sustain the conviction.

19. An imprisonment term of 20 years’ imprisonment is a substantial length of time. A trial court has an obligation to ensure that the prosecution case is proved beyond any reasonable doubt. The evidence in this case fell short of that threshold of proof and the conviction cannot therefore be sustained. Reasonable doubt is logically derived from the evidence or the absence of evidence and if a single circumstance creating reasonable doubt in a prudent mind exists about the guilt of an accused, the same is sufficient to give an accused the benefit of doubts.

20. *Having said that*, I find that there are sufficient grounds for allowing this appeal.

21. 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 be set at liberty.

DATED AND DELIVERED IN BUNGOMA THIS 09th DAY August 2019

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Brendah

Appellant - Present

For the State - **Mr. Akello**