



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NANYUKI**

**CRIMINAL APPEAL NO 18 OF 2018**

**JOSEPH OCHIENG ONYANGO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Appeal from original Conviction and Sentence dated 7/5/2018 in Mararal PM Criminal Case No 997 of 2016 – R K Koech, PM)***

**J U D G M E N T**

1. The Appellant herein, **JOSEPH OCHIENG ONYANGO**, was convicted after trial of **defilement** contrary to **section 8(1) & (2)** of the **Sexual Offences Act, No 3 of 2006**. It was alleged in the particulars of the charge that on 02/04/2016 at about 09.00 hours in **Wamba District** in Samburu East Sub-County within Samburu County, he intentionally and unlawfully caused his penis to penetrate the vagina of one **BN**, a child aged 9 years. He was sentenced to life imprisonment.

2. The Appellant has appealed against both conviction and sentence upon the grounds (as they appear in the Petition of appeal)-

i. That the evidence laid before the trial court was inconsistent (grounds 1, 3, 7 and 9).

ii. That the conviction was based solely upon the testimony of the complainant, a child of tender years, without the trial court cautioning itself under the *proviso* to **section 124** of the **Evidence Act, Cap 80** (grounds 2 and 6).

iii. That the medical evidence tendered excluded the offences charged (grounds 4 and 8) and was in any case defective; and the trial court erred in relying upon it.

iv. That the trial court did not consider the defence of *alibi* put forward by the Appellant and dismissed it out of hand (ground 5).

v. That in light of recent developments in the law the sentence needs to be looked at by this court in the event that the conviction is upheld.

3. Learned prosecution counsel for the Respondent did not support the conviction for the following reasons:-

i. The testimony of the complainant was doubtful and unreliable.

ii. The medical evidence which the trial court relied upon did not corroborate any defilement and was in any case unreliable.

iii. The trial court did not caution itself under the *proviso* to section 124 of the **Evidence Act**.

4. As for the *alibi* defence, learned prosecution counsel pointed out that the same was raised only at the defence stage, and none of the prosecution witnesses were cross-examined upon it. On this point, it is to be noted that the Appellant was defended at his trial by the same learned counsel who represented him in this appeal. His *alibi* defence, if it was indeed a serious defence and not a mere afterthought, should have been raised as early as possible so that the prosecution would have a chance to try to disprove it. An *alibi* defence that is raised only at the last moment, after the accused has been put to his defence, smacks strongly of an afterthought that cannot be taken seriously. Nonetheless, it is not the duty of an accused person to prove his *alibi*; he need only put it forward. It is the duty of the prosecution to disprove it by evidence laid before the trial court and establish the guilt of the accused beyond reasonable doubt.

5. I have on my own read through the record of the trial court in order to evaluate the evidence and arrive at my own conclusions regarding the same. This is my duty as the first appellate court. I have borne in mind however that I did not see and hear the witnesses myself, and I have given due allowance for that fact.

6. The medical report (exhibit 2) produced in evidence by PW5 was itself defective in that it did not bear the name of the doctor who examined the complainant, or indeed the hospital where she was examined. In any case, there was no opinion expressed in the medical report that there was penetration. It was stated in the report that, "examination of (the) vagina was hard because of pain".

7. It was open to the trial court to rely solely upon the testimony of the complainant if it believed her to be telling the truth. Section 124 of the Evidence Act states -

***"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim 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 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."***

8. I have read through the judgment of the trial court. The court stated as follows towards the end of the judgment –

***"I found the evidence of the complainant coherent, cogent and truthful even though she was still suffering emotional trauma at the time of her testimony. Even though the complainant did not narrate her defilement ordeal until her mother returned, she cannot be faulted given her tender age and the unimaginable pain she underwent.***

***The complainant was suddenly thrust into a dark world of brutality and blatant betrayal of trust. In this world it was only her loving mother that she could confide in. As she waited for her return she was undergoing immense pain. While being examined in hospital she was anxious. She resisted the doctor's vaginal examination which could have reminded her of her encounter with the Accused.***

***I do find the Accused's statement of defence to be nothing more than a statement of mere denial. This is understandable given the weight of the charges facing the Accused. The defence witnesses lied to court in order to extricate the Accused. I do find that the Prosecution has proved its charges against the Accused under the main count.***

***I do find the Accused guilty as charged and do proceed to convict him accordingly contrary to section 215 of the Criminal Procedure Code. In view of the above I will not make any finding under the alternative charge. It is ordered accordingly."***

9. Clearly the trial court was satisfied that the complainant was telling the truth and it recorded its reasons for that finding. However, the court did not base the Appellant's conviction solely upon the testimony of the complainant. Earlier in the judgment the court had said -

***"The medical evidence on record shows that the complainant was sexually penetrated and her hymen broken."***

10. With respect to the trial court, the medical report (P3) produced in evidence did not state that there was penetration. It stated quite clearly that examination of the vagina was "hard" because the complainant was in pain and resisted examination. Indeed the hymen was found to be broken, but there was no indication as to when it might have been broken. Further, no spermatozoa were found in the vagina.

11. Had the trial court based the conviction solely upon the testimony of the complainant, it would have been possible to uphold it because indeed the trial court recorded its reasons for being satisfied that the complainant was telling the truth. But clearly the trial court found corroboration of the complainant's testimony in the medical evidence. A court will seek corroboration because it finds the testimony concerned unsafe to solely rely upon. In this case corroboration was found in evidence that was defective (for reasons already given) and which, as a matter of fact, did not provide the corroboration sought.

12. The upshot is that I find that the Appellant's conviction is not safe and cannot be allowed to stand. It is hereby quashed and the sentence imposed set aside. The Appellant shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

**DATED AND SIGNED AT NANYUKI THIS 30<sup>TH</sup> DAY OF OCTOBER 2019**

**H P G WAWERU**

**JUDGE**

**DELIVERED AT NANYUKI THIS 31<sup>ST</sup> DAY OF OCTOBER 2019**