



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL APPEAL NO. 41 OF 2018

BONIFACE ORINDA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the entire Judgment delivered on 16th November 2018 by Hon. Juma–Chief Magistrate, in the Chief Magistrate’s Court at Narok in Criminal Case No. SOA Case No. 41 of 2017 R –vs- Boniface Orinda)

J U D G E M E N T

1. The appellant has appealed against his conviction and sentence of ten years’ imprisonment in respect of the offence of indecent act contrary to section 11 (1) of the Sexual Offences Act No 3 of 2006.
2. The state supported both the conviction and sentence.
3. In this court, the appellant has raised four grounds in his petition of appeal.
4. In ground 1, the appellant has faulted the trial court in failing to appreciate that the prosecution had failed to prove its case beyond reasonable doubt. In this regard, the evidence of the complainant (PW 1) was that on 5th June 2017 she and her friend, M visited her sister M at Sogoo. The complainant had not asked for permission from school. They arrived at Sogoo and went to a hotel and bought tea. While there the appellant arrived and greeted them. It was her first time to see the appellant. M and the appellant walked out. They then returned. M then told her that they go to the appellant’s place. They went to his place and the complainant remained at the gate to the appellant’s house. The appellant then pulled her. She tried to resist but the appellant produced a rungu and threatened her. She tried to scream, but he threatened her.
5. M told her that they go into the house of the appellant. upon entry into the house he locked them in his house. The appellant then put M in one room and the complainant in another room.
6. Thereafter, the appellant went to where she was and removed her shoes and clothes including her panty. He also removed his clothes. “*He used what he uses to urinate to insert in mine which I use for urinating. We were on the bed. He had sexual intercourse with me. He did from 10.00 p.m upto 10.30 p.m. I tried to scream and he told me not to try. He told me to keep quiet. I called my friend who did not come. The teacher rose from me and we slept.*” She then sat until morning and left with her friend M to her sister’s place.
7. Furthermore, in the morning a report was made to the AP camp. The AP in turn reported the matter to the police. He was arrested and charged with defilement and indecent act.
8. The complainant was taken for medical examination at Narok referral hospital. The clinical officer, Isaac Kenyanya (Pw 3) examined her. Upon examination on 8th June 2017, he found as follows. She told Pw 3 that she knew the appellant. “*The vaginal orifice was pink in colour, normal/colour did not see tears or lacerations. Her hymen was intact. Pregnancy test was negative. Urine test was done, red blood cells 2+ was seen-this meant she had received menses.*” The report of Pw 3 was admitted in evidence as P3-Exh 2.
9. It is clear from the evidence of Pw 3 that the complainant did not have sexual intercourse with the appellant as she claimed. If that were so, the medical evidence of Pw 3 could have confirmed it. It therefore follows that the complainant was not a truthful witness. It also follows from her evidence that she knew the appellant before this incident according to Pw 3 she was not telling the court the truth when she testified that she did not know the appellant before this incident.
10. The appellant has submitted that corroboration is required, which is lacking in this case. The corroboration required according to the Court of Appeal in ***Rex v. Manilal Ishwerlal Purchit (1942) 9 E.A.C.A 58*** at page 61 is as follows:-

“...the corroboration which should be looked for is as laid down in R vs Baskerville.....some additional evidence rendering it

probable that the story of the accomplice is true and that it is reasonably safe to act upon it. It must be independent evidence which affects the accused by connecting him or tending to connect him with the crime, confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it. It is of course not necessary to have confirmation of all the circumstances of the crime. Corroboration of some material particular tending to implicate the accused is enough and whilst the nature of the corroboration will necessary vary according to the particular circumstances of the offence charged, it is sufficient if it is merely circumstantial evidence of his connection with the crime. Corroboration may also be found in the conduct of the accused.”

11. Furthermore, where a court has to convict an accused person on uncorroborated evidence of a complainant, it has to warn itself of the danger of so doing but having done so, the court may convict in the absence of corroboration if the court is satisfied that the complainant is truthful: see **Thuo v Republic [1988] KLR 763**.

12. Finally, in **R v. Cherop A. Kinei & Another 3 EACA 124 the Court of Appeal for Eastern Africa observed** “*that it is the practice of this court to look for corroboration in sexual offences.*”

13. In the instant appeal, the complainant was clearly untruthful. Therefore, the issue of looking for corroboration did not arise at all. Before corroboration is looked for the court must first make a finding that the complainant is a truthful witness.

14. The upshot of the foregoing is that the trial court erred in law in finding the complainant to be a truthful witness.

15. Furthermore, the trial court pronounced itself as follows. “*I would not gauge her understanding of how sexual intercourse could go because the doctor found her hymen intact. If the accused removed her clothes and placed his sexual organs on hers then clearly an offence of an indecent act is established.*” A finding of this nature could only be arrived at only if the complainant had been found to be a credible witness by the trial court. And there is no way the complainant could have been found to be a credible witness when the medical evidence materially contradicted her evidence that the appellant penetrated her vagina. She herself told the clinical officer that herself and friend M the appellant before this incident. In her evidence in court she told the court that she did not know the appellant before this incident. She was clearly a dishonest witness; whose evidence was not worthy of credit. I therefore uphold ground 1 that the offence was not proved beyond reasonable doubt.

16. The rest of the grounds are inconsequential and I find it unnecessary to consider them.

17. This is a first appeal. As a first appeal court I have independently re-assessed the entire evidence and as a result I find that the offence against the appellant was not proved beyond reasonable doubt.

18. The appeal succeeds with the result that the conviction and sentence are hereby quashed. The appellant is hereby set free unless held on other lawful warrants.

Judgement signed, dated and delivered in open court at Narok this 30th day of October, 2019 in the presence of the appellant and Mr. Mwangi for the state.

J. M. Bwonwong’a

Judge

30/10/2019