REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. 100 OF 2018

BETWEEN

CHARLES OTIENO AWINDA...APPELLANT

AND

REPUBLIC..RESPONDENT

(Appeal against conviction and sentence in Criminal Case S.0 10 of 2016

Chief Magistrate's Court at Kisumu by Hon. W.K.Onkunya (SRM) on 06th April, 2017)

JUDGMENT

Background

1. The Appellant herein **CHARLES OTIENO AWINDA** has filed this appeal against conviction and sentence on a charge of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006 (***the Act***). The offence was allegedly committed against MAM a girl aged 14 years on 05th May, 2016.

2. The prosecution called 6 witnesses in support of the charges. **PW1,** the complainant herein stated she was in class 7. She recalled that on 05.05.16 at about 09.00 pm, she was going to sleep at her grandmother's house when someone who had a torch and who identified himself as Tabu grabbed her jacket and told her that she was under arrest for loitering. That the said person then took her to a flower bed that was dark and defiled her. She stated that there was electric lighting at the scene she met the said person whom she identified as Appellant whom she knew before and whose home is about 1 km from theirs. She stated that she reported the matter to her father and was later taken to hospital and examined.

3. **PW2 TMN**, the complainant's father stated that complainant was 16 years old and that he had escorted her to hospital after she informed him that she had been defiled.

4. **PW3 Dr. Barbara Otieno** filled her P3 form ***PEXH. 2*** on 09.05.16 and from records obtained from the Post Rape Care Form which showed that complainant was examined on 06.05.16 and found with bruised labia majora and minora, hymen was torn and she had mild vaginal bleeding.

5. **PW4 Richard Ouma Adede** a clinical officer examined complainant on 06.05.16 and filled a Post Rape Care Form ***PEXH. 3*** which showed that complainant was examined and found with bruised labia majora and minora, hymen was torn and she had mild vaginal bleeding. It was his evidence that there was evidence of penetration.

6. **PW5 Richard Kimutai** Langat a government analyst stated that he received a pink dotted blood stained pant, blood stained skirt, buccal swabs from the Appellant and the complainant and upon examination found that that the DNA profiles generated from the pink dotted blood stained pant, blood stained skirt marched the DNA profile of the Appellant. He produced his report dated 13.06.16 as **PEXH.5**.

7. **PW6 Cpl Amina Mohamed**, the investigating officer received complainant's report on 06.05.16 and referred her to hospital. She collected complainant's pant **PEXH.6** and skirt **PEXH.7** and buccal swabs of Appellant's and the complainant's saliva and sent them to government analyst for analysis and later caused the Appellant to be arrested and charged.

8. In his sworn defence, the Appellant denied the offence and stated that he was at home with his wife and children on the material night and time. He also stated that he was framed because there is bad blood after he refused to sell land to complainant's father.

9. *In a judgment* dated 06th April, 2017, *the A*ppellant was convicted and sentenced to 20 years' imprisonment.

Appeal

10. Aggrieved by the conviction and sentence, the Appellant lodged the instant Appeal on 06.11.18. From the amended grounds of Appeal and submissions filed on 03.10.19, the Appellant mainly states that the prosecution case was not proved beyond reasonable doubt.

11. When the appeal came up for hearing on 03.10.19, Appellant stated that he was wholly relying on the amended grounds of appeal and written submissions filed on 03.10.19. The state through Ms. Gathu, Senior Prosecution Counsel opposed the appeal and relied on written submission filed on 03.10.19.

Analysis and Determination

12. 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.''**

13. In order to consider this appeal, it is important to remind myself of the key ingredients necessary to establish a sexual offence under ***the Act***. These are the age of the victim, penetration and identity of the offender.

14. In the case of **Alfayo Gombe Okello v Republic [2010] eKLR,** the Court of Appeal stated that:

> **In its wisdom, Parliament chose to categorise the gravity of that offence (defilement) on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8 (1).**

15. It is therefore important for the prosecution to prove the age of a victim since age determines the sentence to be meted out on the offender. The trial court found as a fact that the complainant's age was proved to be 14 years by way of a baptism card PEXH. 1 which shows that she was born on 05.09.01.

Penetration

16. Section 2 of ***the 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 bruised labia majora and minora, torn hymen was torn and mild vaginal bleeding from complainant's vagina proved without a doubt that there was evidence of penetration.

Identity of the offender

18. The incident occurred at night and the means by which the Appellant was identified by recognition is therefore critical.

19. The difference in approach between identification and recognition was expressed thus by Madan J.A for the Court in **Anjononi and Others vs The Republic [1980] KLR**;

> **"…………………This, however, was a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in Siro Ole Giteya Vs. The Republic (unreported.)"**

20. That being the case, it was necessary for the trial court to test the reliability of such identification. In the case of **Maitanyi vs Republic (1986) KLR 198**, *the Court of Appeal* Court held: -

> **"………………………………………That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its size, and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into.**

21. In the recent case of **John Muriithi Nyagah v Republic [2014] eKLR**, the Court of Appeal held: -

“In testing the reliability of the evidence of identification at night, it is essential to make an inquiry of the relevant circumstances such as the nature of the light, the strength of the light, its size, its position relative to the suspects etc.”

22. The court record shows that the learned trial Magistrate held that the Appellant was known to the complainant and was identified by security lighting at the scene. While it is conceded that the Appellant was not a stranger to the complainant, the trial court did not at all, evaluate the nature of the light, the strength of the light, its size, and its position relative to the Appellant to test the reliability of the evidence of identification at night.

23. In the case of **Simiyu & Another V. R (2005) 1 KLR 193** the Court of Appeal expressed itself on this point as follows: -

“In every case in which there is a question as to the identity of the accused, the fact of their having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by person or persons who give the description and purport to identify the accused and then by the person or persons to whom the description was given. The omission on part of complainant’s to mention their attackers to the police goes to show that the complainants were not sure of the attacker’s identify.”

24. The trial court record discloses that the complainant reported the incident to her father immediately it happened. Her father in his testimony only stated that the complainant told him what had happened to her. His evidence did not disclose that the complainant had named her assailant at that time when her memory was still fresh.

25. In light of the above, I have come to the conclusion that complainant did not name the Appellant immediately she made a report to her father because the circumstances were not favourable for positive identification. Such non-disclosure ought to have sowed a seed of doubt in the mind of the learned trial magistrate concerning the identification of the Appellant and the doubt should have been resolved in Appellant’s favour.

26. The absence of inquiries as to the light condition at the scene of crime by the trial Magistrate notwithstanding, this court is under a duty to consider if there is other evidence that points to the Appellants’ culpability.

27. The trial court found that the government analyst’s report corroborated the complainant’s evidence that she was defiled by the Appellant.

28. The law relating to collection of samples for DNA sampling is to be found in Section 122A of Penal Code which provides as follows:

(1) A police officer of or above the rank of inspector may by order in writing require a person suspected of having committed a serious offence to undergo a DNA sampling procedure if there are reasonable grounds to believe that the procedure might produce evidence tending to confirm or disprove that the suspect committed the alleged offence.

(2) In this section—

“DNA sampling procedure” means a procedure, carried out by a medical practitioner, consisting of—

(a) the taking of a sample of saliva or a sample by buccal swab;

(b) the taking of a sample of blood;

(c) the taking of a sample of hair from the head or underarm; or

(d) the taking of a sample from a fingernail or toenail or from under the nail,

for the purpose of performing a test or analysis upon the sample in order to confirm or disprove a supposition concerning the identity of the person who committed a particular crime;

“serious offence” means an offence punishable by imprisonment for a term of twelve months or more.

29. There is no evidence that the buccal swab from the Appellant was obtained by an order in writing by a police officer of or above the rank of inspector. PW6 Amina Mohamed is a corporal.

30. Section 122C of Penal Code on the other hand provides that: -

Nothing in section 122A shall be construed as preventing a suspect from undergoing a procedure by consent, without any order having been made:

Provided that every such consent shall be recorded in writing signed by the person giving the consent.

(1) **Such consent may, where the suspect is a child or an incapable person, be given by the suspect’s parent or guardian.**

31. There is no evidence that the Appellant gave written consent to undergo the DNA sampling procedure.

32. From the foregoing, it is apparent that DNA samples were unlawfully obtained from the Appellant and ought to have been rejected by the trial court under the provisions of Section 122D of the Penal Code which provides that:

> **The results of any test or analysis carried out on a sample obtained from a DNA sampling procedure within the meaning of section 122A shall not be admissible in evidence at the request of the prosecution in any proceedings against the suspect unless an order under section 122A or a consent under 122C is first proven to have been made or given.**

33. Accordingly, I find that the case against the Appellant was not watertight as to sustain a conviction. In the end 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.

DELIVERED AND SIGNED IN KISUMU THIS *21st* DAY OF *November*, 2019

T. W. CHERERE

JUDGE

In the presence of-

Court Assistant - Amondi

Appellant - Present in person

For the State - Ms. Gathu