REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 154 OF 2016

(DEFILEMENT)

(CORAM: J.A. MAKAU - J.)

NATHAN OWINO OJIGO.....APPELLANT

VS

REPUBLIC.....RESPONDENT

(Being an Appeal against both the Conviction and Sentence dated 04.11.2016 in Criminal Case No. 120 of 2016 in Bondo Law Court before Hon. M. Obiero - PM)

J U D G M E N T

1. The Appellant **NATHAN OWINO OJIGO** was charged with an offence of Defilement contrary to **Section 8(1) and 8(4) of the Sexual Offences Act No. 3 of 2006**. The particulars of the charge is that on diverse dates between 1st August 2015 and 29th January 2016 at [particulars withheld]**, Ugenya Sub-County** within **Siaya County**, intentionally and unlawfully caused his penis to penetrate the vagina of **EAA**, a child aged 16years.

The Appellant also faced an alternative charge of committing an indecent act with a child contrary to **Section II(1) of the Sexual Offences Act No. 3 of 2006.** The particulars of the alternative charge are that on same times, same place, the Appellant intentionally and indecently touched the vagina of **EAA** with his penis, a child aged 16 years.

2. After full trial, the Appellant was found guilty, convicted and sentenced to serve 15 years imprisonment.

3. Aggrieved by the conviction and sentence, the Appellant preferred this appeal setting out three (3) main grounds of appeal being as follows: -

a) That, the Appellant was denied the Prosecution witness statements and all the documents the Prosecution intended to rely on in the case hence he could not fully prepare for his defence.

b) That, the trial court was prejudiced to delay a quick hearing and determination of that matter fairly.

c) That, the trial Learned Magistrate erred in law by failing to observe that Article 200 of CPC was not adhered with.

4. At the hearing, the Appellant appeared in person and in support of his appeal, he submitted written submissions to the Court and had nothing else to add. He however relied on his amended grounds of appeal being as follows: -

> ***(a) That, the Appellant was not accorded a fair trial under Article 50(2)(j) of the Constitution.***
>
> ***(b) That, the Trial Court erroneously convicted the Appellant without considering that he was denied the opportunity to cross-examine PW1(the Complainant).***
>
> ***(c) That, the Trial Magistrate erred in law and in fact to convict the Appellant relying on the medical evidence adduced by PW3 without considering that the same lacked merit in totality.***
>
> ***(d) That, the Trial Court erroneously rejected the Appellant's defence without considering that the Prosecution case was not proved beyond reasonable doubts in the absence of independent witness to prove the Appellant's mode of arrest.***

5. The Appellant in his written submissions, submitted that he was denied an opportunity to adequately prepare for his defence; as he was denied opportunity to receive and view beforehand the evidence the Prosecution intended to adduce against him; contrary to **Article 50(2)(j) of the Constitution of Kenya 2010**; referring to the case of **Juma and Others V Attorney-General (2003) EA 461**, where it was held that the State is obliged to provide an accused person with copies of witness statements and relevant documents; that the Appellant was denied the opportunity to cross-examine, PW1, the Complainant, who gave evidence partially, was stood down and never recalled; that the medical evidence produced by PW3, lacked merit in its totality and that the Appellant's defence was not given due consideration.

6. M/s Maurine Odumba, Learned State Counsel, concedes the appeal on the following grounds; that PW1, the Complainant partially gave her evidence and was stood down, however, she was never recalled back to testify; that she did not identify the Appellant as her Assailant nor did she state he was her boyfriend; that without the evidence of the victim, the appellant ought not to have been convicted; that the alleged victim was aged around 17 years and not a child of tender years to require someone else to give evidence on her behalf and that PW2 did not state the source of evidence.

7. I am the First Appellate Court and I have subjected the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I had no opportunity to see and hear the witnesses and so I cannot comment on their demeanour. I have drawn my conclusions after due allowance. I am guided by the case of **Kiilu and Another V. R (2005) 1 KLR 174** where the court of Appeal held thus:

> ***"an appellant in a 1st appeal is entitled to expect the whole evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision in the evidence. The 1st appellate Court must itself weigh conflicting evidence and draw its own conclusions."***
>
> ***It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; only then can it decide whether the magistrates finding should be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."***

8. The record of appeal contains the Prosecution case and the Defence and I need not reproduce the same save to make a brief summary of the Prosecution case and the Defence.

9. The Prosecution case is that: PW1, EAA, stated that she was 17 years and the Appellant was not her boyfriend at which point, she was stood down for no apparent reason and she was not recalled thereafter. PW2, B A, mother to PW1, stated that in August 2015, PW1 was in Standard 8 at [particulars withheld]School, when other children started telling her that the appellant was seducing her daughter. That the accused was her teacher. That one day, PW1 accused the appellant; that was around 6:00pm. PW2 then called the Headmaster and informed him and the following day, she went to the school and

explained what had happened. That after the school closed the whole of December, PW1 disappeared. That in January 2016, the Headmaster gave PW2, a letter to take to Akala Police Station. That she told the Police she suspected her daughter was with the Appellant. That after 3days, PW1 went home and told PW2 she was at Kisumu and after 3days she disappeared again and that PW2 went to the Appellant's home and found PW1 with the Appellant's parents, that PW1 later went back to PW2's home and left again. That at 5:00am, PW2 led police to Nathan's home and found his daughter and Nathan in the house. That both were arrested and the girl was released to PW2 at 11:00am. She identified Nathan as the accused in the dock. The letter by the teacher identified as MFI-1 dated 8/1/2016, Birth certificate identified as MFI-2 stating date of birth as 26/2/1999.

10. PW3, a Clinical Officer, based at Akala Health Centre, identified P3 Form and clinical notes for EAA which he filled on 29/1/2016. PW1 had reported to have been defiled on 26/1/2016 as she had been living together between 12.12.2015 and 29.1.2016 with the Appellant when they were arrested. PW3 testified he did not notice any tears on the genitalia; cervix reddened, with discharge on the posteria opening. Laboratory tests were negative but there was human spermatozoa. PW3 concluded that the girl had a recent sexual encounter. He produced P3 Form as exhibit 3 and P3 Form for Appellant but nothing else was noted in his clothing. That on his urine, purse cells and spermatozoa were seen making PW3, conclude he had a recent sexual activity. P3 Form produced as exhibit 4.

11. PW4, No. 67148, Cpl John Turunya, received a complaint from PW2 that her daughter aged 17 years had been missing from home. He received a letter from the school and booked her report on 28/1/2016. He received a report that EAA and the Appellant were living together in the Appellant's house. That he proceeded to the Appellant's home and found the two sleeping together on 29/1/2016 at around 5:00am. They arrested the two and escorted them to Akala Police Station and then Akala Health Centre, where the P3 Forms were filled. He later charged the Appellant with the offence. He produced Birth certificate of the Complainant as exhibit 2 and produced P3 Form of the Complainant as exhibit 1.

12. On the Appellant being put on his defence, he gave unsworn defence and opted to call two witnesses. The Appellant's defence is that in the month of August 2015 and January 2016, he was working as a *boda boda* at Akala. That on 17/1/2016, he was at his house sleeping when police officer's came to his house in company of a girl, a woman and a man. That when he opened the door he was arrested; escorted to Akala Police Station; detained and later charged with this offence.

13. The Appellant contends that he was not accorded fair trial under **Article 50(2)(j) of the Constitution of Kenya, 2010. Article 50(2)(j) of the Constitution of Kenya** provides: -

> ***"50. (2) Every accused person has the right to a fair trial, which includes the right: -***
>
> ***(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence…"***

The Appellant's contention is that he was denied an opportunity to prepare his defence, in that he was not supplied with the statements of witnesses being evidence that the Prosecution intended to adduce against him. The **Constitution of Kenya** is clear that an accused is entitled to witness statements before commencement of the case against him so as to prepare his defence. I have perused the court proceedings and the same are silent as regards furnishing the accused herein with the statements. The burden of proof in criminal cases always lies with the Prosecution and never shifts. The State did not in this appeal address court on this ground. In view of the above, I am satisfied that the Prosecution did not rebute the Appellant's assertion that he was not supplied with the witness statements. I therefore find and hold that the Appellant did not have fair trial and his constitutional rights to having fair trial were violated. The trial was therefore null and void.

14. The Appellant contends that he was erroneously convicted as he was denied an opportunity to cross-examine the key witness, PW1, the Complainant. In an offence of defilement, the Prosecution is required to establish the following ingredients: -

(i) the age of the victim,

(ii) the issue of penetration,

(iii) the issue of recognition or identification.

In the instant case, PW1, the Complainant gave her evidence partly. She did not in her evidence, connect the Appellant with the offence of defilement. She did not identify him as the person who was well-known to her nor did she state that the Appellant has had any sexual intercourse with her. The Prosecution called her to give evidence and before she completed her evidence, for no apparent reason, she was stood down. The trial court did not record the reason why she was stood down and in doing so, PW1 being not a child of tender years, her evidence could not be adduced through her next friend. The standing down of PW1 and never calling her again, for at least cross-examination, the Prosecution prejudiced the Appellant's defence.That without assigning reason for standing down the witness, this court, only drew an inference that she was stood down, as she was not giving formidable evidence in support of the Prosecution case. That the Prosecution was apprehensive if the witness continued giving evidence and later subjected to cross-examination she would exonerate the Appellant. That all witnesses who give evidence in a criminal case should be availed to be subjected to cross-examination by the adversely mentioned or by the accused person or by his counsel. Cross-examination in criminal matters is one of the principles of ascertaining fair hearing and a denial of such constitutional right to the accused, in my view vitiate any resultant conviction of the accused person. The main purpose of the cross-examination is doubled edged; first to elicit information concerning the facts in issue, that is favourable to the party on whose behalf the cross-examination is conducted; and secondly to test the veracity of witness statement or cast doubt upon the accuracy of the evidence in chief against such party. The evidence that is not subjected to cross-examination is weak and doubtful and no much weight should be placed on it. The trial court misdirected itself on relying on the PW1's evidence, which was not subjected to cross-examination. The trial court was in error in finding that the refusal by the victim to testify is not fatal to the prosecution case. Without the Complainant having identified the assailant and without stating the name or identifying the person who defiled her, how can failure of her testifying not be fatal to the Prosecution case? I find that her failure to give evidence being a child of not tender years, was fatal to the Prosecution case. She did not want to tell lies maybe to the Court. PW1's evidence was vital evidence as regards whether she was found with the Appellant in his room and whether they had sexual intercourse. In view of the fact that no forensic evidence was produced to connect the Appellant with having had sexual intercourse with PW1; and that the laboratory tests did not connect the Appellant with having defiled PW1, I find PW1's evidence was vital and its omission is fatal to the Prosecution case. The evidence of PW2, PW3 and PW4 in absence of PW1's evidence, I find is shaky and not strong enough to found conviction.

15. The Appellant gave unsworn evidence. He contends his defence was not considered. I have perused the Court's judgment and I have noted indeed the trial court in its judgment only reproduced the Appellant's defence but apart from that the trial court did not analyse nor evaluated nor considered the defence. It was not one of the framed issues for consideration. The court said nothing about it, in the judgment. The failure to consider the same was an error, however, as I have considered the defence herein, the Appellant is not prejudiced. The appellant's defence may be, could have either been or not been dislodged, had PW1 given evidence and subjected to cross-examination by the Appellant. The appellant's defence, was therefore not dislodged and proved to be untruthful and I find the same was dismissed without reasons.

16. The State concedes this appeal. I have considered the appeal and I find the State has correctly conceded the Appeal.

17. The Upshot is that the appeal succeeds. That the conviction is quashed and sentence set aside. The Appellant is set at liberty forthwith unless otherwise lawfully held.

DATED AND SIGNED AT SIAYA THIS 26TH DAY OF JANUARY 2018

HON. J.A. MAKAU

(JUDGE)

DELIVERED IN OPEN COURT ON 26TH DAY OF JANUARY 2018

In the presence of:

Court Assistants:

1. Laban Odhiambo

2. Brenda A. Ochieng

Appellant in Person - Present

M/S Odumba: for State

HON. J.A. MAKAU

(JUDGE)