



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT HOMA BAY
CRIMINAL APPEAL NO.20 OF 2017

BETWEEN

MAXWELL OTIENO ANYANGO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from original conviction and sentence in the SRM's court at Mbita in Sexual Offences act No.25 of 2016 dated 15.03.2017 – Hon. Japheth Bii, RM)

JUDGMENT

1. MAXWEL OTIENO ANYANGO (the appellant) was convicted on a charge of defilement contrary to **Section 8 (1)** as read with **Section 8 (3)** of the **Sexual Offences Act** and sentenced to serve 20 years imprisonment.

The particulars of the charge are that on diverse dates between 16/09/2016 and 18/09/2016 in **MBITA [1]** Sub County in Homa Bay County, he intentionally and unlawfully caused his penis to penetrate the vagina of **S A O**, a child aged 16 years. He denied the offence.

2. SAO (PW1) told the trial court that she had known the appellant over a long period of time as her boyfriend. She stated:-

“I knew him when I was in class 4 we come from the same village I was born in 2001.”

She confirmed that on 16/09/2016 she accompanied the appellant to his house.... actually he lived with his grandmother. They had sex that night, then she left for her parents' home at 5.00 a.m., to pick her school uniform.

3. Thereafter they again had sex in September during the day, although she could not remember the date. When she returned home, her mother asked where she had been, and she claimed to have been at her grandmother's home. However someone had seen her in the company of the appellant and informed her mother, so the matter was reported to the village elder. So the pair was arrested and placed in cells.

4. PW2 (**S O**), **SAO's** father told the trial court he could not remember her age, but recalled that PW1 had left home and did not return. The next day she was seen in the company of the appellant who was their neighbour; so he made a report to police.

5. GEORGE MBAKA (PW3) a Clinical Officer at Mbita sub county hospital examined PW3 and found that her labia minora and majora was intact but her hymen was broken **“but not recent”**,. However there

was evidence of penetration because there was presence of epithelial cells showed disturbance of the vaginal wall.

6. The appellant in his unsworn testimony described how on 19/09/2016 while on his way from the late he was arrested and taken to the police station. He denied knowledge of the offence.

7. The trial magistrate in his judgment held that the appellant was well known to PW1, who described him as her boyfriend and that they had had sex more than once. He was persuaded that PW1's description of what took place inside the appellant's house, where they both removed their clothes, he put on a condom then they got into bed and had sex, was confirmed with the medical evidence.

8. The trial magistrate also found that PW1's evidence as regards being in the company of the appellant was corroborated by Pw3 who said the appellant and PW1 were spotted by one **OTIENO**.

9. As for her age, the trial magistrate held that the birth notification produced showed her date of birth as 11/11/2001 meaning she was just 2 months shy of turning 16.

10. The appellant's defence was rejected as being baseless.

11. The appellant contested these findings on grounds that there was no evidence that the complainant was not found in his house nor were they found together. Further that the trial magistrate erred in failing to find that failure by the prosecution to call one **OTIENO** whom her father said was the source of information regarding him being seen with PW1 and that she had been held hostage inside the appellant's house for four days.

12. The appellant canvassed his appeal by written submissions where he urged the court to find that the failure to call the named **OTIENO** as a prosecution witness was fatal to the prosecution case – and that PW2 in one breath in evidence in chief claimed the person who spotted them together was **OTIENO** but in cross examination he said it was **ODHIAMBO**.

13. In opposing the appeal, **MR. OLUOCH** on behalf of the state submitted that there was no doubt the appellant had sex with PW1 because even in cross examination the only question he asked was whether he had forced her. He pointed out that due to PW1's age, the issue of consent could not arise.

14. Further, that the trial magistrate invoked the provision of **Section 124 Evidence Act** when convicting the appellant and the appeal ought to be dismissed for lack of merit.

15. There is no dispute from the medical evidence that PW1 had engaged in sexual activity over a period of time. Was the accused the person indulging with her in her trysts? It is her evidence that the appellant was her boyfriend with whom they had sampled preferences of the flesh on many past occasions. Did anyone even see them together – apparently none of the witnesses who testified claimed that, but her father said one **OTIENO** had given him such information. The said **OTIENO** did not testify.

16. What is more upon cross examination PW2 said:-

“One Odhiambo saw you with the girl.”

17. So who saw the pair together – due to these contradictions it was important that the person who claimed to have seen the pair together ought to have testified.

18. With that contradiction then it was imperative that the individual whether **OTIENO** or **ODHIAMBO** be called to testify and failure to do so leads to the inference that were he to be called to testify he'd probably have given adverse evidence – See **BUKENYA and 5 OTHERS –VS- UGANDA 1975 EA Pg 578**.

19. This then leads to the next issue – PW1 was a minor, and was therefore a single witness as regards

who was involved in the offence. **Section 124** of the **Evidence Act** provides that:-

“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 the 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.”

20. With the greatest of respect to the trial magistrate – PW2’s evidence cannot be corroboration; it was a report to him by someone who did not testify. The trial magistrate did not record why she believed SAO especially in view of the contradiction observed regarding the source of information.

21. Also the submissions by Mr. Oluoch does not hold because I have perused the entire trial court record and nowhere did the trial magistrate recorded why he believed PW1 was telling the truth.

22,. Due to these two last observations, I find that the conviction was unsafe and is quashed. The sentence be and is hereby set aside.

23. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

Delivered and dated this 22nd day of January, 2018 at Homa Bay.

H.A. OMONDI

JUDGE

[1] Initials used to protect the minor’s identity