REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT LODWAR

HIGH COURT CRIMINAL APPEAL NO. 21 OF 2017

ANDREW LOPEYOK ATIIR …… APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

An appeal from the conviction and sentence in original Lodwar PMCR 749/2014 delivered on 4th May, 2017 by C.M Wekesa – Senior Resident Magistrate)

J U D G M E N T

The appellant **Andrew Lopoyo Atiir** was charged with offence of Defilement contrary to **section 8(1) as read with section 8(4) of the sexual offences Act No.3 of 2006.**

The particulars of the offence are that on the 6th day of December, 2014 in Turkana Central Sub-county within Turkana County, caused his penis to penetrate the vagina of **J A** a girl aged 16 years.

After full trial in which the prosecution called 3 witnesses and the appellant gave unsworn evidence, he was found guilty, convicted and sentenced to serve fifteen (15) years imprisonment. The appellant was dissatisfied with both the conviction and sentence and preferred this appeal on the following grounds.

1. That the learned prosecution counsel and the trial magistrate erred in law and facts when they failed to observe that he was lured at Kalokol Police patrol base and upon going there I was brutally based and nabbed to date without doing anything wrong probable to prove his guilty beyond any reasonable doubt.

2. That the learned prosecution counsel and the trial magistrate erred in law and facts when they failed to observe that the clinical officer was un uncle to the complainant and his entire alibis was marred and barred by incurable irregularities based on family background.

3. That the learned prosecution counsel and the trial magistrate erred in law and facts when they failed to observe that he was not taken for medical check-up along with the complainant.

4. That the learned prosecution counsel and the trial magistrate erred in law and facts when they failed to observe that there was no eye witness to prove him guilty beyond any reasonable doubt.

5. That the learned prosecution counsel and the trial magistrate erred in law and facts when they allowed an outdated mobile phone exhibit at the close of the prosecution case to hunt the innocent appellant for nothing.

The evidence before the trial court was that PW1 J E a girl aged 16 years old was on 6/12/2014 at home where she made mandazi and went to sellthem at the bridge. At 5.30pm she called a motor cycle rider to take her home. The riders he called is appellant whom she knew before as Attir. He came and she rode on the motor bike as a Pillion passenger with instructions to appellant to take her to her home.

After riding for some distance the appellant changed course and went towards Atirai. He then alighted and pulled the complainant, hit her on the cheek. He then tore her under pant and inserted his penis into her vagina. He had sexual intercourse with her for about two hours. He then took her phone and money and went away. She reported the matter to police and also went to hospital where she was treated and examined.

PW2 John Ekai a clinical officer at Kalokol AK Health Centre in Kalokol examined the complainant and found she had lacerations of human bite in front of the ear, and on examination of her vagina, found the Labia Minora and Majora intact, vagina was normal with no lacerations seen. PW3 APC Francis Awiti took over as investigating officer. He produced the baptismal card showing the complainant was born on 26/8/1998 and also a mobile phone recovered from the appellant which belonged to the complainant.

The appellant gave unsworn evidence in his defence. He testified that on 8/12/2014 he was at lake Turkana where he is a fisherman. He received a telephone call from Kenya Police Reservist that he reports to Kalokol. He went there and was advised to go to the police station where he found 2 women whom police asked if it was him they were referring to. They said it wasn't him but the police officer insisted and arrested him. He was later charged with the present offence.

It is upon this evidence that appellant was found guilty and convicted. The appellant filed written submissions in support of his grounds of appeal. He submitted that the complainant in her evidence gave her age as 16 years when she first testified and 17 years old when she was recalled and testified. He submits that there is contradiction on the age of the complainant, and that as the birth certificate was not produced, the actual age of the complainant was not proved.

Further appellant submitted that the complainant should have been taken for age assessment to ascertain her actual age which was not done. The appellant submitted that there was no medical evidence of penetration as all the tests on examination were normal,and that the assertion by the clinical officer that there was penetration was not supported by evidence of examination. Finally the appellant submitted that the clothes worn by the complainant and allegedly torn by him were not produced as exhibits and that the person who arrested him and recovered the mobile phone from him was not called as a witness nor was the appellant taken for medical examination to prove that indeed he had sexual intercourse with the complainant.

Mr. Kimanthi for the state opposed the appeal. He submitted that the appellant was known to the complainant as he was running a boda boda business, that after the defilement he took away her phone and Kshs.400 and the phone was recovered from him; and he did not give an account on how he came to have it in his possession.

On age he submitted that the prosecution produced a baptismal card which showed the date of birth; and age to be 16 years 3 months at time of the offence; and finally that the evidence of the clinical officer confirmed penetration.

The appellant in his submissions has faulted the trial magistrate on 3 main grounds. Firstly that there is no exhibits were produced to support the prosecution case in particular the motor cycle the complainant alleged she was carried on non-production of the torn clothes the complainant was wearing, and which they alleged the appellant tore. From the evidence the motor cycle belonged to the appellant. He was using it in his boda boda business. There is evidence that he went away with it. It was never in the custody of the complainant or the prosecution. The prosecution cannot in my view be faulted for not producing an exhibit which is in the exclusive possession of the appellant.

The appellant submits that the prosecution did not produce the pants and clothes that the complainant

alleged were torn by the appellant when he was committing the offence. The evidence of the complainant on this issue is as stated in her evidence that;

> **"He tore off my clothes. Accused had worn a Kenyan branded shirt brown trouser and red sunglasses. He undressed; he removed his trouser and remained with his underwear. He tore my underwear. Accused removed his penis and inserted it into my vagina without a condom. It was for about two hours. Accused then took my phone and money. I ran away later naked. I went to a nearby house and then in the morning I went to hospital".**

On being asked about the where about of the clothes she informed court that she threw the torn clothes away. The appellant submits that the non-production of these clothes as exhibits was fatal to this case. While it is prudent to produce exhibits mentioned by witnesses in their testimony particularly if it relates to the commission of the offence, and where the production of the materials is deemed relevant. In this case the fact that the torn clothes were not produced as exhibit is not in my view fatal to the prosecution case.

The prosecution placed reliance of the recovery of a mobile phone from the appellant which belonged to the complainant as proof that he was with the complainant on the material day. The complainant in her testimony testified that the appellant on reaching a place where there was no settlement dropped her from the motor cycle, grabbed her, slapped her and threw her down, defiled her and then took away her mobile phone and money. She testified that he took her techno phone and shs.400 and that the same were recovered from the appellant. PW3 P.C No.244201 APC Francis Awiti who took over the investigations from his colleague testified

> **Prosecutor: It's produced as prosecution No 1. A mobile phone make Nokia was also recovered from the accused and it was positively identified by the complainant as hers unfortunately, the cash was not recovered. It was recovered on 7/4/2014 when the accused was arrested the phone belongs to J A and I wish to produce it as exhibit.**
>
> **Prosecutor: This is the phone make Nokia and I wish to have it produced as prosecution No. 2. I didn't know the accused before. That's all.**

The question that arises is hat make of phone was stolen from complainant and which one was recovered from the appellant. The complainant testified that it is a Techno mobile phone that was taken away from her by the appellant. The one allegedly recovered from the appellant was a Nokia by make and this is the one that was produced. If the phone allegedly taken by appellant from the complaint was Techno by make, then it follows that the Nokia that was produced does not belong to the complainant. That exhibit therefore cannot be used as a basis to confirm that the appellant indeed took the mobile phone from a complainant in the processes of defiling her.

The appellant submits that there was no evidence of penetration and that the clinical evidence tendered was shoddy. He submitted the medical examination showed bruises and cuts on the upper body and that the examination of the vagina did not indicate anything abdominal. **PW3 John Ekai** the clinical officer who examined the complainant stated

> **"I examined her. There was no stain or blood seen on clothes, the pants had a discharge, on general history, she said that she also had hepatitis which was worse because of the sexual assault. There was no sign of alcohol on examining the head and neck. There were lacerations of human nails and human bite infront of the ear. On examination the thorax and abdomen, there was no visible injuries, the abdomen was normal. On the upper limb (hands) there was laceration on both there was no evidence of fractures. There was a slight cut on the right tibia region, there were no fractures. The approximate age of injury was 24 hours; possible instruments used nails and claws. I administered pain killers, tetanus injection, amoxil post exposure proxlasis to prevent Aids, we also gave e-pill to prevent pregnancy. The injury was classified as harm. We examined the vagina, though the labia and majora were intact, there was a discharge which was not normal. We did a pregnancy test it showed**

negative, we also did a test of HIV which was non reactive; this was before we administered drugs".

The clinical officer on the basis of that examination testified that in his opinion there was penetration. The appellant rightly in my view submits that the opinion is not supported by the results of the examination; in examination of the vagina, the clinical officer in the P3 indicated.

" both labia majora and minora are intact, vagina is normal, no lacerations noted and yellowish discharge seen in the vagina".

In medical practice opinions must draw from examination or observations. The clinical officer on examination of the vagina did not find anything unusual except the yellowish discharge. What then was the basis of his opinion that there was penetration; in my view I am unable to find a logical analysis of the results of the examination and the opinion that there was penetration. While in law penetration being a complete or partial insertion of the genital organ of one person into the genital organ of another can be proved by the evidence of the complainant or witnesses and/or confirmed by medical examination, the medical examination if relied on must support the finding of penetration.

The final issue raised by the appellant is that crucial witnesses did not testify. He in particular submitted that the arresting officer who is alleged to have recovered the mobile phone did not testify and the person in whose house the complainant ran to after the ordeal even the woman complainant reported to complainant to whom she reported the matter. The prosecution is not obliged to call any number of witnesses to prove a fact where evidence of a witness has adequately proved a fact, there may not be any need for the prosecution to call all the witnesses who will repeat the same evidence. In this case however, the complainant in her evidence states

" I ran away later naked. I went to a nearby house and then in the morning I went to hospital".

The occupant of the house was never called as a witness. Indeed the only witnesses who testified are the complainant (PW1) the clinical officer (PW2) and the police officer (PW3) who was neither the arresting officer who recovered the alleged mobile phone from the appellant.

Evaluating the whole evidence, I find there were gaps in the prosecution case which cumulatively compromised the credibility of complainant and the prosecution case. Carefully considered I find that the prosecution case was not proved beyond reasonable doubt. I therefore allow this appeal against both conviction and sentence. I hereby quash the conviction of the appellant Andrew Lopeyot Atur of the offence of defilement C/s 8(4) of the sexual offences Act and set aside the sentence of 15 years imprisonment imposed. The appellant **Andrew Lopeyok Aftir** to be set at liberty unless otherwise lawfully detained.

Dated at Lodwar this 12th February, 2018.

S N RIECHI

JUDGE