



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL APPEAL NO. 9 OF 2015

ERICK OGOLLA ABEYI.....APPELLANT

VERSUS

REPUBLIC.....REPUBLIC

(From the original conviction and sentence in Criminal case No. 1287 of 2014 of the

Chief Magistrate's Court at Busia by Hon. J.N Maragia– Resident Magistrate)

JUDGMENT

1. The appellant, **ERICK OGOLLA ABEYI**, was convicted for the offence of gang defilement contrary to section 10 of the Sexual Offences Act No.3 of 2006 and the offence of assault contrary to section 250 of the Penal Code.

2. The particulars of the offence were that between 16th and 18th May 2014 in **BUSIA TOWNSHIP** of **BUSIA** County, in association with others he intentionally and unlawfully caused his penis to penetrate the vagina of **A.K** one after the other, a child aged 15 years. At the time of the defilement, they injured her.

3. He was sentenced to serve 15 years imprisonment for the offence of gang defilement and one year for assault. The sentences were ordered to run concurrently. He has appealed against both the conviction and the sentence.

4. The appellant was in person. He raised the following grounds of appeal:

- a) That the learned trial magistrate erred in law and in fact by convicting him based on circumstantial evidence and ignored primary evidence.
- b) That the learned trial magistrate erred in law and in fact by relying on uncorroborated evidence.
- c) That the learned trial magistrate erred in law and in fact by convicting him based on medical evidence tendered unlawfully.
- d) That the learned trial magistrate erred in law and in fact by disregarding gross violation of his rights.
- e) That the learned trial magistrate erred in law and in fact by disregarding his defense.
- f) That the learned trial magistrate erred in law and in fact by disregarding his mitigation.

5. The state opposed the appeal through Mr. Omayo, the learned counsel.

6. The facts of the prosecution case were briefly as follows:

The complainant was a minor aged fifteen years at the time of the incident. Her grandmother had sent her to buy some charcoal. She found three boys standing by the roadside. The trio pulled her to their house where they locked her, burnt her breasts and defiled her in turns for two weeks before she was rescued and taken for treatment.

7. The appellant in his defence denied any involvement in the offences.

8. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO vs. REPUBLIC [1972] EA 32**.

9. The appellant complained that the learned trial magistrate based her conviction on circumstantial evidence and ignored primary evidence. What is circumstantial evidence? In the case of **MOHAMED & 3 OTHERS vs. REPUBLIC [2005]1 KLR 722** Osiemo Judge explained what circumstantial evidence is, as follows;

Circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the fact at issue. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved.

10. Before any court convicts on circumstantial evidence, it must satisfy the conditions which were enumerated by the court of appeal in the case of **SAWE vs. REP [2003] KLR 354**. This is what the court said:

1. In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.

2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.

3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.

11. I will at all times bear this in mind while addressing this issue. Did the court base the conviction solely on circumstantial evidence? My answer to this question is in the negative. The victim gave direct evidence of what befell her. This therefore displaces the contention of the appellant that the conviction was based on circumstantial evidence. It is important to point out at this juncture that a conviction can be based solely on circumstantial evidence if the conditions spelled out in **SAWE vs. REP [2003] KLR 354** (supra) are satisfied.

12. I have perused the record. The appellant was arrested on 22nd May 2015 and was arraigned in court on 23rd May 2015. This is within the stipulated time of production in court after arrest. Immediately after plea, the appellant was granted bond. When the hearing commenced, the matter was adjourned on application by the appellant and his co-accused for they had not at the time been supplied with witnesses' statements. At the time of first hearing, both the appellant and his co-accused intimated to the court that they were ready for hearing. I therefore did not come across any instance where his rights were violated. He did not elaborate which of his rights were breached.

13. The law is now settled where an accused person alleges that his rights were breached. The recourse is to file a civil suit for compensation but cannot be a basis for acquittal. This was held by the Court of appeal in the case of **JULIUS KAMAU MBUGUA vs. REPUBLIC [2010] eKLR** when it stated in a very well researched judgment:

In our view, it is not the duty of a trial court or an appellate court dealing with an appeal from a trial court to go beyond the scope of the criminal trial and adjudicate on the violations of the right to personal liberty which happened before the criminal court assumed jurisdiction over the accused.

However, the trial court can take cognizance of such pre-charge violation of person liberty, if the violation is linked, to or affects the criminal process. As an illustration, where the prolonged detention of a suspect in police custody before being charged affects the fairness of the ensuing trial e.g. where an accused has suffered trial – related prejudice as a result of death of an important defence witness in the meantime, or the witness has lost memory, in such cases, the trial court could give the appropriate protection – like an acquittal. Otherwise the breach of a right to personal liberty of a suspect by police per se is merely a breach of a civil right, though constitutional in nature, which is beyond the statutory duty of a criminal court and which is by Section 72 (6) expressly compensatable by damages.

Though this decision was made before the advent of the new Constitution, the principle applies to the new Constitution.

14. Was the evidence adduced by the prosecution sufficient to base a conviction on? The evidence of **A.K (PW1)** is that while she was going for an errand, three boys who included the appellant forcefully pushed her into a house where they inflicted injuries on her before defiling her in turns. She was beaten using a machete, a knife and a bottle. They locked her for two weeks. The evidence of **E K (PW2)** who had sent her is that she went missing for 3 days. During cross examination she said that **A.K** was unconscious when she was rescued. This coupled with the ordeal she testified she went through, may explain the discrepancy on the time she said she was in captivity.

15. Other than the evidence of **E K (PW2)** who testified that **A.K** was found in the house of the appellant, **MOLLY ADHIAMBO OPIYO (PW3)** testified that on 18.5.2014 she saw **A.K** in the house of the appellant and alerted her (**A.K's**) aunt. This witness was the appellant's landlady. The evidence by these witnesses, placed the appellant in the same house with the victim at the time alleged by the prosecution that he defiled **A.K**.

16. In a case of defilement, the prosecution has the onus of proving the following:

- a) The penetration of the complainant's genitalia;
- b) Whether the victim is a child and the age of such a victim; and

c) Whether the penetration was by the Appellant.

These ingredients were succinctly expressed by Judge Joel Ngugi in the case of **FAPPYTON MUTUKU NGUI vs. REPUBLIC [2012] eKLR at paragraph 24 he said:**

Going by this definition of defilement, I agree with Mr. Mwenda on the issues which the court needs to determine. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant.

In the instant case, I will endeavour to establish if the offence of defilement was proved.

17. The evidence of the complainant is that she was defiled by the appellant and two others in turns. In her evidence she testified that the appellant cut her with a machete. On the day she was rescued, the appellant was in the house.

18. **MACHOGO NYABICHA (PW4)**, the clinical officer who examined the complainant testified that she had the following findings:

- a) Right index finger was swollen and tender;
- b) Bruised and tender left upper arm;
- c) Swollen and tender external chest with bruises;
- d) Swollen and tender thighs with skin colour change;
- e) Swollen and tender back with bruises;
- f) Bruised vagina with whitish discharge;
- g) Presence of spermatozoa; and
- h) Infection with STD.

The medical evidence did not only establish that the girl was defiled but also that she was subjected to cruel treatment causing her several injuries.

19. **A.K** in her testimony said she was 15 years of age. This was confirmed by **JERRY ADAMS (PW5)** Oral Health Officer who examined her for age assessment and placed her age at between 15 to 16 years.

20. I am therefore satisfied that the offence of defilement was proved against the appellant. I also find that the medical evidence was admitted in accordance with the law of evidence. The conviction was sound and cannot be faulted. His defence was considered before it was dismissed.

21. Section 10 of the Sexual Offences Act provides as follows:

Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life.

For the offence of gang defilement the appellant was sentenced to 15 years imprisonment, the minimum provided under the law. For the offence of assault he was sentenced to one year imprisonment. He cannot be heard to complain that his mitigation was not factored.

22. From the foregoing analysis of the evidence on record, I find that the appeal lacks merit. The same is dismissed.

DELIVERED and SIGNED at BUSIA this 15th day of March, 2018

KIARIE WAWERU KIARIE

JUDGE