



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO. 54 OF 2016

S O.....APPELLANT

VERSUS

REPUBLIC.....REPUBLIC

(From the original conviction and sentence in S.O.A case No. 379 of 2014 of the Chief Magistrate's Court at Busia by Hon. Hannah Ndung'u- Chief Magistrate)

JUDGMENT

1. The appellant, **S O**, was convicted for the offence of defilement of a girl contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006.
2. The particulars of the offence were that on the 6th July 2014 within **BUSIA** County, intentionally and unlawfully caused his penis to penetrate the anus of **V I**, a girl aged 3 years.
3. He was sentenced to life imprisonment.
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 failing to appreciate that his rights were violated by the police.
 - b) That the learned trial magistrate erred in law and in fact by failing to appreciate that material witnesses were not called.
 - c) That the learned trial magistrate erred in law and in fact by convicting him on the basis of uncorroborated evidence of minors.
 - d) That the learned trial magistrate erred in law and in fact by convicting him without sufficient evidence.
5. The state opposed the appeal through Mr. Omayo, the learned counsel.
6. The facts of the prosecution case were briefly as follows:

The appellant is a paternal uncle of the complainant. On the material date he asked her to accompany him so that they could buy fish for her grandmother. On the way he sodomised her.
7. The appellant in his defence contended that he had a grudge with his brother, the complainant's father.
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 contended that he was in police custody for more than 24 hours as prescribed by the Constitution. 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. If the appellant is aggrieved, he is at liberty to file a civil suit to seek redress.

10. It is the contention of the appellant that two crucial witnesses were not called. According to him, the girl's grandmother and the person who arrested him ought to have been called. His argument therefore is that failure to call these two was fatal to the prosecution case. The legal position is clear on the failure to call material witnesses. The Court of Appeal for East Africa in **BUKENYA vs UGANDA [1972] EA 549**, (Lutta Ag. Vice President) held:

The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.

11. The complainant (**PW2**) testified that when the appellant asked her to accompany him to buy fish for her grandmother, she was outside her grandmother's house. This is what her sister, **S A** testified to. She added that when the two returned, they went into their grandmother's house. When **V I** complained of pain to her buttocks, the appellant left. This is the only evidence that connect the complainant's grandmother to this case. In my view, she was not a material witness.

12. **P.C David Maina (PW5)** was the investigating officer. He testified that the appellant was arrested by members of public and taken to the police station. The arrest was not in dispute. Therefore, calling a member of public who arrested him, if identified, would not have added any value to the case.

13. I accordingly find that no material witness was omitted.

14. **V I (PW2)** and her sister **S A (PW3)** were minors. The appellant's complaint is that their evidence required corroboration before a conviction could be based on it. The proviso to section 124 of the Evidence Act provides as follows:

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. [Emphasis added]

This proviso took away the need for corroboration in cases of sexual offences. The trial magistrate in respect of **V I** said the following:

In the case before me the accused is a paternal uncle to the child V I. She knew him and simply followed him when he asked her to go with him to buy fish...I have no doubts in my mind that the child told the truth.

The learned trial magistrate complied with the law by recording her reasons as to why she was satisfied that the complainant was telling the truth. She also factored the evidence of **S A** and stated that it had corroborated the evidence of **V I**. This ground of appeal cannot stand.

15. What was the evidence against the appellant? **V I** testified that the appellant "stabbed" her buttocks. Later on she said he penetrated her anus with his penis. The appellant had an issue with this evidence. This was a child aged three years and it would be too much to expect a child of this age to be coherent on matters touching on sex.

16. The evidence of **S A** taken together with that of **V I** left no doubts as to what happened to the complainant and who the culprit was. Their evidence was corroborated by the clinical officer's findings.

17. **Linnet Adhiambo (PW1)** is the clinical officer who examined the complainant. Her positive findings were on her anal orifice. **V I** had a tear at the anal area and the anus was bleeding when she examined her.

18. The appellant contended that he was framed up for the clinical officer testified that she examined the complainant on 5th July 2014, a day before the alleged offence. Indeed, this is what she testified. However, on checking the treatment notes, the date therein is 6th July 2014. I therefore take her testimony on the date as a mere error.

19. During the hearing of the case, the appellant raised an issue of an existing grudge between him and the complainant's father. He alleged that the complainant's father had cut him severally with a machete and showed some scars to the court. This defence was dismissed by the learned trial magistrate and rightly so. When **J I I (PW4)** testified, he said there was no existing grudge with the appellant whom he said was his elder brother. This witness is the complainant's father. The appellant did not cross examine him on the existence of the alleged grudge or on anything. Secondly, **J A (DW1)** his witness and sister told the court that the appellant was cut by their uncle F E. It was the complainant's

father who was then working in Mombasa who sent to him money for treatment. The defence of a grudge was therefore not true.

20. 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 these ingredients were proved.

21. From the foregoing analysis of evidence on record, I find that there was not only adequate evidence against the appellant, it was overwhelming. The conviction was based on sound evidence.

22. Section 8(2) of the Sexual Offences Act provides as follows:

A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

The sentence that was meted out was the only legal sentence available. I therefore find that the appeal lacks merit and accordingly dismiss it.

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

KIARIE WAWERU KIARIE

JUDGE