



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO. 59 OF 2016

VICTOR OKOCH.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in S.O.A, case No. 103 of 2015 of the Chief Magistrate's Court at Busia by Hon. H.N Ndung'u- Chief Magistrate)

JUDGMENT

1. The appellant, **VICTOR OKOCH**, was tried and convicted for the offence of defilement contrary to section 8(1) (2) (sic) 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 on 30th June 2015 in **SAMIA** sub County of **BUSIA** County, intentionally and unlawfully caused his penis to penetrate the vagina of **D.I**, a child aged 9 months.

3. The appellant was sentenced to serve 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 ignoring gross violation of his constitutional rights.
- b) That the learned trial magistrate erred in law and in fact by relying on hearsay evidence.
- c) That the learned trial magistrate erred in law and in fact, by convicting him based on medical evidence that lacked sufficient details.
- d) That the learned trial magistrate erred in law and in fact by disregarding his defense.

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's mother and the appellant were neighbours. When she was going to fetch some water, she requested the appellant to keep an eye on her children who included the complainant. When she returned, she found the appellant holding **D.I**. The baby was crying but her mother managed to soothe her to sleep. Two hours later the baby woke up crying and was scratching her genitalia. She checked and discovered that she was bleeding from the genitalia and had a tear. She took her to hospital and also reported to the police. The appellant was arrested and charged.

7. The appellant denied any involvement in the offence.

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 charge was erroneously drafted. It ought to have read contrary to "**...section 8(1) as read with section 8(2) ...**"

My perusal of the record indicate that the appellant understood the charge before pleading to it. He thereafter participated in the trial. He was

not prejudiced in any way. The defect is curable under section 382 of the Criminal Procedure Code.

10. The appellant in one of his grounds of appeal complained as follows:

That the learned trial magistrate erred in law and in fact by ignoring gross violations, denials and threats to my constitutional rights to fair trial as enshrined in the Constitution of Kenya.

My perusal of the record has not yielded any evidence to support this ground of appeal. He also did not point instances to warrant such a complaint. 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.

11. Although the appellant complained that the learned trial magistrate relied on hearsay evidence, there is no evidence to support this contention. My perusal of the record however, show what was before the court was circumstantial evidence.

12. What is circumstantial evidence was restated in the case of **MOHAMED & 3 OTHERS vs. REPUBLIC [2005]1 KLR 722** by Osiemo Judge 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.

13. Before any court convicts on circumstantial evidence, it must be satisfied that the conditions which were enumerated by the Court Of Appeal in the case of **SAWE vs. REP [2003] KLR 354**, existed. 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.

14. The evidence in this case was solely circumstantial. 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. In the instant case I will endeavour to find if the same was done.

15. **R A W(PW1)** is the complainant's mother. Her evidence is that on 30th June 2015 she went to fetch some water from a river. Before she went, she requested the appellant to keep an eye on her child, **D.I.** She was away for about 30 minutes. When she returned, she found the appellant seated holding the baby. He informed her that he was trying to make the baby sleep in vain. The baby was crying. She managed to soothe her to sleep. However the baby woke up after about two hours crying and scratching her genitalia. When she checked the baby's vagina, she found her bleeding, had a tear and a whitish discharge. In her evidence she said she was in good terms with the appellant.

16. From the evidence we can deduce the following undisputed facts:

a) Before the complainant's mother left for the river, **D.I** was not crying, an indication that all was well with her;

b) **R A W (PW1)** and the appellant were in good terms for when she said so in her testimony the appellant did not challenge this evidence; and

c) That there was no other person who came into contact with **D.I**, other than the appellant.

17. 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.

18. The evidence of **D.I's** mother is that after she returned from the river where she had gone to fetch water, she found the appellant holding the baby **D.I** and he complained to her that try as he could, the baby refused to sleep. When she checked her (baby's) genitalia after she woke up crying and scratching the same, she found that the baby had sustained a tear, was bleeding and had a whitish discharge.

19. The age of **D.I** was established to be 9 months from her mother's evidence and from the evidence of the clinical officer.

20. **NATHAN BWABI KENNEDY (PW3)**, the clinical officer who examined the complainant testified that he made the following findings:

- a) Distended abdomen that was very painful; and
- b) Tear on the vulva;

He concluded that the girl had been sexually violated. This he said was defilement. It is instructive to note that the hymen of the **D.I** was found by the clinical officer to be intact. Penetration was therefore not proved.

21. Though penetration was not proved, the evidence on record established beyond any reasonable doubts that there was an attempt to defile **D.I**. The evidence leaves no doubt that it was the appellant who had the opportunity to do so.

22. Section 179 (2) of the Criminal Procedure Code provides as follows:

When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

I therefore substitute the conviction for the offence of defilement with that of attempted defilement contrary to section 9 (2) of the Sexual Offences Act. The section provides as follows:

A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years

23. From the foregoing, I set aside the life sentence and substitute it with 15 (fifteen) years imprisonment to run from when he was sentenced by the learned trial magistrate. His appeal succeeds to that extent only.

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

KIARIE WAWERU KIARIE

JUDGE