



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 10 OF 2017

I H O.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against Judgment, Conviction and Sentence imposed in Kisumu Criminal SOA Case Number 549 of 2015 by Hon. A.Odawo (RM) read on her behalf by J.Ng'arng'ar (CM) on 8th September, 2016).

JUDGMENT

The Trial

1. The Appellant herein **I H O** has filed this appeal against conviction and sentence on a charge of attempted incest contrary to section 20(2) of the Sexual Offences Act. The particulars of the offence were that:-

On the 13th September, 2015 within Kisumu County intentionally attempted to penetrate the vagina of T.T who to his knowledge was his niece, a child aged 5 years

2. In the alternative count; the appellant was charged with indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars of the charge are that

On the 13th September, 2015 within Kisumu County intentionally and unlawfully touched the vagina of the vagina of T.T who to his knowledge was his niece, a child aged 5 years with his penis

3. The prosecution called a total of six (6) witnesses in support of their case. PW1 M M recalled that on 13.9.15 at about 5 pm upon receiving a report from one R that some children were crying in the house of accused, she went there in company of her sister H M. That when accused refused to open the door, H forced it open. That they found appellant in bed with 2 girls including the complainant who is the daughter of appellant's deceased cousin whose trouser was pulled down to the knees while the other child was fully dressed. That they screamed and appellant who was wearing women clothes was apprehended and handed over to the police.

4. PW2 H M recalled that on 13.9.15 at about 5 pm, she went to appellant's house in company of her sister H M. That when accused refused to open the door, H forced it open. That they found appellant in bed with 2 girls including the complainant who is the daughter of appellant's deceased cousin whose trouser was pulled down to the knees while the other child was fully dressed. That appellant was on top of the children. That they screamed and appellant who was wearing women clothes was apprehended and handed over to the police.

5. PW3 R M recalled that on 13.9.15 at about 5 pm, she was in her house at [Particulars Withheld] Estate which neighbors that of the appellant. That through a crack between the walls, she saw two children get into appellant's house. That she reported the matter to and shortly thereafter she heard screams. That appellant who was dressed in women clothes was dragged out of his house and handed over to the police. That two girls, including the complainant, who are children of appellant's cousin's children were removed from his house.

6. PW4 Dr. Brenda Omondi and PW5 Martha Okello, a clinical officer examined the complainant on 15.9.15 and 14.9.15 respectively and did not find any evidence of sexual assault.

7. In her evidence, the complainant told court that she used to go to appellant's house with her younger sister but denied that the appellant had removed her trousers and pants or tried to defile her.

8. PW6 Linet Mbalaka, the investigating officer recalled that after complainant's case was allocated to her to investigate; she interrogated the complainant and other witness and after receiving the duly filled Post Rape Care form and P3 form as PEXH. 1 and 2 charged the appellant.

9. At the close of the prosecution case, the appellant was ruled to have a case to answer and was placed on his defence. He opted to give no defence. On 8th September, 2016, the learned trial magistrate delivered a judgment in which she convicted the appellant and sentenced him to serve 10 years imprisonment.

The Appeal

10. Aggrieved by this decision, the appellant lodged a Petition of Appeal filed dated 16th October, 2017 which sets out 5 grounds of appeal to wit:-

1. That the learned trial magistrate erred in law by failing to recognize that accused person has a constitutional right to be represented at all times by an advocate of his choice as envisaged in the Constitution

2. That the learned trial magistrate erred in law by denying the defence a right to a fair hearing as envisaged in Article 50 of the Constitution and Section 150 of the Criminal Procedure Code

3. That the learned trial magistrate erred in law and fact by failing to appreciate that evidence of all prosecution witnesses contradicted and could not warrant a conviction

4. That the learned trial magistrate erred in law and fact by failing to note that essential witnesses (relatives of complainant) were not called to prove the offence of incest

5. That the learned trial magistrate erred in law and fact in failing to take into consideration judicial legal grounds in her findings

11. During the hearing of the appeal, Mr. Omondi, learned counsel for the appellant and Ms. Wafula, learned counsel for the state made oral submissions which I have considered together with the evidence on record.

Determination

12. This being a court of first appeal, I am guided by the ruling of the Court of Appeal in the case of **OKENOVS.REPUBLIC[1972]E.A.32**, where it held that:-

“It is the duty of a first appellant court to consider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld”

13. The trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and this court is in dealing with this appeal obligated to give allowance for that.

a. Fair hearing under Article 50(2) of the Constitution

14. Article 50 (2) every accused person has the right to a fair trial, which includes the right—

(g) to choose, and be represented by, an advocate, and to be informed of this right promptly

15. Mr. Omondi, learned counsel for the appellant who represented the appellate and was present when yet date for defence hearing was fixed did not explain why he did not attend court on 30.8.16 when the matter came up for defence hearing. Failure by counsel to attend court cannot be visited on the trial court. I therefore find no merit in this ground of appeal.

b. Section 150 of the Criminal Procedure Code

16. This section deals with power to summon witnesses, or examine person present. There is no evidence that the appellant was denied an opportunity to examine any of the presented witnesses.

c. Failure to call witnesses

17. Evidence that the complainant was daughter to appellant's cousin was not contradicted. PW1 to PW3 stated that they are neighbors of the appellant and the complainant. It is not out of the ordinary for them to know the relationship between complainant and the appellant. I therefore find relationship can be proved by other witnesses other than the relatives themselves.

d. Contradiction

18. Other than the evidence on record, the learned trial magistrate placed heavy reliance on the complainant's statement which the investigating officer produced as PEXH. 3. In that statement, the complainant allegedly stated that the appellant had carried her and her sister to his house.

19. PW3 R M, the eye witness said she saw the children, including the complainant walk to appellant's house. She didn't see appellant carry them to his house or walk there with them.

20. In her statement, the complainant allegedly stated that the appellant had removed her pants but when PW1 and PW2 went to appellant's house, she was in her pants.

21. Further to the foregoing, PW2's evidence that they found appellant lying on the complainant and another girl was contradicted by PW1 who didn't say that he saw appellant lying on the girls.

22. Additionally, the complainant denied that the appellant had removed her trousers and pants, kissed her or tried to defile her.

23. At the close of the prosecution case, there was no evidence that appellant attempted to penetrate the vagina of the complainant or that he intentionally and unlawfully used or that he used his penis to touch the vagina of the complainant who to his knowledge was his 5 year old niece.

Decision

24. In view of the foregoing analysis, I reach a conclusion that the case against the appellant was not proved beyond any reasonable doubt rendering the conviction unsafe. The appeal is thus allowed. The conviction is hereby quashed and the sentence is set aside. It is ordered that the appellant be set at liberty unless otherwise lawfully held.

DATED AND DELIVERED THIS 8th DAY OF March, 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - **Felix & Carolyne**

Appellant - **Mr Omondi**

For the State - **Ms Wafula**

Appellant - Present