



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIIAYA

CRIMINAL APPEAL NO. 16 OF 2017

DAVID OKOTH OCHIENG alias Atoti.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against Conviction and Sentence imposed in Criminal Case Number 73 of 2016 in the Principal Magistrate's Court at Ukwala by Hon. G. Adhiambo (SRM) on 23rd February, 2017)

JUDGMENT

The Trial

1. The Appellant herein **DAVID OKOTH OCHIENG** has filed this appeal against sentence and conviction on a charge of attempted defilement contrary to section 9(1) as read with section 9(2) of the Sexual Offences Act No. 3 of 2006 (hereinafter referred to as **the Act**). The particulars of the charge are that

On 28th June, 2015 at [particulars withheld], Nyamusenda Sub-location, Ugenya District within Siaya County intentionally attempted to cause your genital organ namely penis to penetrate the genital organ namely vagina of P.A a girl child aged 10 years

2. Appellant was also charged with assaulting the complainant contrary to section 251 of the Penal Code.

3. The prosecution called a total of four (4) witnesses in support of its case. PW2 **P.A**, the complainant stated that she was 8 years old. She stated that appellant, whom she knew as **ATOTI** only strangled her but did not do anything else to her. It was her evidence that she spent the night in the house of another person that she did not know.

4. PW2 F.O stated he was in class 3 and that he was 4 years old which age the trial magistrate rightfully doubted. He recalled that on the material date, he had gone to disco- matanga with complainant and other children. He said he saw appellant take the complainant away.

5. PW4 SGT Richard Machasio, the investigating officer, stated that he received appellant and complainant on 28.6.15 and it was alleged that appellant had attempted to defile the complainant the previous day. That after investigations, he caused appellant to be charged.

6. PW1, Judith Okoth, a clinical officer examined complainant on 28.6.15 and found that she had post strangulation marks on her neck with no injury on/in her genitalia. She produced complainant's P3 form as PEXH. 1.

7. At the close of the prosecution case, the appellant was ruled to have a case to answer and was placed on his defence. He gave sworn defence in which he denied the charges. He stated that he was arrested from his house on the night of 28.6.15 and charged with offences he did not commit. Appellant's witness John Omondi Otieno stated that he was with appellant on the night of his arrest at about 2.00 am on 28.6.15.

8. *In a judgment delivered on 23rd February, 2017*, appellant was convicted of both counts and was sentenced to serve life and one (1) year imprisonment respectively.

The appeal

9. Aggrieved by this decision, the appellant lodged the instant appeal. In his amended grounds of Appeal filed on 19th February, 2017, appellant set out 5 grounds of appeal to wit:-

1. The trial magistrate erred in law and in fact by failing to find that circumstances did not favour positive identification

2. The trial magistrate erred in law and in fact by not complying with Article 50(2) of the Constitution

3. The trial magistrate erred in law and in fact by failing to find that the prosecution case was not proved beyond reasonable doubt

4. The trial magistrate erred in law and in fact by failing to find that medical evidence contradicted complainant's evidence

5. The trial magistrate erred in law and in fact by failing to find that investigations were poor

10. When the appeal came up for hearing on 19th February, 2018, appellant relied wholly on his grounds of appeal and submissions filed on 19.2.18. Ms. Odumba, learned counsel for the state opposed the appeal on the ground that there was evidence of partial penetration of the complainant's genitalia and strangulation marks on her neck

Analysis and Determination

11. This being a court of first appeal I have a duty to consider the evidence, evaluate it and draw a conclusions in deciding whether the judgment of the trial court should be upheld taking into account that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence. (See **OKENO VS. REPUBLIC [1972] E.A.32**)

12. In dealing with this appeal, I will separately consider the grounds of appeal as follows:-

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

13. I have perused the record of the trial court and appellant did not at any stage of the proceedings complain that he had not been supplied with statements. This court therefore makes an inference that appellant did not raise any complaint with the trial court, because the statements had been supplied and as such, I find that Article 50(2) (j) of the Constitution was not infringed.

b. Was the offence of attempted defilement proved

14. Section 9 of **the Act** defines attempted defilement as follows:

(1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement

15. Penetration on the other hand is defined in section 2 of **the Act** as follows-

"Penetration' means the partial or complete insertion of the genital organs of a person into the genital organs of another person".

16. The evidence of the complainant did not disclose any element of the offence of attempted defilement. Attempted defilement is a failed defilement. That is why the intention to penetrate a minor is a key ingredient. In the complainant's words, she was only strangled.

17. From the evidence on record, I find that the prosecution failed to prove the offence of attempted defilement or even the minor offence of indecent act with the complainant and the trial court thus erred in entering a conviction on a charge that was not proved.

c. Was the offence of assault proved

Complainant's P3 form as PEXH. 1 which showed that she had post strangulation marks on her neck corroborated her evidence that she was assaulted.

d. Identification of appellant

18. It is on record that the incident occurred at night when complainant and other children had gone for disco-matanga. Complainant testified that she knew appellant by the name ATOTI. PW2 stated that he had seen appellant 3 times before the incident and that he lived at xxxx village. It was his evidence that there was electric lighting near the scene where appellant took the complainant away and that he was able to identify appellant.

In the case of **Maitanyi –vs- Republic(1986) KLR 198** the Court of Appeal stated:-

"That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its size, and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into. In days gone by, there would have been a careful inquiry into these matters, by the committing magistrate, state counsel and defence counsel.

19. This position was restated in the recent case of **John Muriithi Nyagah v Republic [2014] eKLR**, where the Court of Appeal held:-

“in testing the reliability of the evidence of identification at night, it is essential to make an inquiry of the relevant circumstances such as the nature of the light, the strength of the light, its size, its position relative to the suspects etc.”

20. The only witness that led evidence on lighting was PW2. The learned trial magistrate thus erred in failing to consider the strength of the light, its size and its position relative to the appellant and thereby arrived at a wrong conclusion that appellant had been properly identified. The trial magistrate further erred when she found that PW2 had identified appellant by his voice when no such evidence was led by the witness.

21. While there is no doubt that complainant was assaulted, it is apparent that the evidence of identification/identification of the appellant by PW1 and PW2 cannot safely be relied upon to sustain a conviction against the appellant.

Decision

22. In the light of the foregoing analysis, this appeal is allowed, the conviction quashed and the sentence set aside. Appellant is set at liberty unless otherwise lawfully held. It is hereby so ordered.

DATED AND SIGNED THIS 18TH DAY OF APRIL 2018

T. W. CHERERE

JUDGE

DATED, DELIVERED AND SIGNED AT SIAYA THIS 19TH DAY OF APRIL 2018

J.A.MAKAU

JUDGE

In the presence of-

Court Assistant -

Appellant -

For the State -