



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 160 OF 2016

FREDRICK OKOTH OFUNYU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence in Criminal Case Number 449 of 2016 in the Principal Magistrate's Court at Ukwala delivered by Hon. C N. Wanyama(RM) on 8.11.16)

JUDGMENT

Background

1. The Appellant herein **FREDRICK OKOTH OFUNYU** has filed this appeal against his conviction and sentence on a charge of defilement contrary to section 8(1) as read with section 8 (3) of the Sexual Offences Act. The particulars of the charge are that

On 28.5.15 at around 10.00 hrs Bondo District within Siaya County intentionally and unlawfully caused your genital organ (penis) to penetrate the genital organ (vagina) of M.A a child aged 12 years

The prosecution's case

2. The prosecution called 6 witnesses in support of the charge. PW1 **M.A**, the complainant stated that she was born in June 1999 and was 17 years old and in form 3 at [particulars withheld] Secondary School. She recalled that on the material date at about 6.00 am, she was going to school when appellant caught up with her, threatened to harm her with a bottle; strangled her and dragged her into a maize plantation where he defiled her. She said that her mother had travelled to Eldoret and so she reported the matter to her mom's friend one Apondi w/o Mukwawali who escorted her to hospital. She stated that she knew appellant before the material date since he had dropped out of their class in class 3. She additionally stated that appellant used to pass near their home and greet her and she also used to see him at Sikalame Centre. Complainant told court that her assailant was wearing a grey trouser, a red t-shirt and a sweater with Kenyan flag on it.

3. PW2, Margaret Mukwawali stated that she was informed that complainant had been defiled and she found complainant at Chief's office. That while there, the assistant chief went away and returned with the appellant who complainant identified as the one that had defiled her.

4. PW3, the assistant chief told court that complainant reported that she was defiled by a man wearing a sweater and a rastafari cap. He said he was informed that appellant had such a cap and he reported the matter to the police.

5. PW3, a clinical officer testified that he examined complainant on 9.7.16 and found that she had pain on the neck, hymen was broken and the vaginal walls were tender which according to him indicated that there was forceful vaginal penetration. He produced complainant's P3 form as PEXH. 1.

6. PW5, complainant's mother testified that complainant who was born on 2.6.99 was 17 years as shown on her certificate of birth PEXH. 6.

7. PW6, PC Pauline Anyango Oluoch, the investigating officer produced a navy blue sweater and rastafari cap that were recovered from appellant as PEXH. 7 and 8 respective and which complainant had said her assailant was wearing.

The Defence Case

8. In his sworn defence, appellant stated that he was arrested on 7.6.16 and charged with offences that he did not commit.

The Appeal

9. Appellant was tried and found guilty, convicted and sentenced to serve 15 years imprisonment. The conviction and sentence provoked this appeal. In his petition of appeal filed on 16th November, 2016, appellant set out three(3) grounds of Appeal as follows:-

- 1. That the learned trial magistrate erred in law and in fact by failing to observe that the case was not conclusively investigated**
- 2. That the learned trial magistrate erred in law and in fact in relying on contradictory testimonies**
- 3. That the learned trial magistrate erred in law and by finding that the prosecution case was proved yet age of complainant was not proved**

10. When the appeal came up for hearing on 19th February, appellant relied wholly on his grounds of appeal and on submissions filed on 19.2.18. Ms. Odumba, learned State Counsel, opposed the appeal on the grounds that appellant was positively identified by complainant as the one that defiled her. She additionally submitted that complainant's age was proved by way of a certificate of birth and that the P3 form proved that complainant was defiled.

Analysis and Determination

11. This being a court of first appeal, I am expected to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I neither saw nor heard any of the witnesses and have to give due allowance. (See **Issac Ng'ang'a Alias Peter Ng'ang'a Kahiga V Republic Criminal Appeal No. 272 OF 2005**).

12. I have re-evaluated the evidence on record. In dealing with this appeal, I will separately consider the grounds of appeal as follows:-

a. Complainant's age

13. Section (4) of the Sexual offences Act provides "***that a person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years***". The complainant's certificate of birth shows that she was born on 2.6.99. She was therefore a month less to her 17th birthday. Consequently, I find that complainant's age was correctly established.

b. Investigations

14. Appellant failed to give details of what the investigators failed to investigate that was relevant to this case.

c. Contradictions in the prosecution case

15. On the issue of identification of the perpetrator, the learned trial magistrate placed reliance on the evidence of the complainant.

16. In her testimony, complainant stated she knew the appellant and that he was wearing a grey trouser, a red t-shirt and a sweater with Kenyan flag on it when he defiled her. Contrary to her evidence, complainant in making her initial report to PW3 and PW2 stated that the man that defiled was wearing a sweater and a rastafari cap. The investigating officer produced a navy blue sweater and rastafari cap that were recovered from appellant at the time of his arrest.

17. Complainant alleged to have known appellant before the material date but on making her initial report failed so to state. Of interest to note is that complainant described the person that defiled her as one wearing a grey trouser, a red t-shirt and a sweater with Kenyan flag on it and not a blue sweater and a rastafari cap recovered from the appellant.

18. Appellant was arrested not long after the offence was committed. His mode of dressing did not fit in the description of the man that defiled the complainant. I therefore find and hold that the trial court fell into error when it ruled that appellant had been positively identified.

19. While there is no doubt that complainant was indeed defiled, the evidence on record fails to positively identify appellant as the offender and his defence ought not to have been accepted.

Determination

20. From the foregoing, it is clear to this court that the prosecution failed to discharge its burden to prove its case against appellant beyond any reasonable doubt. I thus find and hold that the conviction and sentence were unsafe. Accordingly, I quash the conviction and set aside the sentence. Unless otherwise lawfully held, I order that appellant shall be set at liberty forthwith.

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 -