



## **REPUBLIC OF KENYA**

### **IN THE HIGH COURT OF KENYA AT SIAYA**

#### **CRIMINAL APPEAL NO. 134 OF 2016**

**FREDRICK ONYANGO OTIENO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Appeal against conviction and sentence in Criminal Case Number 30 of 2016 in the Principal Magistrate's Court at Ukwala delivered by Hon. C.N.Wanyama(RM) on 28th September, 2016)*

#### **JUDGMENT**

##### **Background**

1. The Appellant herein **FREDRICK ONYANGO OTIENO** has filed this appeal against this 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 the night of 16th January, 2016 in Ugunja Sub-County within Siaya County intentionally and unlawfully caused your genital organ (penis) to penetrate the genital organ (vagina) of Y.A.Oa child aged 14 years*

##### **The prosecution's case**

2. The prosecution called 4 witnesses in support of the charge. PW1 **M.A.**, the complainant stated that she was born on 27.9.03. She stated she was going home at 6.30 pm when she met appellant, whose sister was in the same school with her, and he forcefully took her to a certain house. It was her evidence that she tried to escape but appellant held her down and defiled her 3 times. That the following day, appellant escorted her to her grandmother's house and lied to her that she had slept in his sister's room. That her grandmother suspected that she had been defiled and escorted her to hospital and later reported the matter to the police who arrested and charged appellant.

4. PW2, a clinical officer, examined complainant on 18.1.16 and found her with a broken hymen with pain and redness of vaginal wall which according to him was evidence of sexual assault. He also found that she had pain on the lower abdomen and both legs had lesions which according to him was a sign of struggle. He produced complainant's P3 form as PEXH. 1.

5. PW3, the investigating officer testified that upon investigating complainant's case, appellant was arrested by PW4 and charged.

##### **The Defence Case**

6. In his sworn defence, appellant stated that he was arrested on 14.1.16 and charged with offences that he did not commit.

##### **The Appeal**

7. Appellant was tried and found guilty, convicted and sentenced to serve 20 years imprisonment. The conviction and sentence provoked this appeal. In his grounds of appeal filed on 19.2.18, appellant set out five (5) grounds of Appeal which I have summarized into 4 grounds as follows:-

1.

4. ***That the prosecution failed to call complainant's grandmother as a witness***

8. 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 State Counsel, opposed the appeal on the grounds that complainant positively identified appellant as the one that defiled her. She further submitted that complainant's evidence that there was a struggle between her and appellant was corroborated by the clinical officer's evidence.

**Analysis**

9. As this is a first appeal, this court is enjoined to consider all the evidence afresh, evaluate it independently and reach its own conclusions having regard to the fact that it neither heard nor saw the witnesses (*Okeno v Republic [1972] EA 32*).

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

**a. Was the charge sheet defective**

11. The record shows that the particulars of the charge sheet do not contain the word "**UNLAWFULLY**". Sexually assaulting a minor cannot by any means be lawful and failure to include the word "**UNLAWFULLY**" in the charge sheet, in my considered view did not in any way prejudice the appellant.

**b. Interpretation**

12. The trial court's record shows that the trial was conducted in both Dholuo and Kiswahili. Appellant cross-examined the witnesses at length and that is a pointer that he understood the two languages and hence, this ground must fail.

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

13. In the case of *Thuita Mwangi & 2 others v Ethics & Anti-Corruption Commission & 3 others [2013] eKLR*, the court held as follows on the issue of statements:

*"The right to be provided with" material the prosecution wishes to rely on is not a one-off event but is a process that continues throughout the trial period from the time the trial starts when the plea is taken. The reality is that there will be instances where all the information relating to investigation may not all be available at the time of charging the suspect or taking the plea. The disclosure of evidence, both inculpatory and exculpatory, is easily dealt with during the trial as the duty to provide the material is a continuing one and the magistrate is entitled to give such orders and directions as are necessary to effect this right. When the fresh material is provided, the accused is entitled to have the time and opportunity to prepare their defence."*

14. I have perused the record of the trial court and appellant did not raise the issue of non-availability of statements during the trial. The court makes a finding that the only reason why appellant raised the issue with the trial court was because he had been supplied with statements. I therefore find no merit in this ground of appeal.

**d. Effect of failure to call complainant's grandmother as a witness**

15. In support of this ground, appellant placed reliance on the case of *Bukenya & Others V Uganda [1972] EA 549* where the court addressed itself thus:-

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

*(ii) That Court has right and the duty to call witnesses whose evidence appears essential to the just decision of the case.*

*(iii) Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tendered to be adverse to the prosecution.*

16. Appellant also relied on the case of *JUMA NGODIA –Vs- REPUBLIC (1982-88)1 KAR 454*, where the Court of Appeal held viz-

*"The prosecutor has, in general, discretion whether to call or not to call someone as a witness. If he does not call a vital reliable witness without a satisfactory explanation he runs the risk of the Court presuming that his evidence which could be and is not produced would, if produced, have been unfavourable to the prosecution."*

17. Complainant's grandmother was not at the scene of crime. What she would have told court was what she might have been told by the complainant and the appellant.

18. Her evidence would not have been necessary to establish the truth in this case and failure to call her cannot therefore be construed to mean that her evidence might have been unfavourable to the prosecution.

**e. Was the prosecution case proved**

19. Complainant stated that she knew the appellant whose sister went to the same school as her. The incident happened at 6.30 pm. Complainant told court that appellant escorted her home the following day at 11 am. The evidence on record clearly discloses that circumstances for recognition of the appellant were favourable.

20. Complainant's evidence that there was a struggle between her and appellant was corroborated by the clinical officer's evidence who stated that complainant had a broken hymen with pain and redness of vaginal wall which was evidence of sexual assault and pain on the lower abdomen and lesions on both legs which according to him was a sign of struggle.

21. From what is stated hereinabove, I find that there is overwhelming incriminating evidence against the appellant and the trial court appropriately considered appellant's defence and rightfully rejected it.

**f. Was complainant's age proved?**

20. The Court of Appeal in *J.W.A. v. Republic (2014) eKLR* held that age of the victim is a matter of fact which could be proved by evidence other than birth certificate and age assessment report. The exact age of the complainant is critical for purposes of computing the applicable penal provision under the Sexual Offences Act. Complainant stated that she was born on 27.9.03 and was therefore 13 years and 8 months when the offence was committed. The clinical officer estimated her age to be about 14 years.

Accordingly, I find that complainant's age was rightfully established.

21. Section (3) of the Sexual offences Act provides that a person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years. The complainant's age was 13 years and 8 months when the offence was committed. The sentence would have been the same if complainant was 14 years as erroneously shown on the charge sheet and appellant has therefore not occasioned any injustice. Appellant was sentenced to serve the minimum sentence. The sentence imposed on him is lawful.

**Determination**

18. From the foregoing, it is clear to this court that the prosecution discharged its burden and proved the case against appellant beyond any reasonable doubt. I thus find and hold that the conviction and sentence are safe. Accordingly, I disallow the appeal, affirm the conviction and uphold the sentence.

**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 - Odhiambo/Brenis**

**Appellant - Present translated in Kiswahili**

**For the State - M/s. M. Odimba**