



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL APPEAL NO. 4 OF 2017

KENNEDY OTIENO ABWON.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence in Criminal Case

Number 522 of 2016 in the Principal Magistrate's Court at Bondo

delivered by Hon. E. N. Wasike (SRM) on 13th January, 2017)

JUDGMENT

The Trial

1. The Appellant herein **KENNEDY OTIENO ABWON** has filed this appeal against sentence and conviction on a charge of defilement contrary to section 8(1) as read with section 8 (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge are that

On 17th April, 2016 at Bondo Sub-County within Siaya County unlawfully and intentionally caused your genital organ namely penis to penetrate the genital organ namely vagina of R.A.O a girl aged 7 years

Prosecution case

2. The prosecution called a total of four(4) witnesses in support of its case. Complainant stated that she was 7 years old and in class 2 at [Particulars Withheld] Academy. She recalled on the material date while she was playing, appellant called her to his house, gave her food, undressed her, and then told her to lie down on the floor where he defiled her. That she reported the matter to her mother who took her to hospital and later to the police station. In cross examination by appellant, complainant told court that one D saw appellant call her to his house.

3. PW2, the complainant's mother told court that on the material date at about 8.00 pm, complainant who looked sickly informed her that appellant had defiled her. That she escorted complainant to hospital and reported the matter to police who arrested and charged appellant.

4. PW3, the investigating officer received complainant's report on 18.4.16 after which appellant was arrested and charged. He produced complainant's birth certificate as PEXH. 1 showing she was born on 1.5.08.

5. PW4, a clinical officer examined complainant on 19th April, 2016 and found her ruptured hymen and swollen labia minora and labia majora. He produced complainant's P3 form as PEXH. 2.

6. 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 not at the scene of crime since he arrived in Bondo at 8.00 pm on 17.4.16. His first witness stated that appellant left Homabay for Bondo at 3.00 pm on 17.4.16. The second witness testified about 16.4.16. The third witness stated that appellant arrived at their home in [Particulars Withheld] village in Bondo on 17.4.16 at about 8.00pm.

7. *In a judgment* delivered on 13.1.17, appellant was convicted and sentenced to life imprisonment.

The appeal

8. Aggrieved by this decision, the appellant lodged the instant appeal. In his amended grounds of Appeal filed on 19th February, 2018, appellant set out 3 to wit:-

- 1. That the trial court erred in its findings by convicting him without considering that the prosecution case was not proved beyond reasonable doubt**
- 2. That the trial court erred in its findings by convicting him on speculation and suspicion**
- 3. That his defence was not given due consideration**

9. When the appeal came up for hearing on 19.2.18, appellant chose to wholly rely on the amended grounds of appeal and submission filed on 19.2.17. Ms. Odumba, Learned Counsel for the state submitted that complainant identified appellant as one defiled her. She further submitted that the offence was committed in the presence of another minor.

10. This being a court of first appeal, I am guided by the ruling of the Court of Appeal in the case of OKENOV.S.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”

11. 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.

Analysis and determination

12. Rape and defilement are both crimes which are perpetrated under the cover of darkness. Complainant stated that she was with one D when appellant called her to his house. She was the only witness to the commission of the offence. She stated that she knew appellant as Kennedy Otieno who was their neighbor.

13. I have considered the provisions of **Section 124** of the Evidence Act Cap 80 Laws of Kenya which provides for conviction on the evidence of a single witness in the following terms:

“Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

14. Further; Section 124 of the Evidence Act Cap 80 Laws of Kenya provides that:

Provided that in criminal cases involving a sexual offence the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings the court is satisfied that the alleged victim is telling the truth.

In light of section 19 of the Oath and Statutory Declaration Act, if the court is receiving the evidence of a child of tender age, it must be of the opinion that she/he possessed of sufficient intelligence to understand the duty of speaking the truth. If such a child willfully gives false evidence on oath he/she will be guilty of perjury.

15. On the issue of identification of the perpetrator, the learned trial magistrate placed reliance on the evidence of the complainant and stated that she was satisfied that the complainant was telling the truth.

16. Appellant raised a defence of alibi and stated that he was not at the scene of crime. He called 3 witnesses who stated that he arrived in Bondo at 8.00 pm on the date that the offence was allegedly committed at about 11.00 am. On alibi evidence, the Court of Appeal in the case of Kiarie v Republic [1984] KLR held:-

“An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The judge had erred in accepting the trial magistrate’s finding on the alibi because the finding was not supported by any reasons”.

17. In dismissing the appellant’s defence, the learned trial magistrate found that it was well corroborated but rejected it on the ground that it was tailored to exonerate the appellant. The trial court forgot that the role of a criminal trial is not to procure conviction by any means but to establish the truth, be it by the prosecution or by the defence.

18. While there is no doubt that complainant was indeed defiled, the trial court erred when it failed to find that the prosecution had not rebutted the alibi defence tendered by the appellant. One D who was alleged to have seen appellant call complainant to his house was not called as a witness. This put the prosecution case in doubt considering that the evidence tendered by complainant cannot be said to be overwhelming. From analysis of the evidence on record, I am of the considered opinion that the learned trial magistrate ought to have appropriately considered appellant’s defence before rejecting it.

Decision

19. From the foregoing, it is clear to this court that the prosecution did not discharge its burden to prove the 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 -