



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA
CRIMINAL APPEAL NO. 7 OF 2017

MAVIN OTIENO ANDEDO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against Conviction and Sentence imposed in Criminal Case Number 150 of 2016 in the Senior Resident Magistrate's Court at Ukwala by Hon. C. N. Wanyama (RM) on 17.01.17)

JUDGMENT

The Trial

1. The Appellant herein **MARTIN OTIENO ANDEDO** and another were charged with gang defilement contrary to section 10 of the Sexual Offences Act No. 3 of 2006 and an alternative count of indecent assault contrary to section 11 (1) of the same Act. Both were convicted of the main count and sentenced to serve 15 years imprisonment.

The appeal

2. Aggrieved by this decision, the appellant lodged the instant appeal. In his Petition of Appeal filed on 23rd January, 2017, appellant set out 1 ground of appeal. In his submissions filed on 19th February, 2017, appellant raised 3 other grounds which I am obliged to consider. They are listed as number 2 to 6 to wit:

- 1. The learned trial magistrate erred in law and in fact by relying on medical evidence that was insufficient to warrant a sound conviction***
- 2. The learned trial magistrate erred in law and in fact failed to conduct voire dire examination yet the complainant was a minor***
- 3. The learned trial magistrate erred in law and in fact by failing to call crucial witnesses***
- 4. The learned trial magistrate erred in law and in fact by failing to furnish the appellant with witness statements and relevant documents***

Prosecution case

3. The prosecution called a total of four (4) witnesses in support of their case. PW1 **LAO**, the complainant recalled that on 7.4.16 at about 7 pm, she was heading home when appellant who was a pillion passenger on a motor cycle, and who was armed with a knife, grabbed her and forced her to board a motor cycle that another man was riding. That after boarding the said motorcycle, she fell off as she was attempting to

escape and appellant slapped her and escorted her to a certain house where the two men defiled her in turns. That on the same night, she pretended to go and wash her legs, locked the two suspects in the house and managed to escape only with a t-shirt and towel, leaving her short trouser, jacket and under pant behind. That she met a lady who called police to the scene and appellant and the other suspect were arrested from the very house where they had defiled her. That her short trouser; jacket and under pant were also recovered from the same house

4. PW2 CPL Kori recalled that on 8.4.16, a lady caller informed him that a girl had been defiled at Siranga. That he visited the scene with his colleagues where they found complainant who led them to the house she was defiled. That appellant and another were arrested at about 4.00 am from the house whereof complainant's short trouser; jacket and under pant were also recovered.

5. PW3 IP Mike Opicho, the investigating officer, received appellant and another who were reported to have defiled the complainant and after investigations, he charged them. He produced complainant's certificate of birth showing that's she was born on 23.2.99. He also produced complainant's black and white jacket; short black trouser and pink under pant as PEXH. 2 A, B and C respectively.

6. PW4 Okere Patrick, a clinical officer examined complainant on 8.4.16 and found that she had swelling on the forehead; the hymen was bruised and tender and freshly torn and she had difficulty walking. He concluded that there was evidence of forceful penetration. He produced complainant's P3 form as PEXH. 1A.

7. At the close of the prosecution case, appellant and another were ruled to have a case to answer and were placed on their defence. In his unsworn defence he denied the charges. He stated that he was arrested at Yenga Market on 7.4.16 at about 8.00 pm and was later charged with offences that he did not commit. In his sworn defence, the other denied the offence. He stated that he was arrested at about 4.00 am when returning appellant's motorcycle.

8. In a judgment delivered on 17th January, 2018, the appellant and another were convicted and sentenced to serve 15 years imprisonment each.

9. When the appeal came up for hearing on 19th February, 2018, the 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 appellant and the other were identified and arrested from the same house complainant's clothes which she had left behind after escaping were recovered from. She also submitted that the P3 form had confirmed penetration by way of the freshly broken hymen while the certificate of birth had proved that complainant was 17 years old.

Analysis and Determination

10. This being a court of first appeal, it is this court's duty to consider the evidence, evaluate it itself and draw its own conclusions in deciding whether the Judgment of the trial court should be upheld considering that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence.. (*See OKENOVS.REPUBLIC[1972]E.A.32*)

11. I have re-evaluated the evidence on record. There is no dispute that complainant was 17 years old when the offence herein was committed. She gave evidence on oath and was extensively cross-examined. There is no doubt that she was intelligent and old enough to give sworn evidence. It is on record that appellant and another were arrested on the same night that complainant was defiled, from the very house where the heinous act was committed and wherefrom complainant's clothes that she had left behind after escaping from her tormentors were recovered. There is no evidence that there was any other crucial witness to this case that was not called to testify. In any case, the evidence on record is sufficient to uphold a conviction. At no point in the proceedings did appellant complain that he had not been issued with statements. That was an issue that would have been properly addressed by the trial court.

12. The P3 form which shows that complainant had freshly torn hymen and was unable to walk

corroborated complainant's evidence that appellant and the other had defiled her in turns.

13. In cross-examining PW2 CPL Kori, the arresting officer, appellant did not put it to him that he was arrested at Yenga Market and not from the house that complainant was defiled. I therefore find that appellant's defence is an afterthought, and as rightfully put by the learned trial magistrate, it did not shake the prosecution's well corroborated case.

Decision

14. Appellant was charged under section 10 of the Sexual Offences Act which carries a minimum sentence of 15 years. The sentence imposed on him is therefore lawful. Having considered the evidence in its totality, I reach a conclusion that the prosecution proved beyond a shadow of doubt that complainant who was a minor had been gang defiled by the appellant and another who were positively identified. The appeal is thus disallowed. The conviction is affirmed and the sentence upheld. It is 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 - Odhiambo/Brenis

Appellant - Present translated in Kiswahili

For the State - M/s. M. Odimba