



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL APPEAL NO. 173 OF 2017

SAMSON OUMA OPIYO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against Conviction and Sentence imposed in Criminal Case

Number 245 of 2016 in the Senior Resident Magistrate's Court

at Ukwala by Hon. C.N.Wanyama (RM) on 1.12.16)

JUDGMENT

The Trial

1. The Appellant herein **SAMSON OUMA OPIYO** was charged with abduction with intent to confine contrary to section 259 of the Penal Code and defilement contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act No. 3 of 2006.

Prosecution case

2. The prosecution called a total of six (6) witnesses in support of its case. PW1 **CAO**, the complainant recalled that on 20.4.16 at about 11 pm, she was going for a disco at Yenga with one Kevin when a man he did not know and who had a sword grabbed her and chased away Kevin. That around the same time, Samuel and 2 others arrived at the scene on a motor cycle and Samuel told the man that had grabbed her that she was a student but he refused to let her go. That the man ordered her to board a motor cycle and took her to a grass thatched house where he locked her and defiled her. That the man who identified himself as Samuel Ouma Opiyo would leave the house every morning and return in the evening and would defile her every night. That one day when appellant, was away, she escaped.

3. PW2 George Omenge Oluoch recalled that on 20.4.16 at about 5.00 am, one Dan Owino informed him that complainant had been abducted by one Samuel Ouma Opiyo who had taken her to a house they identified. That he went to the said house at 4.00 am in company of the area assistant chief and found appellant's brother Kevin. That the witness reported the matter to police and complainant resurfaced some time thereafter. That appellant was arrested 23 days later and charged.

4. PW3 Dan Owino recalled that on 20.4.16 at about 4.00 am, he saw a boy holding complainant's hand leading her to a certain house. He said he was with one Ford who knew both the girl and the boy. That they reported the matter to complainant's father and they went to the house the girl had been taken to but didn't find either the boy or the girl.

5. PW4 George Oduor recalled that on 12.5.16 at about 7.00 pm, complainant went to her house and she escorted her to the police station the following day.

6. IP Mike Opicho, the investigating officer, received a report from complainant's father that complainant had been abducted. That complainant resurfaced on 13.5.16 and appellant who was alleged to have abducted and defiled her was arrested and charged. He produced complainant's certificate of birth showing that she was born on 23.3.00 as PEXH. 1.

7. PW6 Okere Patrick, a clinical officer stated that complainant was examined by his colleague, one George on 25.5.16 and was found that she with broken hymen and she had syphilis. He produced complainant's P3 form as PEXH. 2.

8. At the close of the prosecution case, appellant was ruled to have a case to answer and was placed on his defence. In his sworn defence,

appellant denied the charges. He stated that he was working in Kisumu when the offence was allegedly committed and was arrested at Yenga Market on 3.5.16 when he returned home.

9. In a judgment delivered on 1.12.16, appellant was convicted of both counts and sentenced to serve 4 and 10 years imprisonment respectively.

The appeal

10. Aggrieved by this decision, the appellant lodged the instant appeal. In his supplementary grounds of Appeal filed on 19th February, 2018, appellant set out 4 grounds of appeal to wit:

- 1. The learned trial magistrate erred in law and in fact by failing to find that the charge sheet initially used was defective**
- 2. The learned trial magistrate erred in law and in fact in failing to consider glaring inconsistencies in the prosecution case**
- 3. The learned trial magistrate erred in law and in fact by failing to observe that the appellant's right to a fair hearing as enshrined in Article 50(2)(b)(c)(g) and (j) was infringed**
- 4. The learned trial magistrate erred in law and in fact subjecting appellant to a biased and unfair trial**

11. When the appeal came up for hearing on 19th February, 2018, the appellant relied wholly on his supplementary grounds of appeal and submissions filed on 19.2.18. Ms. Odumba, learned counsel for the state opposed the appeal on the ground that although appellant was unknown to complainant, he had been with her for 5 continuous days and complainant had adequate time to positively identify him. She further submitted that there was evidence that complainant who was 16 years had been defiled.

Analysis and Determination

12. This being a court of first appeal, it is this court's duty to consider the evidence, evaluate it 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**)

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

1. Was the charge sheet defective

14. The record shows that appellant was initially charged with abduction. In her testimony, complainant testified that she was not only abducted but also defiled.

Section 214 of the Criminal Procedure Code provides as follows:

Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case.

The trial court record shows that upon amendment of the charge sheet, appellant was not called upon to plead to the new charge in terms of Section 214(1) of the CPC which is couched in mandatory terms and although the charge is not defective as alleged by the appellant, his trial, conviction and sentence on the second count of defilement which he was not called to plead, was in my considered view a mistrial.

2. Article 50(2)(b)(c)(g) and (j)

15. Article 50 of the Constitution provides

(2) Every accused person has the right to a fair trial, which includes the right—

(b) to be informed of the charge, with sufficient detail to answer it;

From what is stated herein above, I find and hold that failure to require appellant to plead to the second count denied him the right to be informed of the charge with sufficient detail to answer it and his right under Article 50(1) (b) was therefore infringed.

16. The trial court's record shows that when the matter came up for hearing on 22.6.16, appellant stated that he was ready. At no time during the proceedings did appellant claim that he had not been supplied with the prosecution evidence or choose to be represented by an advocate. I therefore find that appellant's rights under Article 50(2)(c)(g) and (j) were not denied.

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

“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.”

18. I have perused the record of the trial court and as rightfully submitted by learned counsel for the state; the court record shows that since 23.1.12 when court ordered that he be supplied with statements, he did not raise the issue of non-availability of statements during the trial. The court makes a finding that the only reason why appellant did not raise any further appeal was because he had been supplied with statements. I therefore find no merit in this ground of appeal.

19. From the foregoing, I find and hold that appellant’s rights under Article 50 (2) (c) (g) and (j) were not infringed.

3. Biased and unfair trial

20. The trial court’s record shows that the appellant was given time to cross-examine each and every witness. Appellant has not given details of the alleged bias on the part of the trial court. This court therefore finds no merit in the ground that the trial was biased.

4. Contradictions in prosecution case

21. PW3 confirmed that the boy and the girl that he saw on the material night were unknown to him. One Ford who allegedly knew both the girl and the boy did not testify. The trial magistrate’s finding that PW3 identified the appellant and that Ford who did not testify had informed complainant’s father that it was the appellant that had abducted the complainant is not supported by the evidence on record and the court ought not to have placed reliance on such evidence to convict the appellant.

22. Further to the foregoing, it is on record that appellant was unknown to the complainant before the incident. Complainant was not present when appellant was arrested and neither was she called to pick him in an identification parade. The arresting officer/s did not testify and evidence as to how they identified appellant as the assailant is lacking. There is no evidence that appellant’s arrest was preceded with the complainant giving a description of her assailant. There is also no evidence that complainant identified the house that she had been held captive nor was the said house established to belong to the appellant.

23. The complainant purported to identify appellant in the dock as the person that abducted and defiled her. In **Gabriel Kamau Njoroge –vs- Republic (1982-1988) 1KAR 1134**, the Court of Appeal observed:-

“Dock identification is generally worthless and the court should not place much reliance on it unless this has been preceded by a properly conducted parade. A witness should be asked to give the description of the accused and the police should then arrange a fair identification parade.”

24. From the foregoing; I find and hold that the identification of the appellant in the dock was unsafe and ought to have been rejected.

5. Appellant’s defence

25. In his defence, appellant raised an alibi and stated that he was working in Kisumu when the offence was allegedly committed.

26. 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”.

27. The prosecution in the case before me did not apply to the court to obtain evidence for the purpose of rebutting the alibi of the appellant. One Ford who knew the appellant and who would have resolved the dispute as to whether or not it was the appellant that abducted complainant did not testify. This puts the case of the prosecution in doubt considering that the evidence tendered against the appellant cannot be said to be overwhelming. I have considered the judgment of the trial court and I find that appellant was not properly identified as the offender. His defence of alibi raises a reasonable doubt that ought to have been construed in his favor.

Decision

28. The burden of proof in criminal cases lies with the prosecution. (See **Republic vs. Derrick Waswa Kuloba [2005] eKLR**). In this case, the prosecution failed to discharge that burden.

Having considered the evidence in its totality, I reach a conclusion that the case against the appellant was not proved beyond any reasonable doubt rendering the conviction unsafe. Accordingly, the conviction is hereby 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 -