



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 44 OF 2017

JOSHUA OMANGA APIYOAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence of the Senior Resident Magistrate's Court at Nyando (Hon. M.C. Nyigei RM) dated the 3rd August 2017 in Nyando SRMCRC No. 1245 of 2016)

JUDGMENT

1. The Appellant, **JOSHUA OMANGA APIYO**, was convicted for the offence of Defilement Contrary to **Section 8(1)** as read with **Section 2** of the **Sexual Offences Act**. He was then sentenced to Life Imprisonment.
2. In his Petition of Appeal he raised five issues which can be summarized as follows:-
 1. *There was no medical evidence linking him to the offence.*
 2. *It was not proved that the blood stains on the mattress were from the victim.*
 3. *The case was just instigated against him because of a grudge between the appellant and the victim's parents.*
 4. *The shoe which was allegedly recovered from the appellant's bed, was not produced in evidence.*
 5. *The defence was sufficiently cogent, to lead to an acquittal.*
3. When canvassing the appeal, the Appellant raised supplementary grounds of appeal, and he made written submissions.
4. The first point he made was that there was inconclusive medical investigations, as the doctor who examined the victim did not carry out tests on forensic samples.
5. In that respect, the appellant noted that the trial court has statutory authority to direct that appropriate samples be taken from an accused person, for purposes of forensic and other scientific testing, including DNA.
6. In my understanding of the authority bestowed upon the Court, it is intended to address situations in which an accused person may have refused to subject himself to forensic or other scientific testing. Ordinarily, an accused person could not be compelled to provide samples which would be tested, with a view to ascertaining his connections, if any, with the offence that he had been charged with.
7. As the testing could yield evidence which might incriminate the accused, the general law recognizes that the accused ought not to be compelled to provide material which may later be used as evidence against him.
8. However, it is also appreciated that Sexual Offences are ordinarily committed away from the eyes of the public. Often times, it would be only the victim and the perpetrator who were present. In the circumstances, when an accused person refuses to provide samples that could be tested, the law now gives authority to the Court to direct that appropriate samples be taken from the accused.
9. It is not mandatory for the trial Court to direct that samples be taken from the accused. Therefore, if the Court does not direct an accused person to give appropriate samples for forensic or other scientific testing, that would not, of itself, be the basis for setting aside a conviction.

10. As regards the blood stains on the mattress which was retrieved from the house of the Appellant, it is true that the prosecution did not lead evidence to prove that the blood was from the victim.
11. However, there was no doubt that there was blood on the mattress.
12. At the time the said mattress was retrieved from the Appellant's house, the victim was still bleeding.
13. During her testimony, the minor said that she was defiled on the Appellant's bed. Upon being defiled, the minor bled.
14. In my considered view, the evidence tendered, paints a very clear nexus between the injuries on the minor and the blood on the mattress. I find absolutely no room for any doubt as to the source of the blood on the mattress.
15. The third issue raised by the Appellant is that the case was fabricated against him because there had been a grudge between him and the victim's father.
16. During cross-examination, the victim's father said that he had never had any issues with the Appellant.
17. At the Appellant's request, the victim's father was re-called for further cross-examination. Even at that stage, the minor's father reiterated that the only thing between him and the Appellant was the case arising from the defilement of his daughter.
18. The Appellant did not suggest to the victim's father that there was any issue concerning a grudge between the two of them.
19. During his testimony, the Appellant made reference to a "*long standing grudge*". However, he never made it clear what the alleged grudge was about.
20. In any event, the fact that the victim was defiled is real. That was not a figment of imagination. The only question was about the identity of the person who performed the heinous act.
21. If the Appellant had not been paid for work which he did at the church to which the victim's father belongs, it would be the Appellant who would have been holding a grudge against the victim's father. I cannot understand how the girl's father would have held a grudge against the Appellant, when the Appellant does not appear to have done anything which could have angered the victim's father, prior to the defilement of the minor.
22. In any event, it is noteworthy that the victim's father had already walked past the Appellant's house, when the Appellant's own mother noticed the victim outside her son's house. To my mind, that indicates that the victim's father did not have any reason to incriminate the Appellant. He rushed his injured daughter to hospital, and it is other persons who first linked the Appellant to the crime. Therefore, I find that the victim's father did not incriminate the Appellant, due to some alleged grudge between the two of them. He did not incriminate the Appellant at all.
23. A shoe was allegedly recovered from the Appellant's house, and the said shoe was said to belong to the victim. However, the shoe was not adduced in evidence.
24. If the shoe had been the only piece of evidence which could have linked the victim to the house of the Appellant, the failure to produce the said shoe could have weakened the case.
25. But I find that the victim was literally next to the Appellant's house, where she was found, still bleeding.
26. PW2 testified that there was blood on the Appellant's mattress, his floor and outside his door.
27. PW5 also testified that there was fresh blood at the door of the Appellant's house and on the floor, leading to the bedroom.
28. Clearly, the shoe was not the only evidence that would have created the nexus between the victim and the Appellant. Therefore, the failure to produce it in evidence did not weaken the prosecution case.
29. The final issue raised by the Appellant was that he had tendered a cogent defence.
30. He had put forward an alibi, saying that at the material time, he was at "*Mama Pima*", where he had gone to purchase food and also to take some alcohol.
31. He had gone there at about 2.00pm, after leaving his place of work at about 12.00 noon. In effect, the Appellant said that he was not at home when the victim was defiled.
32. He also said that the names on the Charge Sheet were not his.
33. It is noteworthy that the Appellant was not a stranger to the victim or the victim's family. He was their neighbour. He was also a member of the same church as the victim's father.

34. The Appellant's mother and the victim's father were together, working on a visitation mission.
35. As they were walking towards home, they met O, who is a son of the Appellant. O informed them that the Appellant had sent him.
36. The said evidence corroborated the evidence of the victim, who had been playing with O, outside the Appellant's house.
37. Therefore, the Appellant's alibi defence was dealt a fatal blow, through the evidence tendered by the prosecution.
38. Even the victim's father confirmed that the Appellant came from inside his house.
39. All the evidence adduced placed the Appellant firmly at the scene of crime.
40. And this was a case of recognition. The victim, her father and the Assistant Chief did not identify the Appellant by his name. They knew him.
41. And the Appellant also confirmed that he and the victim's father knew one another.
42. The victim said that the Appellant was "*Baba Hussein*", and the Appellant confirmed that he has a son named H.
43. He was the person whom the victim recognized as the perpetrator of the crime. Therefore, this was definitely not a case of mistaken identity, as the Appellant asserted.
44. In the final analysis, there are no merits in any of the grounds of appeal. I also find, after a re-evaluation of all the evidence on record, that the prosecution tendered evidence which proved beyond any reasonable doubt that the Appellant had committed the offence of defilement.
45. Accordingly, the appeal is dismissed, and I uphold both the conviction and the sentence.

DATED, SIGNED and DELIVERED at KISUMU this 25th day of **June** 2018.

FRED A. OCHIENG

JUDGE