



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 85 of 2016

WYCLIFF OKOYO ONGONGO.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Kibera Sexual Offence Case No. 49 of 2015 delivered by Hon. C.N. Ondieki, RM on 4th and 6th May, 2016).

JUDGMENT

Background.

1. The Appellant herein was charged in the main count with the offence defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act. The particulars of the charge were that on 10th September, 2015 at Ngina Road in Riruta within Nairobi County, caused his penis to penetrate the anus of HN, a child aged 7 years. In the alternative he was charged of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006 in that he touched the anus of HN, a child aged 7 years.
2. The Appellant was arraigned in court and at the conclusion of the trial found guilty in the main count and sentenced to imprisonment for life. Being dissatisfied with that court's decision he has lodged the present appeal against both the conviction and sentence. His grounds of appeal are that; Articles 25(c) and 50(a) of the Constitution were violated, the prosecution case was not proved the case to the required standard, his mode of arrest was blurred by inconsistencies, his alibi defence was not considered, the charges were framed up against him and that the prosecution case was laced with contradictions.

Submissions

3. The appeal was canvassed before me on 22nd October, 2018. The Appellant who was in person relied on written submissions whilst Miss Atina for the Respondent made oral submissions. I shall consider the respective submissions in the body of the determination.

Evidence

4. I summarize the prosecution case as follows. **PW1**, HN was the complainant. On the material day, he was sent to collect firewood in the company of Meshack at the plot where the Appellant lived. That the Appellant called him but he ignored him. He grabbed him and pulled him to his house where he locked the door, took off his trouser and defiled him. Afterwards the Appellant gave him Ksh. 30/- and asked him not to disclose what had happened. His brother informed their mother what had happened and PW1 was taken to Nairobi Women's Hospital where he was treated. The trouser he was wearing was handed over to the police. In cross examination, PW1 stated that he had known the Appellant for about 11 months and that he was playing alongside other children when the Appellant grabbed him.
5. The testimony of **PW2**, EK, the mother to PW1 was that the latter informed her on 10th September, 2015 that a man had done something bad to him. She stated that as she conversed with PW1, the Appellant arrived and asked her whether her son had told her anything. He informed her that PW1 had gone to his house and he had cooked eggs and given her him Kshs. 50/-. It is then that PW1 disclosed that the Appellant had defiled him. The matter was reported at Satellite Police Station Police and PW1 was taken to Nairobi Women's Hospital for treatment.
6. **PW3**, JMO, PW1's father corroborated the evidence of PW1 and PW2. He added that the Appellant went into hiding for about a week after the incident. **PW4**, MN, PW1's brother was in the company of PW1 when the Appellant dragged him into his house and locked it. He added that he went to the Appellant's house looking for his brother but the Appellant did not open the door. He thus mobilized other children who went and shouted PW1's name after which the door opened and the Appellant explained that they were inside the house eating. He

testified that he knew the Appellant as Wyc.

7. **PW5**, Dr. Joseph Maundu of police surgery examined PW1 on 14th September, 2015 and filled his P3 Form. The examination disclosed that the boy's anus had a tear and laceration at the six o'clock position. **PW6**, Joseph Mwanzia was a clinical officer at Nairobi Women's Hospital who produced Post Rape Care Form filled by his colleague Ndolo who had earlier examined PW1. The child was found with blood stains in the anal region and lacerations of the anus. There was also a whitish discharge. They did a wet perforation test of the region and found pus. The diagnosis was that the child had been sodomised.

8. **PW7**, PC Denis Cheruiyot of Riruta Police Station together with his colleague PC Khamala arrested that Appellant from his home on 17th September, 2015. **PW8**, PC Naomi Kamara investigated officer the matter. She recorded the witness statements on 14th September, 2015. She also issued the complainant with a P3 form. She made a request to PW7 to arrest the Appellant. She thereafter charged HIM accordingly.

9. The Appellant gave an unsworn statement of defence in which he denied committing the offence. He stated that on 10th September, 2015 he was at home at around 7:30 a.m. when he was asked to relief a fellow security guard. He worked overnight and walked home where he arrived at about 7.40 a.m. That on 11th September, 2015 PW2 came to his house and claimed that he had defiled her child. He was shocked as he had not seen the child on the day in question. **DW2**, Douglas Omariba Ong'ondo, the Appellant's brother testified that on 10th September, 2015 he went home to Kisii as there was a function on 13th September, 2015 before returning on 14th September, 2015. He recalled that on 15th September, 2015 while having his lunch two police arrested the Appellant. In cross examination he stated that the Appellant travelled to Kisii on 12th September, 2015.

Determination.

10. I have considered the evidence on record and the respective rival submissions after which I have deduced that the issues arising for determination are whether the Appellant's right to a fair trial was violated, whether the prosecution failed to call crucial witnesses, whether the Appellant's alibi defence was considered and whether the case was proved beyond reasonable doubt.

Whether the Appellant's right to a fair trial was violated.

11. The Appellant submitted that his right to a fair trial as set out under Article 25(c) of the Constitution was infringed as the court failed to observe that he was innocent until otherwise proved guilty. He submitted that this arose from the inconsistencies and contradictions that were witnessed in the trial, more so as regards the complainant's evidence. He urged the court to holistically reevaluate the evidence and find that there was a breach of his right to a fair trial. He submitted that the investigation carried out was shrouded by inconsistencies as the investigating officer did not conduct the investigation with due diligence. He pointed to the presence of two people in the house during his arrest and questioned the failure to call the other party present as a prosecution witness to corroborate his identification.

12. Ms. Atina on her part submitted that the contradictions highlighted by the Appellant did not affect the substratum of the case and did not therefore prejudice the Appellant.

13. From the Appellant's submission, it is clear that he misconstrued the import of the provision under Article 50(2)(a) which requires that the accused be presumed innocent until otherwise proved. This presumption requires that a trial be conducted in a fair manner that is not prejudicial to an accused. For an instance, the presumption may easily be dispelled where the court shifts the burden of proof upon an accused person as this goes against the tenets of a criminal trial. On the contrary, it does not apply merely because the prosecution adduces contradictory evidence. Such evidence can only work to the advantage of an accused as he can challenge it as weak and shredding the prosecution case. Any contradictions and inconsistencies are simply relevant when it comes to deciding whether the offence was proved to the required standard. A conclusion as to their materiality can only be undertaken after a full analysis and evaluation of the evidence. Consequently, I am unable to find that the Appellant's right to be presumed innocent unless proven guilty was violated by pointing to contradictory evidence in the prosecution case.

Whether crucial witnesses were not called.

14. The Appellant contended that a crucial witness one Mama Peter was not called in the matter and the failure to call her implied that her evidence would have been adverse to the prosecution's case. Ms. Atina on the other hand contended that the prosecution called all necessary witnesses.

15. It is trite that the prosecution is under no duty to call a particular number of witnesses. What is paramount is that they call the witnesses they deem are sufficient to establish their case. See: **Section 143 of the Evidence Act**. The witness, one Mama Peter that the Appellant stated was not called could not be deemed a crucial witness. Her role was merely that she sent the complainant and his brother to fetch firewood before the incident. She was not privy to the incident and the only plausible reason for which she would have been called was to establish what the complainant was up to prior to the incident. This role was ably filled by the evidence of PW1's brother who testified that they were playing with PW1 before the Appellant pulled him into his house. This ground of appeal accordingly fails.

Whether the Appellant's alibi defence was considered.

16. The Appellant submitted that the trial court failed to consider his alibi defence in reaching its decision. Ms. Atina countered this by submitting that the Appellant's defence was contradicted by his brother as a result of which it was dismissed as unmerited.

17. The Appellant gave an unsworn statement of defence and also called a witness, his brother. He raised an alibi stating that he was called to work which assertion was evidenced by his supervisor Maina Sylvester and a fellow guard Damaline Nyakundi. The trial court in a bid to

ensure the just determination of the matter summoned the two named persons to testify. The Appellant then informed the court that he could not find the witnesses and only called his brother, DW2. The latter testified that he had left the house on 10th September, 2015 at 7.00 a.m. and travelled to Kisii and returned on 14th September, 2015. DW2's evidence sharply contrasted the Appellant's statement that he was with him at the house on 10th and 11th September, 2015. This called into question the credibility of the Appellant's defence which, just as the trial court found, this court finds did not oust the strong prosecution case against him. It could not bail him out. Equally, this ground of appeal fails.

Whether the case was proved beyond a reasonable doubt.

18. The prosecution was enjoined to prove three essential elements, namely; (i) age of the victim, (ii) identification of the perpetrator and (iii) penetration. It was the Appellant's submission that owing to his defence the elements of the offence were not proved and he could not therefore be linked to the offence. Additionally, he submitted that the clothes that were collected from PW1 were not subjected to DNA analysis as further proof that he defiled PW1.

19. Miss Atina on the other hand submitted that the ingredients of the offence of defilement were proved beyond a reasonable doubt. For penetration she pointed to the evidence of complainant which was corroborated by medical evidence adduced by the medical experts. Pertaining to the age of the minor she submitted that a clinic card was produced accordingly. With regards to identification, she submitted that it was through recognition as the Appellant was known to the complainant and the identification was supported by the complainant's brother who was present near the scene. She added that the Appellant's assertion that his defence was not considered was not factual as the same was not supported by the witness he called. She submitted that the contradiction in the defence pointed to the same being an afterthought which the trial court rightly rejected. With regards to the Appellant's assertion that there was bad blood between him and the complainant's family she submitted that the issue was never raised during the proceedings. She concluded by urging the court to dismiss the appeal.

20. My reevaluation of the evidence drives me to conclude that the age of PW1 was proved by production of a clinic card that proved that the child was aged 7 years when the offence occurred as he was born in November, 2008. With regards to identification, the evidence on record was that the Appellant was recognized by the complainant and his brother, PW4, who recalled that the Appellant was referred to as "Wyc". The evidence of recognition was also corroborated by the evidence of the mother, PW2, who testified that the Appellant visited her that evening enquiring whether the child had told her anything, a fact he did not dispute which pointed to familiarity between the parties involved. I have no doubt therefore that the Appellant was positively identified as the man who dragged PW1 to his house.

21. With regards to penetration the complainant's evidence was that after the Appellant dragged him into the house he undressed him and proceeded to defile him. His evidence was corroborated by the medical evidence produced by Dr. Maundu and Ndolo which indicated that there was a laceration and tear of the rectum. The Post Rape Care report that was filled the same date of the incident indicated that blood stains were found on the rectum. The evidence proved penetration of the child's anus and that the penetration was perpetrated within a short period of the examination. It can only then be concluded that the perpetrator of the offence was the Appellant.

22. In sum, I find that the offence of defilement was proved beyond a reasonable doubt. The appeal is unmerited and I dismiss it in its entirety. I uphold both the conviction and sentence.

Dated and Delivered at Nairobi this 27th day of November, 2018.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Appellant in person.*

2. *Miss Nyauncho for the Respondent.*