



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 2 OF 2017

(From Original Conviction and Sentence in Criminal Case No. 656 of 2015 of Senior Resident Magistrate's Court at Mumias)

ZAKAYO OKETCH OMITI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant was convicted by Hon. FM Nyakundi, Resident Magistrate, Mumias, of gang rape contrary to Section 10 of the Sexual Offences Act No. 3 of 2006, and was accordingly sentenced to twenty (20) years imprisonment. The particulars of the charge against the Appellant were that on 17th May 2015 in Kakamega County in association with another not before court he intentionally and unlawfully caused his penis to penetrate the vagina of VAO a child aged fourteen (14) years.

2. He had also been charged with an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act. The particulars of the alternative charge were that on the same date and at the same place stated in the main count, he had intentionally caused his penis to come into contact with VAO, a child aged fourteen (14) years.

3. The appellant pleaded not guilty to the charges before the trial court and the primary court had to conduct a trial. The prosecution called nine (9) witnesses.

4. VAO, the complainant testified as PW1. She explained how she met the appellant, a *boda boda* operator, who instead of taking her to her destination, advised that he could accommodate her at his home for the night on the understanding that he would take her to her destination the following morning. He took her to a house where he forcibly removed her clothes and inserted his penis into her vagina. He then brought in another person, who was his co-accused before the trial court, and he left her with him, and the second person proceeded to have sex with her against her will for the remaining part of the night. The next morning she informed several persons of her ordeal, and she was eventually taken to the police and to a medical facility.

5. Consolata Nekesa Omono (PW2), Adam Oduor Chebi (PW3), Patrick Masala Omolo (PW5) and Asha Mukoya Wanga (PW6) were among the persons who first got information from the complainant the following morning of her ordeal, and they narrated what she told them and the steps they took to ensure that she got justice. Corporal Erastus Nyakwaba (PW7), Sergeant Hassan Jumba (PW8) and Corporal Maurice Otieno (PW9) were the police officers involved in the matter. They received the first report and took the complainant for medical examination, and later apprehended the suspects. George Watila (PW4) was the clinic officer who attended to the complainant and prepared the Police Form 3 which was put in evidence. He concluded that the complainant had been defiled.

6. The appellant was put on his defence. He denied that he was a *boda boda* operator, and said that on that material day he was at home with his wife, but on cross-examination he said he was not going to call his wife as a witness.

7. After reviewing the evidence, the trial court convicted him of the main charge of gang rape contrary to Section 10 of the Sexual Offences Act, and sentenced him to twenty (20) years imprisonment.

8. The appellant being dissatisfied with the conviction and sentence, appealed to this court and raised several grounds of appeal, namely:-

- a) That the learned trial Magistrate had convicted him on basis of evidence that was uncorroborated, fabricated, malicious, discredited, farfetched and lacking credibility;
- b) That the learned trial Magistrate did not consider that the age of the complainant had not been ascertained;
- c) That the learned trial Magistrate did not consider that he had not been supplied with all the relevant documents or information the

prosecution was relying on;

d) That the trial court had convicted him on the strength of the evidence of a single witness which was discredited, lacked probative value and was uncorroborated;

e) That he was not medically tested to confirm whether he was the one who committed the offence;

f) That the court rejected his *alibi* defence which was cogent and had created doubt on the prosecution's case; and

g) That the sentence meted out was harsh.

9. Being the first appellate court, I have re-evaluated all the evidence on record. I have drawn my own conclusions, whilst bearing in mind the fact that I did not have the benefit of observing the witnesses as they testified. The Court of Appeal's decision in the case of **Okeno vs. Republic (1972) EA 32** has consistently been cited on this issue. In its pertinent part, the decision is to the effect that:-

“An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”

10. The appeal was canvassed on 25th September, 2018, and the appellant relied on written submissions that he placed before the court. Mr. Juma, Prosecution Counsel, opposed the appeal and invited the court to go through the record of the trial court, and thereafter make appropriate orders.

11. In his written submissions, the appellant argued that Article 50(2)(g)(h) and (j) of the Constitution were violated as he was informed of his right to legal representation and that he was occasionally ambushed with new evidence in the course of the trial to which he was required to cross-examine on, yet he had not been allowed access to the information that the prosecution was to rely on. He submitted that contrary to section 198(4) of the Criminal Procedure Code (CPC), Cap 175, Laws of Kenya, the language that was used at the trial by seven of the witnesses was not recorded and was therefore unknown. He asserted that he was unable to cross-examine the witnesses because of language hitches. He attacked the medical evidence on the basis that the complainant had not attended medical treatment as alleged in the P3 form and that the complainant had taken a bath after the incident and there was therefore no way any medical tests would have yielded the results stated in the P3 form. He further submitted that the complainant had stated that she had blood on her underwear and her pair of shorts yet these items of clothing were not produced in evidence, and no explanation was given as to what became of them. He also submitted that the age of the complainant was not proved. He submitted that the evidence on record was not strong enough to sustain a conviction.

12. On whether the evidence of the complainant was corroborated, I have carefully scrutinized the record. The complainant was clearly placed at the compound of the appellant and on the morning of the alleged incident was in the company of the appellant. Indeed, the incident only came to light when the appellant's wife became irritated that the complainant was in the company of her husband. The events thereafter involved several other individuals who gave coherent and consistent accounts that provided corroboration to the complainant's account. I find nothing in the record which would suggest that the evidence of the complainant was not consistent was not or corroborated or was not credible.

13. On the complainant's age, the complainant herself said that she was 14, and was still in primary school, she stated her class to be Standard Six. I note too that the court was minded to conduct a *voire dire* examination of her, suggesting that she was a person who was obviously a child. PW4, the clinical officer, stated that he did an age assessment and in his opinion found her to be in the 14 years of age bracket. The appellant alleged that the clinical officer did not have the technical competence to conduct such a test, but he did not provide any basis for making that assertion. I do not find any material upon which it can be concluded that the complainant's age was not ascertained.

14. The appellant submitted that he was not supplied with the evidence that the prosecution was to rely on. I am alive to the constitutional requirement that an accused person is entitled to access to information. I have carefully perused through the record, I have not come across anything on the record that indicates that the appellant herein applied to be supplied with information and that plea was turned down by the court. It was his duty to apply to be supplied with the information if he wished to rely on it at the trial. The fact that there is nothing on record showing that he asked for such records is an indication that he either had been supplied with it, and therefore it was not necessary for him to ask for it, or if it had not been supplied by the prosecution, he did not need it hence he did not apply for it. A constitutional right is a matter of law, both sides are deemed to be aware of the law, and the principle remains that ignorance of the law is no defence. I do not think that anything turns on this.

15. Related to that is the right to legal representation and to translation of the proceedings into the language that the appellant was familiar with. These are issues of law. It is a trite law that all are expected to be aware of the law, and ignorance thereof is not a defence. There is no obligation that the trial court informs accused persons facing sexual charges that they are entitled to legal representation. There is nothing on record that suggests that the trial court in one way or the other hindered the appellant's right to legal representation, or frustrated his exercise of that right in any way. On the language used, it is clear that at the time plea was taken the language used was Kiswahili. The rest of the record does not indicate the language used during the rest of the trial, but I would presume that the trial court continued with the use of Kiswahili. The appellant has not indicated the language that was being used at the trial and which he now claims limited his cross-examination of the witnesses. In any event, there is nothing on record to show that he ever protested at any stage to proceedings being conducted in a language that he was not familiar with. I am not persuaded that there was any language hitch.

16. On the medical evidence, the appellant argued that the complainant was not treated at all, and therefore there cannot be basis for the

findings by the clinical officer who prepared the P3 form. The evidence on record is that the complainant was escorted by the police after the report was made to them to hospital for examination, not treatment, to ascertain whether or not she had been sexually violated. It was a process in evidence gathering, and not treatment. He seeks to raise doubts on the accuracy of the medical records given that the complainant had taken a bath, suggesting that would have had the effect of destroying evidence. Whether taking a bath *per se* washes away the evidence of sexual assault is a matter that he should have taken up with the witness who made the P3 form. It is not something that the court can just assume or take judicial evidence of. He should have confronted it at the trial. Regarding the failure by the complainant to produce her clothes that she alleged were bloodied during the ordeal, I am not aware of any requirement that compels sexual offence victims to avail clothing that allegedly bear evidence of the assault. Failure to produce such material is itself not fatal to the prosecution so long as there is other evidence that points to the commission of the offence.

17. The appellant submitted that his conviction was not safe as the trial court based it on the evidence of a single witness, which, in his view was discredited. Sexual offences are never committed in the public eye, but in privacy. It is therefore incredible to expect that there would be more than one eyewitness to it, apart from the complainant herself. It is for this reason that the law require corroboration. I believe that I have dealt with this matter obliquely when I dealt with the question as to whether the evidence of the complainant herein was uncorroborated and therefore unreliable or not. I have already found that there was sufficient corroboration of the evidence of the complainant and therefore the trial court did not commit any error in relying on her testimony.

18. On the issue of that his *alibi* defence was not considered. I have perused the record of the trial court. I have read and re-read his statement on defence, and I do not get the impression that the appellant gave any *alibi* defence. There is no account of where he was on the material day at the material time of the commission of the alleged offence. It cannot therefore be said that the trial court erred in not considering the appellant's *alibi* defence.

19. On the sentence being harsh, I note that the trial court convicted the appellant on a charge of gang rape, and sentenced him to serve 20 years imprisonment. The said Section 10 of Sexual Offences Act under which the appellant was convicted and sentenced provides thus:

“Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less fifteen years but which may be enhanced to imprisonment for life.”

20. I do find that the offence with which the appellant was charged was a serious offence and deserved very stiff punishment as rightly observed by the trial court. The maximum penalty for the offence charged, and in respect of which the appellant was convicted, is life imprisonment, and the minimum fifteen years. The sentence imposed was within the range allowed in law. In my view the appellant got away with a fairly light sentence given that the victim was a child.

21. Having considered all the issues raised in the appeal, I am of the considered view that the conviction of the appellant in Mumias PMCCRC No. 656 of 2015 was safe. I shall accordingly confirm the said conviction and uphold the sentence imposed. The appeal herein is hereby dismissed. The appellant has a right to challenge this judgement at the Court of Appeal.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 24TH DAY OF DECEMBER 2018

W MUSYOKA

JUDGE