REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 67 OF 2016

FELIX ONYANGO NYANDIGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against Judgment, Conviction and Sentence imposed in Criminal Case Number 8 of 2013 in the Senior Resident Magistrate's court at Winam delivered on 1.11.16 by Hon. B.Kasavuli)

JUDGMENT

Background

The Appellant herein **Felix Onyango Nyandiga** has filed this appeal against his conviction and sentence on a charge of defilement contrary to section 8(1) as read with section 8 (4) of the Sexual Offences Act No. 3 of 2006.The particulars of the charge are that

> ***On 30.12.12 at [Particulars Withheld] Area in Kisumu East District within Nyanza County intentionally and unlawfully caused your genital organ namely penis to penetrate the genital organ namely vagina of T M a girl aged 17 years***

The prosecution's case

The prosecution called 4 witnesses in support of the charge. PW1 T M testified that she was 17 years and that the appellant was her boyfriend. She said she went to appellant's home on 30.12.12 and found his father. That appellant later came with his brother and on that night, she had sexual intercourse with appellant. DW2 who is complainant's mother said that complainant was born in 1996 and she produced her certificate of birth as PEXH. 1. She recalled that on 30.12.12, at about 3 pm, she noticed that the complainant was not at home and her other children told her that she had gone away in company of a tall man. That she went to Nyabondo AP Camp where she found appellant'smother who told her that her daughter had gone to her home and that the appellant wasn't there. That later in the day; she returned to the AP Camp where she found the complainant and appellant. She was later recalled and she produced another certificate of birth which showed that complainant was born on 2.10.96 as PEXH. 2. PW3 told court that he arrested the complainant and appellant from appellant's house.PW4, clinical officer stated when he examined complainant on 3.1.13 and found blood in her vagina and a bacterial infection. She concluded that sexual penetration had been taking place.

The Defence Case

When put on his defence, the appellant gave a sworn testimony in which he denied the offence. He recalled that on the night he was arrested; he had returned home at 7 pm and his siblings informed him

that their parents had escorted a certain girl to the police station. That later at 4.00 am, police went to his house in company of complainant and he was arrested and later charged with an offence he did not commit. The appellant's mother testified that on the material date, complainant went to her home at about 2 pm and said that she was from [Particulars Withheld] village. That when complainant declined to tell her why she had gone to her home; she escorted her to the AP Camp where she met complainant's mother. That the assistant chief advised her to go back home with the complainant who spent the night with her daughters in the main house. Appellant's father recalled that on the material date at about 3.00 pm, complainant went to his home and said that she was from [Particulars Withheld] village. That since the complainant was a stranger; he called his wife to escort her to the AP Camp. That his wife returned with complainant and said that the assistant chief had advised her to keep her for the night. That later the same night, police went to his home and they arrested the complainant from the main house and appellant from the kitchen.

The Appeal

The Appellant was tried and found guilty, convicted and sentenced to serve 15 years imprisonment. The conviction and sentence provoked this appeal through the firm of M/s. Doe Anyul and Company Advocates in which the Appellants set out seven (7) grounds of Appeal being as follows:-

> *(i)* ***The trial learned magistrate erred both in law and fact by failing to appreciate the significance conduct of DW2 and DW3 and their testimony and thereby raising doubt as to whether there was actual sexual contact between the appellant and PW1 and such failure occasioned a miscarriage of justice***
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> *(ii)* ***The trial learned magistrate erred both in law and fact by ignoring the fundamental issue that the appellant was neve examined by a doctor to ascertain that the injuries and the infection to the complainant were caused by the appellant hence arriving at a wrong decision***
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> *(iii)* ***The trial learned magistrate erred both in law and fact dismissing an important aspect that the investigating officer was not called to testify in view of the contradictions and inconsistencies of the testimonies of PW1, PW2 and PW3 which consistencies should have been evaluated in favor of the appellant***
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> *(iv)* ***The trial learned magistrate erred both in law and fact by failing to appreciate the significance conduct of DW2 and DW3 and their testimony and thereby raising doubt as to whether there was actual sexual contact between the appellant and PW1 and such failure occasioned a miscarriage of justice***
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> *(v)* ***The trial learned magistrate failed to ascertain the circumstances under which the birth certificate was obtained in view of the testimony by PW1 and further failed to ascertain the age of the appellant taking into account that the appellant was unrepresented and hence arrived at a wrong decision***
>
> *(vi)* ***The trial learned magistrate erred both in law and fact shifting the burden of proof on the appellant***
>
> *(vii)* ***The sentence was manifestly excessive in view of eth circumstances***

Ms. Wafula, learned State Counsel, conceded the appeal on the grounds that the prosecution did not prove the case beyond reasonable doubt, that the doctor did not explain why he concluded that there was sexual intercourse yet a bacterial infection can be caused by other causes other that sexual intercourse.

Analysis and Determination

This being acourt offirstappeal, I am expected to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I neither saw nor heard any of the witnesses

and have to give due allowance. I am guided by the Court of Appeal's decision in the case of **ISSAC NG'ANG'A ALIAS PETER NG'ANG'A KAHIGA V REPUBLIC CRIMINAL APPEAL NO. 272 OF 2005** which held as follows:-

> ***"in the same way, a court hearing a first appeal (i.e. a first appellate court) also has duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same.***

There are now a myriad of case law on this but the well-known case of ***Okeno v Republic (1972) EA 32*** will suffice. In this case, the predecessor of the Court of Appeal stated:-

> ***The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) E.A. 570). 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 finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should 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 (See Peters Vs. Sunday Post, (1958) EA 424)'***

, submitted that there was no contact between the appellant and the complainant. He further submitted that the trial court had found that appellant and complainant were arrested while sleeping together but that such evidence was lacking in the proceedings. It was additionally submitted It was as well submitted that the appellant was not taken for medical examination to confirm if he was also infected with the same bacterial infection as the complainant.

Mr. Anyul, learned Advocate for the appellantsubmitted that there was doubt that the complainant was 17 years old. He argued that the prosecution produced 2 birth certificates as PEXH. 1 and PEXH. 2 but that the former was missing from the court record.

It is not disputed that 2 birth certificates were produced PEXH. 1 and PEXH. 2 but that the former was missing from the court record. It is however worthy to note that complainant testified that she was 17 years and her mother maintained that complainant was born in 1996. I find that evidence on record supported the fact that complainant was 17 years and that no doubt regarding her age has been proved.

asCounsel argued that the prosecution had not proved its case beyond any reasonable doubt. He relied on ***Pius ArapMaina v Republic [2013] eKLR*** in which the court held:

> ***It is gainsaid that the prosecution must prove a criminal charge beyond reasonable doubt. As a corollary, any evidential gaps in the prosecution's case raising material doubts must be interpreted in favour of the accused.***

PW3 in his evidence stated that he found the appellant and the complainant sleeping in the same house. Complainant did not in her evidence state that she was found sleeping in the same house with the appellant. The appellant told court that he did not see the complainant until the time he was arrested while sleeping in his parent's kitchen. His mother, DW2, told court that she was in company of the complainant from the time she went to her home up to the time complainant went to sleep in the main house from where she was arrested while the appellant was arresting from the kitchen where he was sleeping. Similar evidence was given by appellant's father DW3. There isobviously no evidence that the appellant came into contact with the complainant and the learned trial magistrate's finding that they were found sleeping in the same house was a misdirection of the facts.

It was further submitted that there was no evidence to connect the appellant with the offence of defilement because the complainant was found to have a bacterial infection and that it was thus necessary to conduct a medical examination on the appellant. Counsel referred to the case of

OcharoObaigwa Vs. Republic CR.A. NO. 92 OF 2003 where the Court of Appeal held:-

> ***"The evidence of Dr. Michael Njeru (PW5) was not specific. He did not reveal the type of sexually transmitted disease that the complainant had contracted. There is no evidence that the complainant was put under any treatment. Curiously, the appellant was not examined to find out if he suffered from any sexually transmitted disease and if so its relevance to the offence charged. The evidence of the Doctor does not in any way connect the appellant with the commission of the offence and therefore does not in law amount to corroboration"***

This court is aware of importance of the evidence of corroboration which in essence does not only tend to connect the accused person with the crime, but confirms in material particulars the evidence that the crime was committed by the accused person and non-other. See the case **of Mutonyi vs. Republic [1982] KLR Pg. 203**.

As conceded by the state, the evidence of the doctor does not in any way connect the appellant with the commission of the offence and therefore does not in law amount to corroboration.

In view of the foregoing analysis of the prosecution and defence case, I reach a conclusion that the case against the appellant was not proved beyond any reasonable doubt rendering the conviction unsafe. The appeal is thus allowed. The conviction is hereby quashed and the sentence is set aside. The appellant is set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED THIS 28TH DAY OFAPRIL 2017

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Clerk Felix

Appellant In person

For the State Wafula