REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 188 OF 2016

(CORAM: J.A. MAKAU – J.)

PETER ONYANGO OBIERO….……..…....APPELLANT

VS

REPUBLIC…….……...…….....RESPONDENT

(Being an Appeal against both the conviction and the sentence dated 13.12.2016 in Criminal Case No. 633 of 2015 in Bondo Law Court before Hon. M. Obiero-PM)

J U D G M E N T

1. The appellant **PETER OBIERO ONYANGO** was charged with the offence of unnatural offence contrary to **Section 162(a) of the Penal Code.** The particulars of the charge are that on the 2nd day of July 2015 around 2000hrs at [particulars withheld] village, Bar Kowino sub-location, Bondo township location in Bondo sub-county within Siaya County intentionally and unlawfully had carnal knowledge of JOO aged 14 years against the order of nature. The appellant also faced an alternative charge of committing an indecent act with a child contrary to **Section 11(1) of the Sexual Offences Act. No. 3 of 2006**. The particulars of the alternative charge are that on the same day, same place, the appellant intentionally and unlawfully touched the anus of JOO a child aged 14 years with his penis.

2. After full hearing, the trial court found the appellant guilty, convicted him with the main count and sentenced him to serve five (5) years imprisonment.

3. The conviction provoked this appeal which the appellant lodged through the firm of M/S Sala and Mudany Advocates setting out 11 grounds of appeal being thus:-

> ***(a) That the learned magistrate erred in law and in fact in finding that the prosecution had proved its case beyond reasonable doubt when the evidence as presented did not support the charge as drawn.***
>
> ***(b) That the learned trial magistrate erred in law and in fact in convicting the appellant under Section 215 of the Criminal Procedure Code, without sufficient evidence and without making a specific finding as to whether the appellant in fact defiled the complainant on the date, time and place indicated in the charge sheet.***
>
> ***(c) That the learned trial magistrate erred in fact and in law in failing to consider glaring inconsistencies in the prosecution's evidence and in failing to consider the evidence as a whole and especially for the defence.***

(d) That the learned trial magistrate completely misunderstood the case that was before him, misconceived the issues and as a result came to a wrong decision.

(e) That the learned trial magistrate erred in fact and in law in failing to taken into consideration the defence put forward by the appellant, in shifting the burden of proof to the appellant and in failing to find the appellant on parallel evidence.

(f) That the learned trial magistrate erred in law and in fact in convicting the appellant in the absence of compelling evidence from the prosecution.

(g) That the learned trial magistrate erred in law and in fact by deviating from the evidence adduced by the complainant as backed by her statement by the police and introducing extraneous facts and assumptions on which the complainant was not led during the examination in chief.

(h) That the learned trial magistrate erred in law by not appreciating and disregarding the evidence of the defence throughout the case.

(i) That the learned trial magistrate erred in law and procedure by shifting the burden of proof from the prosecution to the defence.

(j) That the learned trial magistrate erred in law and in fact in wholly premising his finding and conviction on his own personal views and opinions which were neither supported by the evidence before him nor the applicable law.

(k) In whole, the finding and holding of the learned trial magistrate as contained in his judgment delivered on 13/12/2016 is inconsiderate, erroneous, unlawful, biased and untenable in law.

4. At the hearing of the appeal, Mr. Sala, Learned Advocate, appeared for appellant whereas Mr. Ombati, Learned State Counsel, appeared for the state.

5. The facts of the prosecution's case form part of the record of the appeal and I need not reproduce the same, but shall summarize the prosecution's case and the defence.

6. The prosecution's case is as follows; that on 2/7/2015 at 8.00pm, the appellant called the complainant who was in company of two others requesting him to accompany him to his farm. That the complainant agreed, and the complainant and appellant proceeded to the appellant's farm. That after checking the farm, the appellant started touching the complainant's body especially his buttock. The appellant removed the complainant's short, carried the complainant, placed him on his thighs as he was squatting and put his testis into the complainant's anus for 2 hours which caused the complainant to feel pain but he did not bleed. After that, the appellant escorted the complainant home. The complainant informed his grandmother (PW5) who in turn informed PW2, father to complainant. The complainant went to hospital on 3/7/2015 and was examined by PW3, a clinical officer who compiled P3 form exhibit 3. PW4, the complainant's schoolteacher, was also informed called and talked to the complainant and he did a letter to Children's officer, police and Assistant Chief over the issue. The appellant was subsequently arrested and charged with the offence.

7. The appellant denied the commission of the offence and gave a defence of alibi, stating that on 2/7/2015, he went to school in the morning and returned at 5.30pm and as from 8.00pm, he was preparing for the following day; preparing some school work. That at 9.00pm he went to watch news at the sitting room upto 9.30pm when he took supper. That he was with his two sons; D O and I O and his daughter in-law Min J, wife to Daniel. That at 10.30pm, he went to sleep. He stated that he was arrested on 13/7/2015. The appellant stated he didn't commit the offence and that he did not see the complainant on that day. The appellant urged that he is framed due to grudge between himself and the complainant's family over land dispute.

8. I am first appellate court and I have subjected the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I had no opportunity to see and hear the witnesses and so I cannot comment on their demeanour. I have drawn my conclusions after due allowance. I am guided by the case of **Kiilu and Another V. R (2005) 1 KLR 174** where the court of Appeal held thus:

> ***"an appellant in a 1st appeal is entitled to expect the whole evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision in the evidence. The 1st appellate Court must itself weigh conflicting evidence and draw its own conclusions."***
>
> ***It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; only then can it decide whether the magistrates finding 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."***

9. Mr. Sala, Learned Advocate, for the appellant urged ground no(s) 1, 2 and 5 and abandoned all other grounds of appeal. He urged that the evidence adduced at the trial court did not support the charge; that there was no sufficient evidence and the trial court convicted the appellant without making a specific finding as to whether the appellant in fact had defiled the complainant on the material date, time and place indicated in the charge sheet and lastly, the trial court erred in failing to take into consideration the appellant's defence and in shifting the burden of proof to the appellant.

10. Mr. Ombati, Learned State Counsel, opposed the appeal urging that the prosecution proved penetration and the complainant's evidence was corroborated by the doctor. That the matter was reported to the authorities without delay; that crucial and relevant witnesses were called. That the conviction was proper and the sentence given was lenient.

11. The appellant contends the prosecution did not prove their case beyond reasonable doubt on a charge of unnatural offence as penetration was not probed.

12. **Section 162(a) of the Penal Code** provides:-

"162. Any person who -

> ***(a|) has carnal knowledge of any person against the order of nature.***
>
> ***(b) has carnal knowledge of an animal; or***
>
> ***(c) permits a male person to have carnal knowledge of him or her against the order of nature, Is guilty of a felony and is liable to imprisonment for fourteen years."***

13. In proving an offence of unnatural offence contrary to **Section 162(a) of the Penal Code**, penetration is required to be proved as against the order of nature. The **Black's Law Dictionary**, *page 1169* defines "penetration" as: -

> ***"entry of the penis or some other part of the body or a foreign object into the vagina or other body orifice"***.
>
> **Section 2 of the Sexual Offences Act No. 3 of 2006** defines "penetration" as:-
>
> ***"2. (1):***
>
> ***"penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person"***

14. From the above definition in an offence of unnatural offence, the prosecution is supposed to prove the

following:-

(a) Penetration.

(b) or carnal knowledge of any person against the order of nature.

(c) Recognition/identification of the perpetrator.

15. In the instant case, the prosecution relied mainly on the evidence of the PW1 and PW3. PW1's evidence is that the appellant removed PW1's short, carried him and placed him on his thighs while squatting and put his testis into PW1's anus and did that for 2hours. PW1 felt pain. On cross-examination, PW1stated the appellant placed his testis on his anus.

16. The complainant in this case was then 14years and he must have known the parts of a human body and I find he could not have been mistaken on the part that he referred to when he stated what the appellant did to him. From the position as described by the complainant, this court finds it hard to understand how a man when another is sitted on his thighs in a squatting position could be able to, put his testis or place his testis on the anus of another person and keep them there for two hours still squatting bearing in mind the position of a man's testis. I find that this is biologically impracticable. I also find it difficult for a man to put his testis into another man's anus for 2hours or place it there for 2hours and not use his penis so as to sodomize the other.

17. PW3, E A, grandmother to PW1 testified PW1 told her the appellant made him squat, removed his trouser and made him squat and he inserted his penis into his anus. The version PW3 stated she was told by PW1 is contradictory and inconsistent to what PW1 told the trial court. PW1 told the trial court, the appellant carried him, placed him on his thighs and put his testis into the anus. During the cross-examination of the complainant, he changed his version of evidence and stated the appellant placed his testis on his anus which contradicted his evidence as to what he said the appellant had done.

18. PW1 stated that after the appellant put his testis into his anus, he did not bleed but felt pain and thus he went to the hospital on 3/7/2015. PW3, the clinical officer, Maruti Lawrence examined PW1 on 3/7/2015 and stated that he noted laceration or tear on the anal opening which was painful to touch and that there was no bleeding and that there was pain from the scrotal area, that the tests proved negative as no spermatozoa were seen. I have examined treatment notes exhibit 2, laboratory request form exhibit 3 and P3 form exhibit 1 and I have noted PW3 did not make a finding on defilement nor did he indicate the probable weapon that might have been used to cause the minor laceration at the anal opening of the complainant and whether the same could not be caused by sickness or another cause.

19. PW4, MOW, stated that when he called the complainant from the class on 3/7/2015, he was walking normally. PW3 did not observe any abnormality in the way the complainant was walking and so was PW2. The complainant similarly did not complain of any difficulties in walking.

20. The complainant did not make the report to the police promptly. PW6, No. 95522, PC Patrick Anyango Oluoch stated the complainant made a report in company of his grandmother and Chief on 10/7/2015, thus after 8days from the date of the alleged incident. PW6 stated as per P3 form under paragraph 4(a) there were no injuries noted. She stated the treatment notes for the accused exhibit 5 indicated no injuries were found on the genitalia and the treatment was after 2 weeks.

21. The appellant contends that the trial court failed to reconcile the inconsistencies and contradictions in the prosecution evidence. It is the appellant's case the testimony of PW1, PW2, PW3, PW4, PW5 and PW6 is inconsistent and that there is no evidence to prove penetration, that the inconsistencies were not considered by the Lower Court. I have examined the evidence of PW1 against that of PW2, PW3, PW4, PW5 and PW6 and I find there are fundamental inconsistencies that dent the prosecution case. The appellant has succinctly identified the alleged inconsistences as pointed herein above and how they dent the prosecution case.

22. From the evidence of PW1, PW1 alleged the appellant put his testis into his anus for about two hours contrary to the evidence of PW5 who stated PW1 told her the appellant made him squat and he inserted his penis into his anus. PW1 stated he felt pain but he did not mention of having sustained any injuries as a result, however, PW3 the clinical officer who examined PW1 stated that PW1 had laceration or tear on the anal opening which was painful on touch and that there was no bleeding. P3 form exhibit 1 and treatment notes exhibit 2 did not indicate that there was a penetration into the complainant's anus. P3 form in respect of the appellant, exhibit4 and treatment notes exhibit 5, did not disclose any injuries to his genitalia. Testicle is a sex endocrine gland that produces sperm and makes sex hormones, resulting to the steroid testerone. It is distinct and different organ from penis and very delicate. I find that the complaint did not mention being penetrated by the appellant with his penis. The complainant's allegation of being penetrated by the appellant with his penis is not supported by the medical evidence nor his own evidence and I find that there was no penetration of the complainant's anus by appellant's penis or testis. On the issue of putting of the appellant's testis into complainant's anus, I note from PW1's evidence, that he stated the appellant was squatting for 2hours inserting his testis into complainant's anus. PW3 who examined PW1, noted he had laceration or tear to anal opening yet on examination of the appellant he found no lacerations or injuries on the testis. That if the appellant had inserted his testis into the complainant's anus for two hours and testis being delicate genitalia organs, PW3 the clinical officer should have found injuries to the appellant's genitalia, which he did not. Testis being so delicate could not have caused laceration or tears to the complainant's anus without being injured. The treatment notes on the complainant's exhibit 2 indicates he weighed 43.7kgs. He claimed the appellant as he was putting his testis into his anus he was squatting and the complainant sat on his thighs for 2hours. This I find is practically impossible for a 59 year old appellant as per exhibit 4 to sustain such a weight in a squatting position for two hours without a rest. I therefore find from the evidence, the prosecution failed to prove penetration of the complainant's anus by any of the appellant's genitalia organs.

23. I have also considered the appellant's defence that he was framed over the land dispute between himself and the family of the complainant. PW1 admitted on cross-examination that there is a land dispute between his family and the appellant's family. PW2 father to the complainant also admitted the appellant has transferred the land into his name. PW5 stated the appellant threatened her with eviction from the land. I have also taken into account that this case was reported to police on 10/7/2015 after the purported incident had taken place on 2/7/2015. No good reasons were advanced for such delay. I therefore find that it is possible that the accusation against the appellant might have been actuated by malice due to the land dispute and with intention to have the appellant fixed so as not to evict the complainant's family from his land.

24. **Whether failure to call crucial witness is fatal to the prosecution's case?** The appellant contends the prosecution failed to call crucial witnesses, urging from the evidence of PW1, he maintained that he was with MA and D at 8.00pm when the appellant called him from the house and asked him to accompany him to the farm. PW5 mentioned that when the appellant came, they went with the complainant's mother and her co-wife R A O and BA. The record reveals that save PW5, E A and other four witnesses who are alleged to have seen the appellant call the complainant and left with him were not called. PW5 stated from her house to that of Rael's is about 50 metres away and it was a dark night, the kind of lighting was not disclosed and that being a rural set up, it is not clear what enabled PW5 to see the appellant from a distance of 50metres. I find the chance of mistaken identity cannot be ruled out. I also note no good reason was given for failure to call the four crucial witnesses to put the appellant at the scene of crime.

25. In **Tetu Ole Sepha V Republic Criminal Appeal No. 15 of 2008 (Nairobi)**, the Court of Appeal held: -

> ***"Although, the evidence of the Administration Police would have buttressed the prosecution case, there was sufficient evidence which placed the appellant at the scene of the crime and therefore, the omission could not have been the basis of any adverse inference."***

26. I have considered the prosecution evidence in support of the charge and I find that there was no sufficient evidence which placed the appellant at the scene of the crime and bearing in mind of the

existing grudge due to land dispute between the family of the complainant and the appellant, the omission of calling the four crucial witnesses leads me to draw an inference that the witnesses were not called because they would not have given favourable evidence for the prosecution.

27. The appellant did not urge ground no. 5 of the appeal and as such I will treat the same as abandoned together with the other grounds which the appellant's counsel had abandoned at the beginning of his submissions.

28. **The upshot is that the appellant's appeal is meritorious and is allowed. The conviction is quashed and sentence set aside. The appellant is set at liberty forthwith unless otherwise lawfully held.**

DATED AND SIGNED AT SIAYA THIS 9TH DAY OF MARCH 2017.

J.A. MAKAU

JUDGE

DELIVERED IN OPEN COURT THIS 9TH DAY OF MARCH 2017.

In the presence of:

Mr. Sala: for Appellant

M/S Odumba: for State

Appellant present

Court Assistants:

1. George Ngayo

2. Patience B. Ochieng

3. Sarah Ooro

J.A. MAKAU

JUDGE