



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
CRIMINAL APPEAL NO. 52 OF 2016

GEOFFREY OUMA BARASA..... APPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence in S.O.A case No.83 of 2015 of the Chief Magistrate's Court at Busia by Hon. H.N Ndung'u (Miss) – Chief Magistrate)

JUDGMENT

GEOFFREY OUMA BARASA the appellant, was convicted for the offence of defilement contrary to section 8(1) (2) (sic) of the Sexual Offences Act No.3 of 2006.

The particulars of the offence were that on diverse dates between 2nd February 2015 and 30th March 2015 at **[particulars withheld]** village of within Busia County, he intentionally and unlawfully caused his penis to penetrate the vagina of **Z.R**, a child aged 2 years.

He was sentenced to serve life imprisonment. He has appealed against both conviction and sentence.

The appellant was in represented by Mr. J.V.Juma, learned counsel. He raised seven grounds of appeal which I have summarized as follows:

1. That the learned trial magistrate erred in law and in fact by over relying on circumstantial evidence.
2. That the learned trial magistrate erred in law and in fact by relying on uncorroborated evidence of an intermediary.
3. That the learned trial magistrate erred in law and in fact by shifting the burden of proof on the identity of the perpetrator to the appellant.
4. That the learned trial magistrate erred in law and in fact by ignoring the defence.

The state opposed the appeal through Mr. Owiti, the learned counsel.

The facts of the prosecution case were briefly as follows:

Between 2nd February 2015 and 9th April 2015 **Z.R** was staying with her grandparents, at Maenje in Busia County. Her mother took her to their Nairobi home on 9th April 2015. On 17th May 2015 while she

was sitting on her mother's lap she started behaving in a manner to suggest somebody had had sex with her. She implicated Ouma. This led to the arrest and the prosecution of the appellant.

The appellant contended that he did not commit the alleged offence.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO vs. REPUBLIC [1972] EA 32**.

The charge was erroneously drafted. It ought to have read contrary to "**...section 8(1) as read with section 8(2) ...**"

My perusal of the record indicate that the appellant understood the charge before pleading to it. He thereafter participated in the trial and was at all times represented by counsel. He was not prejudiced in any way and the defect is curable under section 382 of the Criminal Procedure Code.

For an offence of defilement to be proved, three ingredients must be proved beyond reasonable doubts. In the case of **FAPPYTON MUTUKU NGUI vs. REPUBLIC [2012] eKLR** the court enumerated them in the following terms:

The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant. (Emphasis mine)

The age of the complainant was established by the production of a copy of certificate of birth. According to this document, she was born on 7th June 2012. At the time of the alleged offence she was therefore two years and seven months.

According to the complainant's mother (PW1), when the complainant was positioning her genitalia with hers (mother's) she interpreted this to mean that she had had sex. In my view this was a wrong conclusion. This was a child of very tender age and who at the time could not have appreciated the pleasure of sexual intercourse. Had there been an attempt to penetrate her genitalia, it could have been very painful. This could have left her with a harrowing memory. The description by her mother is like she had enjoyed the experience. The learned trial magistrate ought to have interrogated this evidence further. This was no evidence to indicate that there was penetration.

The medical evidence that was adduced by Sammy Obuhuma (PW4) is that the child's hymen was broken. He concluded that penetration was by whatever means. Certainly it could not have been by a male adult's penis for this would have left obvious injuries on the little child.

The learned trial magistrate was criticized for relying on circumstantial evidence. What is circumstantial evidence? This question was answered in the case of **MOHAMED & 3 OTHERS vs. REPUBLIC [2005]1 KLR 722** where Osiemo Judge explained what circumstantial evidence is as follows:

Circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the fact at issue. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved.

In the case of **SAWE –V- REP [2003] KLR 354**, the Court of Appeal held as follows:

1. In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.

2. Circumstantial evidence can be a basis of a conviction only if there is no other existing

circumstances weakening the chain of circumstances relied on.

3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.

...

...

7. Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.

If we assume that there was penetration by a male genitalia, an assumption that is not supported by the evidence on record, then there was no evidence to connect the appellant to the offence. The fact that he is called Ouma and the child mentioned Ouma as the culprit, did not mean he was the perpetrator. The prosecution had the onus to prove which Ouma was the culprit. The evidence on record already show that there were two other Oumas in the home. The learned trial magistrate ought not to have convicted the appellant without evidence that identified him as the offending Ouma.

It would appear that the grandmother of the child did not note any anomaly on her grandchild. My conclusion is that she did not for there was none. If it existed, the child's mother ought to have noted it immediately she took her daughter to Nairobi on 9th April 2015. She says she discovered the anomaly on 17th May 2015. This ought to have raised a red flag to the investigating officer and the learned trial magistrate. The investigating officer ought to have probed to establish the age of the perforation of the hymen. This would have thrown more light on the issue especially after evidence has shown that the complainant's mother was not happy with the arrangement to have her child stay away from her.

From the foregoing analysis, I find that the conviction of the appellant was not based on any evidence. I accordingly quash the conviction and set aside the sentence meted by the learned trial magistrate. The appellant is set at liberty unless if otherwise lawfully held.

DELIVERED and SIGNED at BUSIA this 31st day of July, 2017

KIARIE WAWERU KIARIE

JUDGE