REPUBLIC OF KENYA

IN THE HIGH COURT OF KAKAMEGA

HCRA 103 OF 2016

JOHN OLANDO OMBUNGA......APPELLANT

V E R S U S

REPUBLIC................................RESPONDENT

(Arising from the Judgment of Hon. M.I.Shimenga criminal case No. 54 of 2016 at Principal Magistrate's court at Butere)

J U D G M E N T

1. **John Olando Ombunga** the appellant herein was charged with the following two offences before the Chief Magistrate's court Kakamega . Count 1 – Defilement contrary to section 8 (1) (3) of the sexual offences Act No. 3 of 2006 . Particulars being that the appellant on the 3rd day of February 2016, within Kakamega County , intentionally caused his penis to penetrate the vagina of **A O A** , a child aged 14 years old.

Alternative Count

Committing an indecent act with a child contrary section 11(1) of the Sexual Offences Act No. 3 of 2006 . Particulars being that the appellant on the 3rd day of February 2016 , within Kakamega County , intentionally touched the vagina of **A O A** , a child aged 14 years.

2. The appellant denied the charge and the case proceeded to full hearing with the prosecution calling five (5) witnesses. The appellant gave an unsworn defence and called no witness. He was convicted of the principal count and sentenced to 20 years imprisonment.

3. Being dissatisfied with the judgment he has appealed against both conviction and sentence citing the following grounds:

i. THAT the trial magistrate erred in both in law and facts in convicting me yet the evidence on record was not corroborated , fabricated , inconsistent , discredited married with a lot of contradictions and very implicative.

ii. THAT , the trial court did not consider that the doctor did not put him under any examination to prove that he actually committed the offence.

iii. THAT , the trial court did not consider that the alleged weapon (panga) was not produced in court as an exhibit .

iv. THAT the trial court did not produce the alleged six girls who claim to have seen the complainant coming from his house in court.

4. A summary of the case is that PW2 (A.O.A) a child then aged 14 years was a pupil at [particulars withheld] Primary School in class 6. She lived not far from the school and so would go home for lunch .On 3rd February, 2016 she went home for lunch and on her way back to school at 2 pm she met the appellant known as Georgy. He standing was next to his gate which is on the Emutesa road. He had a panga in his left hand .

5. He grabbed her using his right hand and took her to his house, 2M from the gate . He took her to his bedroom which had a wooden bed and a mattress and bedsheets. He removed her under garments and pushed her uniform upto the waist . He then removed his trousers and under wear and had sexual intercourse with her and she felt a lot of pain .He warned her not to tell anyone , as she dressed up and went to school arriving at 3 pm.

6. She found C M and J (Pupils) on the playground and informed them of what had befallen her . The two pupils took her to their headmaster (PW1) who made every effort to ensure the minor received treatment and the matter was also reported to the authorities.

PW3 **R M** the minor's grandmother was also involved to ensure she was treated.

7. Pw4 **Belinda Mulanya** is the Clinical officer who examined PW2 on 4th February 2016 . She confirmed that the girl had been defiled and she produced the treatment notes, PRC form ,and P3 form (EXB 2,3,4) . PW5 CPL **Isiah Kiroi** the investigating officer took PW2 to the hospital for age assessment . Her age was assessed as 14 years. The appellant was then immediately arrested.

8. In his unsworn statement of defence the appellant stated that he was arrested on 7th February, 2016 evening after arriving from his masonry work at a construction site . Upon arrest he was taken to the police station and arraigned in court , on 8th February , 2016 . It's while in court that he was notified of the charges . He denied defiling the complainant (PW2).

9. When the appeal came for hearing the appellant through his written and oral submissions told the court that his trial was held in violation Article 50 of the constitution as he was not supplied with witnesses statements and he was not informed of his right to legal representation . He also submitted that failure to call the two pupils C M and J and those who arrested him was fatal to the prosecution case .

10. He faulted the prosecution for the failure to have him medically examined to be sure that he was sexually active . It was his submission that a DNA report was required for this kind of case. Finally he stated that the doctors evidence and statement were contradictory . He denied being known as Georgie.

11. The appeal was opposed by the State through Mr. Juma who submitted that medical examination of the appellant was not mandatory . He cited the case of **Kassim Ali VS R (2006) Eklr** to support this submission . He further submitted that there was no contradiction in the evidence of the doctor and complainant save for the terminology used. For him what was material was to prove " penetration" which was actually done .

12. He argued that under section 143 of the Evidence Act there was no limit on the number of witnesses to be called by the prosecution . It was his submission that the witnesses called were sufficient as there were no eye witnesses. He admitted that no voire dire examination was conducted because the complainant was aged 16 years and was therefore not a child of tender years.

13. This is a first appeal and this court has a duty to re- evaluate and reconsider the evidence and arrive at an independent decision. At the same time it must been in mind that it did not see or hear the witnesses .

The Court of Appeal expressed itself on this issue in the case of **Kiilu &another vs R(2005) 1 KLR 174** when it stated:

" **2. An appellant on a first appeal 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 conclusion.**

3. 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 courts' findings and conclusions; 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".

14. I have considered the evidence on record afresh , alongside the grounds of appeal and submissions by both the appellant and respondent .

I will cluster grounds 3,4,5 together and deal with them as one ground.

15. The appellant was not arrested in the act or on the same day, of incident which occurred on 3rdFebruary , 2016. He was arrested on 7th February2016. No one knows what he was doing with himself during that time. Any examination on him after his arrest could have been an exercise in futility . In any event it is not a mandatory requirement , as the court would still consider other evidence in its possession to prove that fact . See **Kassim ali vs R (2006) eKLR**

16. It is true the panga talked of by PW2 was not produced as an exhibit . It is not the weapon that was used to perpetrate the offence and failure to produce it, is therefore not fatal . PW2 did not mention anything about six(6) girls who saw her coming from the appellants' house . She said there were two girls she found at the school's play ground . The three grounds (3-5) do not therefore raise any issue warranting this courts intervention .

17. I now wish to deal with ground 2 of the grounds of appeal.

In his oral submission he stated that there was a contradiction in the doctor's evidence and statement. At the same time he submitted that his rights were violated because he was not supplied with witness statements . If that is true then one wonders where he got the doctor's statement from . He must have been supplied with witnesses statements . Secondly the right to legal representation is not the same as being given legal representation by the State . It is not clear which of the two is complaining about.

18. The issue of the complainants age was well captured by the learned trial magistrate's Judgement at page 38 lines 13-18 where she stated

"On the age of the complainant both the complainant and her grandmother didn't know the complainant's age. She as well didn't have a birth certificate, clinic card or baptismal card. This is very common in my jurisdiction. However, the prosecution produced an age assessment report performed at Khwisero Health Centre on the complainant which indicated that on 7.2.1016 she was 14 years old. "

19. PW2 lived with her grandmother as her father had died. They did not have a birth certificate and the investigating officer(PW5) promptly took her for age assessment . I am satisfied that PW2's age was proved to be 14 years .

20. The next issue is whether there was penetrative sexual intercourse . PW2 explained in great detail what happened to her on 3rd February, 2016 2pm. Upon her return to school she promptly informed two pupils she found on the play ground . The two reported to their headteacher (PW1). The action the two girls and the head teacher took is so commendable . Through their action and that of PW3 the minor was treated in good time and the matter reported to the administration for action .

21. PW4 examined PW2 at the hospital on 4th February,2016 and these were her findings on the minor:

i. Her external genitalia was normal with no tears.

ii. There was a whitish mucoid from her vagina .

iii. A urinalysis was done which revealed the presence of epitherial cells.

iv. There was no hymen.

The presence of epitherial cells confirms friction in the vaginal lining.

All this goes on to confirm that PW2 was penetrated by way of sexual intercourse .

22. The appellant had submitted that failure to call certain witnesses diluted the evidence of PW2. First of all there was no eye witness to Pw2's complaint.. The absence of an eye witness cannot of itself render the evidence of PW2 as being valueless . The same is admissible and acceptable as long as the Court is satisfied with the credibility of the witness.

Section 124 of the Evidence Act provides as follows:-

> "**124.** *Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.*
>
> *Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.*

The learned trial magistrate believed PW2 and I also find her to be a credible witness as already explained elsewhere in this judgment.

23. The final issue is whether the appellant is the one who caused the penetration complained of. The appellant has argued that the witnesses were referring to one Georgie as the culprit and that is not his name as he is known as John Olando Ombunga.

This incident occurred in broad day light . PW2 promptly reported this matter and action was taken. The investigating Officer (PW5) visited the appellants house and gave a description similar to that given by PW2 .

24. Pw1, PW2, PW3 and PW5 have all confirmed that the appellants' names are John Olando but he is commonly known in the village as **Georgie/ Georgy.** There is nothing that was placed before the court to show or suggest why PW2 or anyone else would fabricate this evidence against the appellant.

25. Though the state submitted on the issue of voire dire examination I have not seen where it was raised by the appellant , in either the grounds of appeal or both written and oral submissions.

26.My finding is that the learned trial magistrate evaluated the evidence well and applied the law correctly .

27. I only wish to point out that the charge sheet cited the wrong provisions under the Sexual Offences Act . There is no Section 8(1)(3) under the Sexual offence Act . Section 8(3) is the penal provision .

The correct provision should have been Section 8(1) as read with Section 8(3) of the Sexual Offence Act No. 3 of 2006. This misquoting of the Provisions did not in any way prejudice the appellant as he was

clear on what he faced before the trial court.

28. l find no merit in this appeal which I dismiss . The sentence meted out to him is the minimum sentence under Section 8(3) of Sexual Offence Act, hence its legality.

29. I therefore confirm the conviction and sentence by the trial court.

Orders accordingly.

Delivered, signed and dated this 18th of day August, 2017 .

H.I.ONG'UDI

JUDGE