REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 13 C OF 2015

MILTON OBOTE ATIENO…….....APPELLANT

VERSUS

REPUBLIC……....RESPONDENT

(Appeal against Judgment, Conviction and Sentence imposed in Criminal Case Number 401 of 2013 in the* Senior Principal Magistrate's court at *Nyando on 27.01.15 by Hon. B.M.Kimtai (SRM)

JUDGMENT

Background

The Appellant herein **Milton Obote Atieno** 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. The particulars of the charge are that

> ***On 16.3.13 at [particulars withheld] Sub-Location, Bolo Location in Nyakach District within Kisumu County intentionally caused his penis to penetrate the vagina of M. A .T a girl aged 17 years***

Strangely, the particulars of the alternative count of indecent assault are word for word similar to those of the main count and I need not repeat them.

The prosecution's case

The prosecution called 5 witnesses in support of the charge. PW1 ***M. A .T*** testified that she was born in 1996 and was 17 years and further that she was a form 2 student at [particulars withheld] Secondary School. She recalled that on 16.3.13 at about 5.00 pm; she went to [particulars withheld] trading Centre and on her way home, she met W and S and they started walking home together. That they found the appellant at [particulars withheld] junction who accused her and the other girl of behaving as if they were more educated. That at that point; the appellant chased her towards her home, beat her with a cane and defiled her. That her sister later took her to Sondu Miriu Police Station where she reported the matter and was later treated at Nyakach District Hospital. PW2 Odhiambo Wycliffe recalled that on 16.3.13, he saw the appellant chase and slap the complainant. In cross-examination by the appellant; the witness stated that there were other people at the scene of the incident. PW3 L A O, the complainant's sister recalled that on 16.3.13, the complainant arrived home at about 7 pm and claimed that she had been defiled by the appellant. That she escorted the complainant to the police station and later to hospital. PW4 CPL Awash Omar issued complainant with a P3 form which was duly filled. He produced an age assessment report dated 17.7.13 showing that complainant was between 16 and 17 years as PEXH. 1 and complainant's T-shirt and torn pant as PEXH. 2 and 3 respectively. That he later arrested and charged the appellant. PW5,

Dr. Omwenga stated that he examined complainant on 16.3.13 and found she had swollen abdomen and right fingers, the labia was tender and hymen was swollen. He concluded that sexual penetration had taken place and produced the P3 form and treatment notes as PEXH. 4(a) and (b) respectively.

The Defence Case

When put on his defence, the appellant gave an unsworn testimony in which he denied the offence. He recalled that he met the complainant on the material date and that all he did was slap her after she insulted him.

The Appeal

The Appellant was tried and found guilty, convicted and sentenced to serve 15 years imprisonment. The conviction and sentence provoked this appeal in which the Appellant set out five (5) grounds of Appeal as follows:-

> ***i. That the medical evidence was inconclusive and disqualified the appellant from being the defiler***
>
> ***ii. That the learned trial magistrate failed to consider the grudge between complainant and appellant***
>
> ***iii. That there was need for a crucial independent witness***
>
> ***iv. That the respondent's evidence was inconsistent, incredible and marred with contradictions***
>
> ***v. That the investigations carried out were sketchy and shoddy***

Ms. Wafula, learned State Counsel, opposed the appeal on the grounds that the prosecution had proved the case beyond reasonable doubt and that the doctor had confirmed that the complainant had been assaulted and defiled.

Analysis

This being a court of first appeal, 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)'***

The complainant stated that she was in company of W and S when the incident occurred. Of interest to note is that the said witnesses were not called to testify. Instead the prosecution called other witnesses who did not witness the incident complained of.

This court is alive to the fact there is no legal requirement in law on the number of witnesses to prove a fact. Section 143 of Evidence Act (Cap 80) Laws of Kenya provides:-

> ***"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact"***

In the case of ***Bukenya & Others V Uganda [1972] EA 549*** court addressed itself thus:-

> ***"The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.***
>
> ***Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tendered to be adverse to the prosecution.***

In the case of ***JUMA NGODIA –Vs- REPUBLIC (1982-88)1 KAR 454***, the Court of Appeal held viz-

> ***"The prosecutor has, in general, discretion whether to call or not to call someone as a witness. If he does not call a vital reliable witness without a satisfactory explanation he runs the risk of the Court presuming that his evidence which could be and is not produced would, if produced, have been unfavourable to the prosecution."***

Determination

Having considered the evidence in its totality, I find that there is evidence of sexual assault on the complainant. However, failure by the prosecution to call eye witnesses to corroborate the complainant's case that it was the appellant that defiled her leaves the court wondering whether the prosecution was holding back some evidence that may have been adverse to its case. A doubt is raised in the prosecution case and I resolve it in favour of the appellant.

The conviction is unsafe and I hereby, allow the appeal, quash the conviction and set aside the sentence. The appellant is set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED THIS *21st* **DAY OF** *September* **2017**

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Appellant - In person

For the State - Ms Wafula