



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 48 OF 2016

(DEFILEMENT)

(CORAM: J.A. MAKAU - J.)

MOSES OTIENO OPONDO.....APPELLANT

VS

REPUBLIC.....RESPONDENT

(Being an Appeal against both the Conviction and Sentence dated 26.04.2016 in Criminal Case No. 376 of 2015 in Ukwala Law Court before Hon. R.M. Oanda - SRM)

J U D G M E N T

1. The Appellant **MOSES OTIENO OPONDO** was charged with an offence of Defilement contrary to **Section 8(1) and 8(4) of the Sexual Offences Act No. 3 of 2006**. The particulars of the charge is that on diverse dates between 1st April 2015 and 17th July 2015 at **Sega Sub-location, Ugenya Sub-County** within **Siaya County**, intentionally caused his penis to penetrate the vagina of **MAM**, a child aged 17years.

2. The Appellant also faced an alternative charge of committing an indecent act with a child contrary to **Section II (1) of the Sexual Offences Act No. 3 of 2006**. The particulars of the alternative charge are that on diverse dates between the same time, same place, the Appellant intentionally touched the vagina of **MAM**, a child aged 17 years with his penis.

3. After full trial, the Appellant was found guilty, convicted and sentenced to serve 10 years imprisonment.

4. Aggrieved by the conviction and sentence, the Appellant preferred an appeal through a Petition dated 6th May 2016, setting out 5 grounds of appeal, however, at the hearing, he relied on amended grounds of appeal dated 16th October 2017 setting five (5) grounds of appeal being as follows: -

a) That, the Learned Magistrate erred in matter of law and fact by convicting me on a case that was not fully investigated.

b) That, the burden of proving facts which justify the drawing of this inference from facts to the conclusion of any hypothesis is always on Prosecution and never shifts to the accused yet the learned Trial Magistrate shifted the same to the Appellant.

c) That, the Learned Magistrate erred by failing to analyze that, “credit of a witness could be impeached by a party who called her by proof of a former statements inconsistent with any part of his evidence which was liable to be contracted. The procedure is to apply for leave and the treat the witness as hostile”, sees in PW1’s allegation.

d) That, the medical evidence was insufficient to warrant its authenticity as the author of the P3 Form presented for cross-examination and said nothing concerning the appellant.

e) That, the Appellant cannot recall all that transversed during the trial hence begs leave of Honourable Court to supply him with certified proceedings and judgment to adduce more grounds.

5. I am the First Appellate Court and as expected of me have 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 case which sets out the principles that apply on a first appeal. These are set out in the case of **ISSAC NG'ANGA ALIAS PETER NG'ANG'A KAHIGA V REPUBLIC CRIMINAL APPEAL NO. 272 OF 2005** 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 -VS- REPUBLIC (1972) EA 32 will suffice. In this case, the predecessor of this court 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)”

6. At the hearing, the Appellant after being warned by the Court, that the sentence imposed of 10years was illegal and upon appeal being dismissed, the Court may substitute the sentence with the lawful sentence of 15years as set out under **Section 8(1)(4) of the Sexual Offences Act No. 3 of 2006** which provides: -

“8. (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.”

The Appellant opted to proceed with his appeal. He relied on his written submissions which he handed over to the Court and on his amended grounds of appeal. The Appellant's main contention in this appeal is that the complainant's evidence was not credible as it was obtained through coaching and threats; that the Prosecution case was inconsistent and contradictory; that crucial witnesses were not called to give evidence, that there was no medical evidence linking the appellant with that offence and that the judgment was unsound.

7. M/s Maurine Odumba, Learned Prosecution Counsel, concedes the appeal on the grounds that the Trial Court in its judgment did not consider the retracted statement of the complainant; that the Appellant's defence was not considered, that he was framed by his wife and that the complainant's evidence was contradictory and inconsistent.

8. In proving an offence of defilement, the Prosecution is supposed to prove the following three ingredients: -

(i) Penetration

(ii) Identification / recognition of the assessment

(iii) Age of the victim is below 18 years.

9. PW1, MAM, in her evidence, she stated that she met the Appellant and they agreed to get married. That she moved in with the Appellant as husband and wife and that they stayed together for a period of a month and used to have sex. That on 17th July 2015, the complainant was interrogated and arrested by Chief, taken to Chief's office and late to Segal Patrol Base. That the complainant and the Appellant were placed in cells and later taken to Ambira sub-district hospital and both were examined and P3 form filled. PW1 was recalled for cross-examination on 12th November 2015 having previously given evidence in chief on 20th July 2015. The accused did not cross-examine PW1, however, in the cross-examination by the Court, PW1 stated: -

“I did not get married to the accused person herein. I didn't have sex with him. I was told what to say when I come here the first time. I was told by the Chief, Segal, Ooko”

10. The Court then made an order as follows: -

“I order that she be put in custody and PC Kithinji to take statement from both the witness and the Chief”

11. In the instant case, the Court's Order of 12th November 2015 was not complied with. The Chief, Segal, Ooko did not record his statement nor the complainant as ordered by Court. The Complainant on being cross-examined by Court denied having had sex with the Appellant and was categorical; she lied to the Court and she told the Court what she had been told by the Chief, Segal, Ooko to tell the Court. This meant she was retracting the evidence which she had given to the Court on oath implicating the Appellant. A retracted statements needs corroboration and further evidence of a minor in sexual offences did not need corroboration where the Court complies with the provision under **Section 124 of the Evidence Act**, which provides: -

“Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is 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.”

12. The Appellant contends the Complainant's statement incriminating him was obtained through coaching and threatening of the Complainant and urged under **Article 50(4) of the Constitution of Kenya 2010**, evidence obtained in violation of fundamental freedoms in the **Bills of Rights** should be excluded. **Article 50(4) of the Constitution** provides: -

“50. (4) Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.”

13. I have very carefully perused the evidence given by PW1, the Complainant and her assertion in part that she was coached and/or told what to tell the Court by the Chief Sega, Ooko under threat. The Court ordered the Investigating Officer to take statement of the complainant and the said Chief, and the Complainant, put in custody. The Police Officer seems not have complied with the Court's Order as no action was taken against the complainant and the Chief thereafter. The Chief was a person with authority over the Complainant and his acts were unlawful; and amounted to suppression of justice. It was against **Article 25 of the Constitution of Kenya 2010** which provides: -

“25. Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited: -

(a) freedom from torture and cruel, inhuman or degrading treatment or punishment;

(b) freedom from slavery or servitude;

(c) the right to a fair trial; and

(d) the right to an order of habeas corpus”

14. In view of the above, I find that the complainant's evidence was riddled with inconsistencies and contradictions; the Complainant having denied she has had sexual intercourse with the appellant, and though she was pregnant as per evidence of the Clinical Officer (PW4), and as per P3 Form exhibit 1, in absence of any other medical evidence linking the Appellant with the penetration, the trial court ought to have treated the Complainant's evidence with a lot of caution. The Trial Court should have looked for other evidence corroborating the Complainant's evidence, that she indeed had sexual intercourse with the Appellant. The requirements under **Section 124 of the Evidence Act** as per the Court's judgment were not satisfied. The Court failed to address itself on the credibility of the evidence of the complainant and the provision of **Article 50(4) of the Constitution of Kenya 2010**, as regards evidence that was obtained in complete violation of the Complainant's right on fundamental freedom in the **Bill of Rights** and its admissibility, its admission would render the trial unfair, or would otherwise be detrimental to the administration of justice. I find that PW1's evidence was not only inconsistent and contradictory to her evidence but was detrimental to administration of justice. The Complainant's evidence renders the trial against the appellant a sham and did not guarantee the appellant the right to a fair trial. The contradictions and inconsistencies from PW1's evidence leads me to the conclusion that what the witness told the Court should not have been relied upon at all in absence of other corroborative evidence to found a conviction. She was in my view an untrustworthy witness whose evidence should not have been relied upon in absence of corroboration. The Trial Court should have declared her evidence incredible and should have looked for other evidence before conviction. The other evidence could have been received if the Trial Court's order had been complied with by summoning the Area Chief.

15. The Appellant contends crucial witnesses were not summoned to give evidence in this case. The crucial witness according to the Appellant, who he submitted were the relevant and crucial witnesses were as per evidence of PW5, Thaddeus Odhiambo Okello, one Alice Achieng, purported wife of the Appellant, who had reported the Appellant had abandoned his family and went to stay at Sega with a certain girl and she needed his assistance; and the Chief, Sega, Ooko, who PW1 stated had told her to lie to the Court, that she has had sexual intercourse with the appellant. **Section 143 of the Evidence Act** provides: -

“143. 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.”

16. That though no particular number of witnesses is required to give evidence to prove a fact; in this case, I find that the evidence produced by the Prosecution was not sufficient enough to sustain a conviction. That there was need to call the wife of the Appellant and Chief, Sega, Ooko, who were crucial witnesses in this case as PW1 alleged she was told by the Chief what to tell the Court and from her evidence what she told the trial court was false. Had the two been called, the Court would have been armed with sufficient arsenals to decide the case in one way or the other. In **Samuel Karanja Kuria V Republic, CA (2011)eKLR**, the Court of Appeal held: -

“The Appellant's suggestion that the potential witnesses who were not called to testify knew something about the killing was not supported by any evidence and the fact that they were not called as witnesses could not have reasonably invited an inference from the trial court because the prosecution evidence was already strong enough to support a conviction.”

I find failure to call, the two relevant and crucial witnesses prejudiced the Appellant's case and I draw an inference had the two been called, they would not have supported the Prosecution case which was not strong enough to sustain conviction.

17. The Prosecution through the evidence of PW2; who gave the Complainant's date of birth as 18th August 1998, and identified Birth Certificate MFI-P2 and which PW3 produced as exhibit P2 proved, the Complainant was as of 15th April 2015, a minor, aged 17 years. PW2 stated the Complainant on examination by PW4, a Clinical Officer, on 18th July 2015, as per exhibit P1, which PW4 filled was, found to have broken hymen and pregnant. However, though the penetration was proved as the Complainant was found pregnant and the age of the Complainant to be 17 years and though PW1 stated she knew the Appellant, in view of PW1's evidence exonerating the Appellant, I find the Prosecution failed to prove that the Appellant had penetrated the Complainant and caused her pregnancy. PW1 being the key witness and the one who could state who had penetrated her and having cleared the Appellant of the commission of penetration on her, it is my finding that

all the three ingredients of the offence of defilement and more specifically penetration has not been proved. I find without proving penetration even if the other two ingredients are proved a case for defilement cannot be found. I find that it was unsafe for the trial court to have convicted the Appellant with an offence of defilement.

18. The State Counsel concedes the appeal and having analysed and evaluated the whole evidence, I find that the State Counsel rightly concedes the appeal.

19. Before I conclude this appeal, I would like to comment on the sentence imposed by the Trial Court. **Section 8(4) of the Sexual Offences Act No. 3 of 2006** sets a minimum mandatory sentence of 15 years on conviction of an accused person with the offence of defilement. The Trial Court has no discretion of imposing any lesser sentence than the mandatory minimum sentence. The Trial Court was in error in sentencing the Appellant to serve 10years imprisonment instead of 15years minimum mandatory sentence. Where a minimum mandatory sentence is set out by a Statute, the Court should impose the prescribed sentenced and where it has no discretion and imposes a sentence, below the minimum sentence, the Court will be acting contrary to the law and such sentence is by all means illegal and on appeal being dismissed, the Appellate Court is obliged to substitute the illegal sentence imposed with lawful sentence. That as this appeal succeeds, the Court shall not substitute the illegal sentence with the lawful sentence, save to state the lawful sentence should have been the minimum mandatory sentence of 15years imprisonment.

20. The upshot is that the appeal is merited. **The Appeal is allowed, conviction is quashed and sentence set aside. The Appellant is set at liberty forthwith unless otherwise lawfully held.**

DATED AND SIGNED AT SIAYA THIS 17TH DAY OF NOVEMBER 2017

HON. J.A. MAKAU

(JUDGE)

DELIVERED IN OPEN COURT ON 24TH DAY OF NOVEMBER 2017

In the presence of:

Court Assistants:

1. Kevin Odhiambo

2. Beryl Kachuodho

Appellant in Person - Present

M/S Odumba: for State

HON. J.A. MAKAU

(JUDGE)