



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CRIMINAL APPEAL NO. 34 OF 2017**

**OTIENO COSMAS AYORA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Appeal against Conviction and Sentence imposed in Sexual Criminal Case Number 2 of 2017 in the Senior Resident Magistrate's Court at Tamuby Hon. E.M.Onzere(SRM) on 12.5.17)***

**JUDGMENT**

**The Trial**

The Appellant therein **OTIENO COSMAS AYORA** has filed this appeal against sentence and conviction on a charge of attempted defilement contrary to section 9(1) as read with section 9(2) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge are that

***On 10.1.17 at [particulars withheld] in Muhoroni Sub-County in Kisumu County intentionally attempted to cause your genital organ namely penis to penetrate the genital organ namely vagina of M.A a girl child aged 17 years***

In the alternative count; the appellant was charged with indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars of the charge are that

***On 10.1.17 at [particulars withheld] in Muhoroni Sub-County in Kisumu County unlawfully and intentionally caused your genital organ namely penis to touch the genital organ namely vagina of M.A.O a girl child aged 17 years***

The prosecution called a total of four (4) witnesses in support of their case PW1 **M.A.O** the complainant recalled that on the material date at about 1.10 am, she was sleeping in their kitchen together with her sister and brother who were on a separate bed. That appellant went into the kitchen by cutting the iron sheet wall with a knife and when she woke up, she found him lying on top of her without his trousers and underwear. That she screamed and got hold of the appellant and her sister and brother woke up and also screamed. That her phone torch which was on enabled her to see the appellant and the knife he was holding. That appellant managed to escape and left his shoes, trousers and underwear in their kitchen. That she reported the matter to her parents who in turn reported the matter to a village elder the following morning. That the village elder informed them that the appellant had already been arrested and she went to the police station and recorded her statement. She said she used to see appellant pass by their home.

PW2 H A, complainant's sister recalled that she was sleeping in their kitchen with complainant and brother on the material date. That she was awoken by the complainant's screams at about 1.00 am and she

saw complainant struggling with someone. That her sister put on her phone torch and she identified appellant who was armed with a knife because she used to see him loiter in the village. She confirmed that appellant left his clothes in their kitchen.

PW3 Gilcrest Otieno Sombe, assistant chief Koru Sub-location recalled that he rescued the appellant from a crowd that threatened to lynch him for allegedly attempting to defile a minor on the night of 10.1.17. He produced a blue underwear and cream trousers as exhibits 1 (a) and (b) respectively which the complainant alleged were left at the scene of crime by the appellant.

PW6 Sgt Dan Omachode the investigating officer received the appellant from PW3 and after investigating complainant's report that appellant had attempted to defile her charged him. He produced complainant's age assessment report PEXH. 2 which shows that she was 17 years old.

At the close of the prosecution case, the appellant was ruled to have a case to answer and was placed on his defence. He gave an unsworn defence in which he denied the charges. He said he was arrested by village elders who handed him over to the chief and later to the police and he was charged with an offence he did not commit.

In a judgment delivered on 12.5.17, the appellant was convicted and sentenced to serve 10 years imprisonment.

### **The appeal**

Aggrieved by this decision, the appellant lodged the instant appeal. In his Petition of Appeal filed on 26th May, 2017, the appellant set out 5 main grounds of appeal to wit:-

- 1. The trial magistrate erred in law and in fact in convicting and sentencing him on insufficient evidence***
- 2. No medical evidence was adduced to link him to the offence***
- 3. The prosecution case was marred with contradictions and inconsistencies***
- 4. The trial magistrate erred in law and in fact in dismissing the defence***
- 5. That the prosecution failed to comply with Article 50(2)(j) of the Constitution***

When the appeal came up for hearing on 3.10.17, the appellant relied wholly on his grounds of appeal and submissions filed on 2.10.17. Ms. Wafula, learned counsel for the state opposed the appeal on the ground that the appellant was properly identified by PW1 and PW2 by means of a torch light.

This being a court of first appeal, I am guided by the ruling of the Court of Appeal in **OKENOV. REPUBLIC [1972] E.A. 32**, where it held that:-

***“It is the duty of a first appellate court to consider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld”***

The trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and this court in dealing with this appeal is obligated to give allowance for that.

#### **a. Fair hearing under Article 50(2)(j) of the Constitution**

Article 50 (2) every accused person has the right to a fair trial, which includes the right—

***(j) to be informed in advance of the evidence the prosecution intend to rely on, and to have reasonable access to that evidence;***

I have perused the record of the trial court and the appellant did not raise the issue of statements either during trial or when he made his submissions. I therefore find no merit in this ground of appeal.

#### **b. Medical evidence**

This is a case of attempted defilement and medical evidence was not necessary and this ground too has to fail.

#### **c. Contradictions and inconsistencies**

I have perused the record of the trial court and I have not seen any contradictions and inconsistencies and this ground too has to fail.

#### **d. Insufficient evidence**

PW1 and PW2 told court that they identified the appellant using the light of a phone torch. The incident occurred about 1.00 am.

In the case of **R v Turnbull, (1976) 3 All ER 551**, Lord Widgery CJ observed

***“the quality of identification evidence is critical; if the quality is good and remains good at the close of the defence case, the danger of mistaken identification is lessened, but the poorer the quality, the greater the danger”.***

In the case of **Wamunga –vs- R, [1989] KLR 424** the Court of Appeal while dealing with the complexities of an identification of an assailant stated as follows;-

***“It is trite law that where the only evidence against a defendant is evidence of identification of recognition, a trial Court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction”.***

In a recent case of **John Muriithi Nyagah v Republic [2014] eKLR**, the Court of Appeal held:-

***“in testing the reliability of the evidence of identification at night, it is essential to make an inquiry of the relevant circumstances such as the nature of the light, the strength of the light, its size, its position relative to the suspects etc.”***

In this case, the learned trial magistrate fell into error when she failed to make an inquiry of the relevant circumstances relating to the strength of the phone torch light, its size and its position relative to the suspects. Further to the foregoing; the complainant and her sister were not called upon to identify the clothes allegedly left in their house by the suspect thereby failing to link them to the appellant.

#### **Decision**

In view of the foregoing analysis, I reach a conclusion that the case against the appellant was not proved beyond any reasonable doubt rendering the conviction unsafe. The appeal is thus allowed. The conviction is hereby quashed and the sentence is set aside. It is ordered that the appellant be set at liberty unless otherwise lawfully held.

**DATED AND DELIVERED THIS 16th DAY OF November ,2017**

**T. W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

Court Assistant - Felix

Appellant - Present

For the State - Ms Wafula