



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 129 OF 2014

SAMUEL OCHIENG ODAGO APPELLANT

VERSUS

REPUBLIC RESPONDENT

[Being an appeal from the conviction and sentence of the Senior Principal Magistrate's Court at Nyando (Hon. P. Wechuli RM) dated the 26th September 2014 in Nyando SPMCCRC No. 170 of 2014]

JUDGMENT

The appellant was charged with defilement of a child aged 1½ years contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act in that on 6th February 2014 at about 10.30AM in Tura Sub-location, Nyando District, Kisumu County he intentionally and unlawfully caused his penis to penetrate her vagina.

He denied the charge but after the trial the Trial Magistrate found him guilty and convicted him and sentenced him to life imprisonment. Being aggrieved he filed this appeal.

The prosecution's case was that on the material day at about 10.30AM Peter Akhumachu Ongoma (PW3) got a telephone call that a young man was causing a disturbance. He went to the house and found the young man who he identified in Court as the appellant with a boy and a girl, the girl had no underpant and the appellant was naked and she was between his thighs. He took the girl outside followed by the boy and then bolted the door on the outside. The complainant's mother (PW1) was doing her washing outside the house when information that her child was being defiled behind Peter's (PW3) house reached her. She rushed there only to find the child crying and without a pant and Peter struggling with the appellant inside the house. She called her husband as well as the police. She had examined the child and seen that her vagina was inflamed. When the officers arrived she reported the matter to them. They arrested the appellant who was still locked in the house and took him to Ahero Police Station where he was charged. The child was taken to Ahero Sub-district Hospital where she was examined by Clinical Officer Nicodemus Buge (PW2) who confirmed there was a small crack on the lower part of her vagina though the girl was otherwise in fair condition. He concluded there was forceful penetration.

In his defence the appellant stated that he did not know the child or even her parents and contended that he was arrested on an issue he knew nothing about.

In his Petition of Appeal he raised the following grounds:-

- 1. That he did not plead guilty to the said offence of defilement as per the allegations brought before court.**
- 2. That the learned trial magistrate erred in law and in facts by failing to evaluate the case against him.**
- 3. That the learned trial magistrate erred in law and in facts by not warning him the appellant of the seriousness of the offence.**
- 4. That the medical doctor did not provide any evidence linking him to the offence and the trial magistrate did not warn himself on the danger of relying on the fabrications and hearsay testimony in chief of the mother.**
- 5. That prosecution also failed to call on essential witnesses that would have exonerated him from the alleged offence.**
- 6. That the learned trial magistrate erred in law and facts by overlooking his mitigation which was enough to secure his acquittal.**
- 7. That he learned trial magistrate erred in law and in facts by being biased during trial and failed to observed whether there was a collection of exhibits to prove the same.**

At the hearing of the appeal he relied on home made written submissions where he stated; firstly, that he was not represented by an Advocate at the trial and was never informed of his right to be so represented hence resulting in for instance his coming short when it came to cross-examination of the Clinical Officer; secondly that he was not supplied with the witness statements contrary to the provisions of Article 50(2) of the Constitution which guarantees his right to a fair hearing. He contended that this denied him a chance to prepare his defence and hence he could not cross examine the witnesses extensively and exhaustively. He gave the example of PW4. He further contended that he did not understand the nature of the accusation leveled against him and was not informed of the reason for his arrest. He submitted further that the evidence adduced was based on speculation and conjecture and the prosecution had not proved their case beyond reasonable doubt as there was no evidence from an independent witness. He wondered why the wife of PW3 was not called to testify and stated that this omission resulted in PW3's evidence amounting to hearsay. He contended that the investigating officer (PW4) ought to have produced a rough sketch plan of the scene and wondered how PW3 alone could prevent him from escaping. He also stated that the age of the victim was not ascertained to be 1½, 2½ or 2 years and that failure to do so meant there was no evidence to sustain the charge.

It was also his submission that penetration was not proved as no bleeding was detected; that he was not taken for examination and no DNA test was carried out to confirm the nexus between him and the alleged offence hence resulting in a mistrial. He concluded by stating that the evidence adduced fell short of the standard required; was meager, farfetched, distorted and of the weakest kind and that his alibi demolished the defence case but the trial magistrate shifted the burden of proof to him hence prejudicing him. He urged the Court to allow the appeal; to quash the conviction, to set aside the sentence and set him at liberty. He relied on the following cases:- **Pett V. Greyhound Racing Association [1968]2 ALL.E.R.545, Republic V. Ward [1993] 2 ALL.E.R. 557, Byrne V. Kinematograph Renters Society Ltd [1958]2 ALL. E.R. 579, David Okiro V. Republic Kisumu CRA 216 of 2010, Hosea Otieno Watete V. Republic Busia CRA 326 OF 2016, Stoddartt (12) (1909)2 LR.APP.REP.217 at page 242.**

In opposing the appeal Miss Wakio Learned Prosecution Counsel submitted that the charge was explained to the appellant in a language he understood at the time of taking plea and again during the first mention when he intimated that he had not understood the charge. As for the victim's age she submitted that a birth certificate was produced to confirm she was 1½ years old. She stated that the child's mother found her crying without her underpants and that on examining her she noted her vagina inflamed. She stated

this was corroborated by the findings of the clinical officer and that there was evidence that the appellant was found naked with the child between his thighs by PW3. She submitted that the trial magistrate analyzed all the evidence including the appellant's defence and also considered his plea in mitigation. He nevertheless had to impose the minimum sentence provided by the law. She disputed there was a mistrial or that the trial magistrate erred in convicting the appellant. She contended that all the ingredients of the were proved hence the conviction and sentence were lawful. She urged the Court to dismiss the appeal and uphold the conviction and sentence.

In reply the appellant reiterated his written submissions and also his contention that he was jailed for something he did not do. He noted that he had forgiven his accusers.

Being the first appellate Court I have reconsidered and evaluated the evidence so as to arrive at my own conclusion all the while bearing in mind that I did not have the benefit of seeing the witnesses testify.

The birth certificate produced in evidence gives the complainant's date of birth as 5th July 2012 and this offence is alleged to have occurred on 6th February 2014 which means she was slightly more than 1½ years at the time. On the face of it the certificate reads:-

“This certificate is issued in pursuance of the Births and Deaths Registration Act (Cap 149) which provides that a certified copy of any entry in any register or return purporting to be sealed or stamped with the seal of the Director of Civil Registration shall be received as evidence of the dates and facts therein contained without any or other proof of such entry.”

Section 83(1) of the Evidence Act enjoins this Court to presume this certificate to be genuine and it is my finding therefore that the age of the victim in this case was conclusively proved.

I am also satisfied that there is proof beyond a shadow of doubt that she was defiled. This evidence came both from her mother and from the clinical officer. Her mother (PW1) testified that when she arrived at the scene the girl did not have her pant and she was crying and upon examining her she noted her vulva was inflamed meaning it was swollen. This was corroborated by the Clinical Officer (PW2) who upon examining the complainant detected a crack on the lower part of the little girl's vagina. He like the mother concluded there was forceful penetration, although there was no bleeding or spermatozoa noted. As to whether the appellant committed the offence it is my finding that this was proved beyond reasonable doubt. There was evidence from PW3 that when he arrived at the scene upon being notified by phone of a disturbance at his house, he found the appellant with some children in a house. One was a boy and the other was the victim in this case. It was his evidence that he found the appellant holding the child who was without an underpant between his thighs. It was also his evidence that the appellant had removed his trousers. He had to struggle with the appellant before he got the children out of the house. He did not stop there but went ahead and bolted the door of the house from outside hence imprisoning the appellant. Both the girl's mother (PW1) and the arresting officer (PW4) confirmed that they found the appellant inside the house which confirms that PW3 was telling the truth. This incident occurred in broad daylight at 10.30am and so the witnesses positively identified him. None of them knew him prior to that day and so could not have had reason to lie against him. Although he alleges to have raised an alibi in his defence that is not the case. An alibi arises when an accused person states that he was not at the place of the alleged crime at the time it occurred. The appellant did not state that he was elsewhere at the material time. He only stated that he was arrested for something he did not know about. I also doubt that an alibi would have withstood the strong evidence adduced by the prosecution in this case.

It is correct that under Article 50(2)(g) of the Constitution the accused has a right to legal representation and informed of this right promptly. Indeed Article 50(2)(h) guarantees a right to legal representation at state expense to an accused if substantial injustice would otherwise result. It is the appellant's contention that he was prejudiced by the lack of legal representation. The record however shows that the charge was read to him in Dholuo which he understands and that the trial magistrate made an order for him to be supplied with witness statements. We can only presume this was done as he did not raise the matter of those statements again during the trial. The record also shows that when he intimated he did not understand the charge it was read to him once again. Indeed after stating his name, place of abode and

trade and before making his unsworn statement he indicated to the Court that he knew the charge facing him. He was accorded an opportunity to cross examine all the prosecution witnesses and in my view his trial was fair and there was no prejudice. If he did not cross examine the Clinical Officer it was because he saw no need to do so.

The evidence on record was sufficient to prove the charge against him beyond all reasonable doubt and the prosecution was under no legal obligation to call other witnesses. Section 124 of the Evidence Act provides that the evidence of a victim of a sexual offence is sufficient to prove the charge provided the Court believes the victim. In this case the victim was too young to testify but we have the testimony of her mother, Peter (PW3) and the Clinical Officer (PW2) which as I have stated sufficiently proves the charge.

Accordingly I find no merit in this appeal. The same is dismissed and the conviction and sentence which is the minimum provided by the law are upheld.

Signed, dated and delivered at Kisumu this 21st day of April 2016

E. N. MAINA

JUDGE

In the presence of:-

Wakio for the state

Appellant in person

CC: Felix Magutu

