



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA

H.C.CR.A NO. 27 OF 2015

(J.A. MAKAU – J.)

P.N.O..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the Original Conviction and Sentence dated 14.5.2015 in Criminal Case No. 349 of 2014 of P.M'S Court At Siaya By C.A. OKORE (SRM))

JUDGMENT

1. **P.N.O ALIAS “O”** was charged with the offence of defilement Contrary to **Section 8(1) (2) of the Sexual Offences Act No. 3 of 2006**. The Particulars of the Offence are that on the 21st day of April 2014 in Gem District within Siaya County, intentionally caused his penis to penetrate the vagina of **M.G.A.W**, a child aged 10 years. The appellant faced alternative charge of **committing indecent Act with a child contrary to Section II(1) of the Sexual Offences Act No. 3 of 2016**. The particulars of the alternative charge are that on the 21st day of April 2014 in Gem District within Siaya county, intentionally touched the vagina of **M.G.A.W**. a child aged 10 years with his Penis.

2. After full trial the Appellant was found guilty on the main count, convicted and sentenced to life imprisonment.

3. Aggrieved by the conviction and sentence, the appellant preferred this appeal setting out several grounds of appeal which can be summarized as follows:-

- I. ***That the learned trial magistrate erred in law and fact in convicting and sentencing the appellant without knowing the appellant was H.I.V. + and the complainant was not found positive according to the doctor and the P3 form did not indicate so thus proving the appellant was framed.***
- II. ***That the trial court erred in failing to consider the evidence of medical officer which indicated that after examination of the complainant after 72 hours there were no tares to the vaginal walls to prove her claims.***
- III. ***That there were contradictions on the appellant's arrest and that of the P3 form where it was reported as the matter was reported on 23.4.2014, whereas the incident took place on 21.4.2014 and the appellant arrested on 6.5.2014 thus the appellant was framed.***
- IV. ***That the appellant's constitutional rights were violated for being detained by police for more than 24 hours contrary to Article 49 (f) (I) of the constitution of Kenya 2010.-***

4. The Appellant appeared in person and the State was represented by M/s. Mourine Odumba, learned

prosecution counsel.

5. I have very carefully considered the Appellant's written submission as well as his oral submissions and the learned prosecution counsel's oral submissions.

6. I am the first appellate court and as such I have subjected the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I had no opportunity to see and hear the witnesses and so I cannot comment on their demeanour. I have drawn my own conclusions after giving due allowance. I am in that regard guided by the **Court of Appeal case of Okeno -Vrs- Republic [1972] EA 32** where the Court set out the duties of the first appellate court thus:-

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vs. Republic (1957) E.A. (336) and the appellate court's own decision on the evidence. 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 V. Sunday Post, (1958) E.A. 434)”

7. The facts of the prosecution case are found in the record of the lower court proceedings which I have carefully perused and need not reproduce them as these form part of the record of appeal and can be perused from therein, however I will summarize the prosecution and defence case herein below.

8. The facts of the prosecution case are that PW1, “**M.G.A.W.**” aged 10 years was on 21.4.2014 sent by her father G.O, PW2, to go and tether their three (3) goats as PW2 briefly remained at home. That as PW1, “**M.G.A.W.**” was tethering the goats “**O**”, the appellant herein as he is known in the village, who is also known as James Ngesu Okumu alias “**O**” approached PW1, “**M.G.A.W.**” while armed with a panga, grabbed PW1 and put her on the ground near a mango tree. He removed his trouser and underpants lied on top of PW1, “**M.G.A.W.**” and inserted his penis into PW1's vagina. She felt pain but did not cry or make any noise as the appellant threatened to cut PW1 with a panga. Meanwhile PW2 G.O took the other two goats to the field and saw his daughter coming from where flowers were and started running when she saw him. PW2 went to where the goats were tethered and saw some human feet protruding from some flowers, checked and saw a man hiding and on enquiry the man showed up asking him if he had seen some police officers who were chasing him as he was drinking some alcohol in some home. PW2 told him he had not seen any, then the appellant picked his panga and left hurriedly. He testified the person he saw was “**O**” who is nicknamed so in the village. PW2 reached home but did not find PW1 “**M.G.A.W.**” He searched for her and when he found her he noted she had red eyes, her clothes were dirty from the back and her body was dirty. He asked her why she had run away and she insisted she was in the toilet. That after 2 hours she told him that “**O**” inserted his penis into her vagina when she had gone to tether the goats, PW2 took PW1 “**M.G.A.W.**” to Yala Hospital that evening where she was examined. He identified in patient card MFI – P1 and stated that they left the hospital the following day. PW2 had earlier on reported the matter to Wagai A.P. Camp and Yala Police Station who issued PW2 with a P3 form MFI-P2 which was completed on 29.4.2014. On that day he recorded statement with Police and identified PW1's Birth certificate MFI – P3 showing PW1 “**M.G.A.W.**” was born on 24.3.2004. PW3 a clinical Officer, Yala Hospital produced complainant's P3 form as exhibit P2, out patient sheet MFI – P1 as exhibit P1 and Appellant's P3 form as MFI. P4 as exhibit P4. PW4 No. 65447 P.C. Oscar Nthusa from Yala Police Station in Crime Branch Office recorded complainant's complaint on 23.4.2014 upon being taken there by her father PW2 on a complaint of defilement. That on 29.4.2014 he received victim's P3 form, took statements of witnesses and commenced investigation. He made an arrest order to A.P. Nyawara who arrested the appellant. The appellant was taken to the hospital, his P3 form filed and PW4 charged him with this offence.

9. The appellant denied the offence. In his unsworn statement he stated that on 14.5.2014 he was at his house sleeping when at around 9.00 p.m. the police officers knocked the door to his house and on opening

they found him with his wife. They then arrested him and took him to Wagai Police Station. He was subsequently charged with the offence he does not understand. He added that he cannot understand what transpired on 21.4.2014 and that he does not know the complainant.

10. The appellant contended that the complainant was not competent witness and therefore testified on coerced evidence. That the police investigation was shoddy. That the doctor who attended to the complainant was not summoned, and failure was not legally explained, that the appellant's H.I.V. Positive status was not considered as complainant was not found to be H.I.V. +, that there was no evidence of tare of the complainant's private parts hence Appellant was framed and that there was material contradictions on the important dates pointing to the fact that he was framed and that as he was detained for more than 24 hours his constitutional rights were violated.”

11. The State opposed the appeal contending that, it was not necessary for trial court to warn itself on H.I.V. Status of the appellant before sentence nor is it necessary for trial court to warn the accused of sentence in respect of the offence in advance, that there was sufficient evidence on the injuries sustained by the victim, that penetration was proved, that victim was examined by court and found to be competent witness, that doctor's evidence was properly produced in accordance with the proviso's of Evidence Act, that there were no contradictions on the dates and lastly on the appellant's constitutional rights he did not raise the issue with the trial court and that even if his rights were violated his remedy lies with the Constitutional court and not this court. He prayed that the appeal be dismissed.

12. In an offence of defilement for the prosecution case to succeed the prosecution must prove the following ingredients:

(I) *identification.*

(II) *Penetration.*

(III) *Age of the victim and lack of consent*

13. Regarding identification I am guided by the of case of **Paul Etole and Another V. Republic CA 24 of 2000 (UR) Pg. 2 and 3** thus:-

“The prosecution case against the second appellant was presented as one of recognition or visual identification. The appeal of the second appellant raises problems relating to evidence and visual identification. Such evidence can bring about miscarriages of justice. But such miscarriages of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused, the court should warn itself of the special need for caution, before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific weaknesses which had appeared in the identification evidence. It is true that recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made.”

14. In the present case I have examined the evidence of PW1 and PW2, which is evidence of “**recognition**” and not identification. In the case of **Wamuanga V Republic (1989) KLR 424**, it was stated that where the only evidence against the accused is evidence of recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of the recognition were favourable and free from possibility of error before it can safely make it the basis of conviction. Further in the case of **Simiyu and Another V R (2005) 1 KLR 192**, it was stated there is no better mode of identification than by name and when a name is not given, then there is a challenge on the quality of identification and a great danger on mistaken identity arises.

15. In the instant case, was there a first report to the police or any other person? where PW1 stated she could recognize the assailant? PW1 testified she was tethering the goats on 21.4.2014 in the field when

“O” came and held her, knocked her down, removed his clothes and defiled her. It was during day time and she clearly saw him and recognized him. She stated “O” is also known as Paul Ngesa Okumu and “O” is the name he uses at home. PW2 testified on 21.4.2014 he had send PW1 to tether his goat in the grazing field. He later followed her after 7 minutes and saw someone hiding, in the flowers, when he talked to the person he recognised that it was “O” who is also called James Ngesa Okumu. He saw him coming from the same flowers where he had earlier on seen his daughter running from. PW1 after 2 hours told PW2 that the appellant had defiled her. PW2 made a report to Wagai AP camp and Yala Police Station. The evidence of PW1 and PW2 placed the appellant at the scene of crime. The Appellant did not in his cross-examination deny that he was not at the scene of the incident on 21.4.2014. PW1 had given the name of the appellant to PW2 at the earliest opportunity as her assailant. I have examined the evidence of recognition of the appellant by PW1 and PW2 and I am satisfied the circumstances of the recognition were favourable and free from possibility of error as the witness saw and recognised the appellant, talked to him and PW1 also gave his name. The quality of recognition of the appellant by PW1 and PW2 is was thorough though inview of their evidence and I find that there is no error of recognition of the appellant.

16. Did the prosecution prove penetration?

“Penetration” is defined as follows:-

“Penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person;”

17. PW1 in her evidence stated that the appellant inserted his penis into her vagina and she felt pain PW1 told PW2 that the appellant inserted his penis in her vagina. PW3, the clinical officer's evidence corroborated the evidence of PW1. He testified that the complainant was defiled on 21.4.2014. That on physical examination PW3 testified there was laceration to the vagina and hymen was torn. The P3 form exhibit P2 indicated there was forceful penetration. That bruises were visible, the outpatient sheet exhibit P1 confirmed the victim was defiled. In view of the evidence of PW1, PW2 and PW3 I am satisfied that prosecution proved that there was penetration.

18. Was the age of the victim proved and was there any consent?

Section 42 of the Sexual Offences Act Provides:

“For the purposes of this Act, a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice.”

19. In the instant case PW2 testified that PW1 was born on 24.3.2004. Her birth certificate was produced as exhibit P3 by PW2. It therefore follows at the time of commission of the offence PW1 was aged 10 years. PW1 testified she was 10 years. PW3 also confirmed PW1 was aged 10 years. In view of the victim “M.G.A.W.” being 10 years as of the time of the commission of the offence I find and hold that she could not consent to sexual intercourse with the Appellant. I therefore find that prosecution proved that the complainant was 10 years old and lacked capacity to consent to sexual intercourse.

20. The Appellant contended that the complainant was not competent witness and she was coerced on what to say hence she framed him. PW1 was aged 10 years and therefore a minor. The trial court therefore had to conduct **voire dire** test. That from the proceedings it is not possible to tell which religion she professed or whether she understands the meaning of the oath as she stated she does not know why people take oaths but she stated she does not tell lies. The court found the child competent witness as she understands herself and surrounding, eloquent in her speech but declined to have her sworn as she does not understand the essence of taking of oath. I find the trial court acted properly by conducting a **voire dire** examination before it allowed PW1 to testify. I therefore agree with the trial court that PW1 was a competent witness, and the trial court which had opportunity of seeing the witness and hearing her properly determined her demeanour, which this court cannot do and found PW1 competent witness. I cannot therefore rule otherwise. On the ground that PW1 was coerced on what to say the appellant at the

trial court had the opportunity to cross-examine PW1 and others on that point which he did not. I therefore find no basis on the allegation that PW1 was coerced on what to say, this ground is without basis and is rejected.

21. **Section 35 (1) (a) of the Evidence Act** provides:

“(1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say:-

(a) if the maker of the statement either-

(i) had personal knowledge of the matters dealt with by the statement; or

(ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have personal knowledge of those matters; and”

22. The prosecution through PW3 laid down the basis for PW3 to produce medical document by Dr. Oginga who had made the denouement. The appellant did not raise any objection to PW3 giving evidence nor did he challenge the medical document in anyway. I therefore find that the medical document made by the doctor who did not attend court to give evidence was properly produced by PW3 after prosecution complied with the provision of **Section 35 and 50 (1) of Evidence Act**.

Section 50 (1) of the Evidence Act provides:-

“50(1) When the court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is admissible.”

23. The appellant contended that the trial court erred in failing to warn itself that the appellant was H.I.V. Positive and complainant was not found positive according to the doctor as per P3 form hence the appellant urged he was framed with the offence. The evidence of Pw3 is that the complainant and the appellant were only physically examined and that no laboratory tests were conducted on any of them. The P3 form do not show H.I.V. Status of the victim or the appellant as no test were conducted on any of them. The appellant was charged with an offence of defilement contrary to **section 8(1) (2) of the Sexual Offence Act** and not under **Section 26 of the Sexual Offences Act** which provides:

(1) Any person who, having actual knowledge that he or she is infected with HIV or any other life threatening sexually transmitted disease intentionally, knowingly and willfully does anything or permits the doing of anything which he or she knows or sought to reasonably know-

(a) will infect another person with HIV or any other life threatening sexually transmitted disease;

(b) is likely to lead to another person being infected with HIV or any other life threatening sexually transmitted disease;

(c) will infect another person with any other sexually transmitted disease, shall be guilty of an offence, whether or not he or she is married to that other person, and shall be liable upon conviction to imprisonment for a term of not less than fifteen years but which may be for life.”

24. He was not convicted under **Section 26(1) (a) (b) and (c) of the of The sexual offences Act No. 3 of 2016** which requires proof of existence of such sickness. In the instant case the trial court was not under obligation to consider the HIV status of the victim for an offence of defilement as that was not one

of the ingredients of an offence of defilement. The proof by prosecution of recognition or identification, penetration, age lack of capacity to consent to sexual intercourse by the victim was enough proof of an offence of defilement and there was no need of proof that the appellant had infected PW1 with HIV disease for an offence of defilement to succeed. I find no merits in the ground of appeal.

25. Whether there are contradictions of dates of the appellant's arrest and that in the P3 form? Whether there are contradictions on the date the matter thus was reported? The charge sheet show that the appellant was arrested on 6.5.2014 and arraigned before court on 8.5.2014. That the complaint was filed on 21.4.2004 and P3 issued on 23.4.2014, the day PW1 reported to PW4. I therefore do not find any contradiction from the evidence of PW1 and PW2 on the date of commission of the offence thus 21.4.2014 and the day PW1 and PW2 reported to PW4 and P3 form issued. On the date of arrest PW4 does not state when the appellant was arrested but the charge sheet show that he was arrested on 6.5.2014. The Appellant himself stated he was arrested on 14.05.2014. It follows further that when he stated in his ground of appeal number 3 that he was arrested on 6.5.2014 there is contradiction. The appellant's assertion that he was arrested on 6.5.2014 in his ground of appeal or otherwise in his evidence, thus 14.5.2014 is contradictory but the same was raised by him. He is contradicting himself. I therefore find that the same do not materially affect the prosecution case.

26. Whether appellant's constitutional rights were violated for being detained over 24 hours at Police Station?

27. **Article 49 (1) (f) (I) of the Constitution of Kenya 2010** provides:

(1) An arrested person has the right-

a. to be informed promptly, in language that the person understands, of-

i) the reason for the arrest;

ii) the right to remain silent; and

iii) the consequences of not remaining silent;

b. to remain silent;

c. to communicate with an advocate, and other persons whose assistance is necessary;

d. not to be compelled to make any confession or admission that could be used in evidence against the person;

e. to be held separately from persons who are serving a sentence;

f. to be brought before ad court as soon as reasonably possible, but not later than-

i) twenty-four hours after being arrested; or

ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;

g) at the first court appearance, to be charged or informed of the reason for the detention continuing, or to be released; and

h) to be released on bond or bail, on reasons conditions, pending a charge or trial, unless there are compelling reasons not to be released.

28. The charge sheet show that the appellant was arrested on 6.5.2014 and was arraigned before court on 8.4.2014 after 24 hours had lapsed. The failure to have appellant taken to court within 24 hours was not explained nor did the appellant raise the issue with the trial court, He cannot blame the trial court in that regard though his constitutional rights were indeed violated. However that notwithstanding, the trial

court proceedings were conducted without breach of the appellant's constitutional rights as enshrined in the constitution under **Article 50 of the constitution of Kenya 2010**. This court is not sitting in this appeal as a constitutional court but as a criminal court. That the appellant's remedy lies with a constitutional court and if he feels aggrieved by the violation of his constitutional rights by failing to be arraigned in court within the speculated time in the Constitution, the appellant is at liberty to file a constitutional reference with a constitutional court under provisions of **Article 22 of the Constitution of Kenya** seeking the appropriate remedy under Article 23 of the Constitution of Kenya 2010.

29. The upshot is that the appeal has no merits. The conviction is upheld and sentence confirmed.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 26TH DAY OF MAY, 2016.

J. A. MAKAU

JUDGE.

JUDGMENT DELIVERED IN THE OPEN COURT

IN THE PRESENCE OF:-

Appellant in person: Present

M/s Odumba for State: Present.

Court Clerk: 1. Kevin Odhiambo

2. Mohammed Akide:

J. A. MAKAU

JUDGE