



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

HIGH COURT CRIMINAL APPEAL NO. 39 OF 2014

(Formerly Nakuru High Court Criminal Appeal No. 74 of 2014)

(Being an appeal against conviction in Naivasha Criminal case No. 3767 of 2011- S. M. Githinji, CM)

EDWIN NYAMBASO ONSONGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant herein was charged with offence of Defilement contrary to section 8 (1) as read with Section 8 (3) of the Sexual Offences Act. The particulars state that on 18th December, 2011 at Naivasha township, he caused his genital organ namely his penis to penetrate the vagina of M. W. a girl aged 14 years. The alternative charge preferred was Indecent act with a child contrary to section 11 (1) of the Sexual Offences Act. He denied the charge.
2. After a full trial the Appellant was found guilty, convicted and sentenced to serve 20 years imprisonment. He now appeals to this court against the conviction.

The Appellant's home-made Petition which he filed in person contains 12 grounds while the Supplementary Petition filed by his advocate raised 3 additional grounds of appeal that can be summarized as follows;

1. That the trial court erred in law and fact by convicting the Appellant against the weight of the evidence.
 2. That the court erred in law and fact in finding that the charges had been proved beyond any reasonable doubt.
 3. That the trial court erred in law and fact in convicting that Appellant through speculation and conjecture rather than evidence.
3. Ground 4 repeats grounds 1 and 2 of the Supplementary Petition. The Supplementary grounds are a summary consolidating the initial grounds 1,3,4,5,7,8,9,10 which challenge the prosecution evidence at the trial. But in addition, ground 2 of the initial grounds raises the complaint that the Appellant's defence was not considered. Ground 11 of the initial grounds raises a constitutional issue on delayed arraignment before the trial court in alleged violation of the Appellant's rights

- under Article 50 of the Constitution.
4. The Appellant through his advocate filed written submissions which he relied on at the hearing in support of the appeal. Mr. Kibelion on behalf of the DPP opposed the appeal through oral submissions. The Appellant's submissions consolidated, the initial and supplementary grounds of appeal and argued them under 6 heads.
 5. On the issue of age the Appellant argues with regard to head 1 & 2 that the victim's age was not established by documentary evidence and that the Complainant's evidence was inconsistent and contradictory. On the 3rd head, the Appellant argued that the Medical evidence tendered did not prove penetration of the victim, or connect the Appellant with the spermatozoa seen in the victim's high vaginal swab (HVS); that the PRC contradicted the observation of the P3 form regarding whether the victim's clothes were blood stained two days after the incident. That doubts created by the medical evidence should have been resolved in the Appellant's favour.
 6. Under the 4th head, it was submitted that the prosecution evidence was riddled by inconsistencies and contradictions, some of which are highlighted, with regard to : whether there was a radio and/or whether the Appellant raised the volume thereof (**PW1 & PW2**); for **PW2**, the time of assault and examination of the victim; per **PW2** and **PW1**, whether the assailant wore a condom or not during the assault and per **PW5** and the PRC whether the clothes worn by the victim had blood stains or had been washed during examination; whether **PW2** was kidnapped (see evidence of **PW2 & PW1**), whether **PW1** could walk to hospital (evidence of **PW1,2,5**). Citing the Complainant's allegation that the Appellant held her mouth while putting on the condom, her own conduct after the attack the Appellant states that the Complainant's evidence was not believable.
 7. Submissions were also made on the fifth head with regard to the delay in the arrangement of the Appellant, in violation of the Appellant's constitutional rights.

Under the sixth head of issues, the Appellant's advocate attacks the judgment of the lower court for failing to comply with the requirements of Section 169 (1) of the Criminal Procedure Code by failing to indicate the points for determination, the determination and reasons thereof.

8. It was contended that in certain respects in the court's judgment the onus of proof was shifted to the Appellant. It is also submitted that the judgment contains surmises, assumptions and conclusions not borne out of the evidence but rather based on speculation and conjecture in favour of the prosecution's case. The Appellant cites in this regard the court's conclusion in dealing with evidence on the presence of spermatozoa in the private parts of the Complainant despite the alleged use of a condom by the Appellant. Finally, it was argued that the trial court glossed over the Appellant's defence and ultimately entered a conviction against the weight of evidence.
9. In his response, Mr. Kibelion conceded the appeal based on contradictions on the age of the victim as between the charge and evidence by PW1 & PW2.

However, he stated that the conviction was safe. He urged the court to invoke Section 364 of the Criminal Procedure Code and correct the sentence or otherwise order a retrial. 10. In **Okeno -vs- Republic 1973 E.A. 322** the court of appeal set out the duty of the Appellate court as follows:

“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- R [1957] EA 336) and to the Appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala – Vs- R [1957] EA 570. It is not the function of the first appellate court merely to scrutinize the evidence to see there was some evidence to support the lower court's findings and conclusions; 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.”

Also in the case of **Francis Otieno Oyier –Vs- Republic Criminal Appeal No. 158 of 1984 2 (UR)** the court held that the Appellate court will not interfere with findings of the lower court that are based on the

credibility of witnesses unless the findings were plainly wrong or that no tribunal could have made them.

10. The prosecution case, as presented through five witnesses was as follows. M.W.W. was a 14 year old girl in the year 2011. She was a student at [particulars withheld] school and lived at [particulars withheld] with her mother. It is not clear whether she was in primary school or high school in the material period. During school holidays in December, 2011 the said Complainant M.W.W. (PW1) went to visit her older sister J.N.W. (PW2) who was residing in Naivasha. PW2 lived as a tenant in the same plot as the brother or host to the Appellant in the material period.
11. On 18/12/11 the Complainant wanted to prepare a meal. She went to get a piece of glowing charcoal from the house of the Appellant's host, in order to kindle her jiko. The Appellant was outside the room of his host. He pulled PW1 into the room and locked the door.

He then put the complainant on the bed before undressing her. He also undressed and wore a condom before having sexual inter course with the Complainant after which he released her.

The Complainant dressed up and left with the coal for her sister's house. While she was cooking a neighbor, also resident in the same plot Beatrice **Mumbi Mbatia (PW3)** came by. PW3 noted that the Complainant was crying.

12. On inquiry, the Complainant told PW3 that a tenant in the plot had defiled her. She identified the Appellant by the room occupied. PW3 allowed the Complainant to use her phone to call PW2 who immediately came home from work, and on listening to the Complainant led the Complainant to Naivasha Police Station. That complaint was received by PC **Irene Wamuyu (PW4)** who referred the reportees to the hospital at Naivasha. **Dr. Maundu (PW5)** upon examining the Complainant concluded that she had been defiled. Spermatozoa and red blood cells were seen in the high vaginal swab (HVS) taken during the examination for the PRC1. The P3 form was completed on 20/12/11 and the Appellant arrested and charged.
13. In his defence, the Appellant gave a sworn statement to the effect that he worked as a Security officer and resided in Naivasha. He said he knew the Complainant who would visit his house then to listen to music.
14. That on the material date, the Complainant requested him to fetch water for her as she went to church. He obliged and also asked her to return the favor as he went on an errand. On return he found the Complainant seated in his house. They engaged in chit chat about music. She went to get some music discs to play in his house presumably on his system. He left her there and went to visit a relative.
15. On return, he found the Complainant still in the house. PW3 questioned him about the presence of the Complainant in his room and he explained that she was playing music. He asked the girl to leave whereupon PW3 questioned the Complainant. That at 2.00 p.m. the Complainant informed him that PW3 had called her sister and made a false allegation about their being together in his house. That the Complainant later told her that she was coached to lie against him but was hesitant. That PW2 got him arrested on the same date.
16. **Robert Muturi (DW2)** testified on behalf of the Appellant that he lived in Naivasha in the same compound as the Appellant and PW1. That on 18/12/12 at 9.30 a.m. he and the Appellant, the complainant and other tenants were fetching water. That one of the tenants called mama Jane observed how the Complainant was conversing with the Appellant. He went away from the plot and upon returning at noon learned from **Mama Dama (PW3)** that the said Mama Jane had called PW2 to report that the Appellant had had sexual intercourse with the Complainant. And that it was a police matter because PW2 reported to police. Allegedly, PW3 later told DW2 that she never expected the matter "to reach that far".
17. I have considered the submissions made by the Appellant's counsel and the ODPP and the evidence on record.

Ground 11 of the initial Petition of appeal raises a constitutional question that can be taken right away. The delay of two days in the arraignment of the Appellant, was not made an issue during the trial or at plea time. However, whether the said delay violated the Constitutional rights of the Appellant is not

relevant in this appeal. The Appellant is at liberty to pursue damages in a civil claim. The legal position has been settled since the court of appeal decision in **Julius Mbugua vs Republic (2010)eKLR**.

18. The rest of the grounds of appeal are really aimed at the prosecution evidence at the trial, concerning the age of the Complainant, whether there was proof of penetration and whether indeed there was credible evidence that the Appellant is the person who defiled the Complainant.

Before dealing with these matters, I find it apposite to consider the Complaint by the Appellant that the court in writing its Judgment failed to comply with Section 169 (1) of the Criminal Procedure Code. The section is in the following terms:

“Every such judgment shall, except as otherwise expressly provided by this code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, shall be dated and signed by the presiding officer in open court at the time of pronouncing it.”

19. It was argued by the Appellant that the trial magistrate did not set out the points for determination and the reasons for his findings thereon. I have carefully considered the judgment of the trial magistrate. I note that after setting out the evidence by the prosecution and the defence, the trial court stated;

“At this juncture the court need to determine as to whether the offence against the accused is proved by the prosecution beyond reasonable doubt.”(sic).

From that point the trial court considered the trial evidence and gave reasons for believing PW1, 2 & 3 and its reliance on the medical evidence tendered. I think the only aspect upon which the trial magistrate can be faulted is the apparent failure to expressly refer to the question of the age of the appellant.

It would seem that he took the evidence of Pw1 & 2 as adequate proof of age as evidenced by his final findings.

20. The omissions notwithstanding I do not agree that the court failed to comply with Section 169 (1) of the Criminal Procedure Code. From the Judgment the court was alive to the ingredients of the offence and made express findings on related evidence. It would have been more desirable however to expressly indicate the points or issues for determination rather than a bald statement that the court was required to determine whether the offence had been proved against the Appellant beyond reasonable doubt. Thus, nothing turns on the question regarding compliance with section 169 (1) Criminal Procedure Code.

21. Turning now to the question of the age of the Complainant, it is asserted in the charge sheet that the offence occurred on 18/12/11 when the Complainant was 14 years of age. The Complainant testified on 16/8/12 almost one year since the offence. She stated that she was 15 years old.

She gave her date of birth as 27/7/97. If she was 14 in 2012 she had turned 15 at the date of her evidence. Her sister PW2 testified on 14/3/13 and gave the Complainant's age as 15 years. The doctor who completed her P3 form (Exhibit 1) on 26/12/11 estimated her age to be 14 years.

22. There is no significant contradiction between the age of the Complainant as stated by **PW1 & PW2**. Going by the date of birth given by **PW1** she was still 15 early in 2013 turning 16 on her birthday on 27/7/2013. Thus her age in August 2012 when she testified was 15 years the birthday being 27th of July. It is true that no birth certificate was tendered regarding her age.

23. However there is no hard and fast rule that the age of minors can only be proved through documents. The court of appeal recently stated in the case of **Mwalongo Chichoro Mwanjembe -vs- Republic, Mombasa Criminal Application No. 24 of 2015 (UR)**:

“.....the question of proof of age has finally been settled by a recent decisions of

this court to the effect that it can be proved by documentary evidence such as a Birth Certificate, Baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof” It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. (See Denis Kinywa -vs- Republic Criminal Appeal No. 19 of 2014) and (Omar Ucher -vs- Republic Criminal Appeal No. 11 of 2015). We doubt if the courts are possessed of requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decision of the Court of Appeal of Uganda in Francis Omuroni -vs- Uganda Criminal Appeal No. 2 of 2000.

“We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim’s age, it has to be credible and reliable.....”

24. In my considered view, the trial magistrate was entitled to believe the evidence of age through **PW1** and **PW2** which was confirmed by the doctor’s assessment of the minor’s age at the time of the offence in 2011, and to overlook the minor discrepancies in the evidence of **PW1** and **PW2**. His findings are well supported.
25. Regarding the assault itself, the court relied on the evidence of **PW1, 2 and 3**. **PW1** narrated how the Appellant locked the door behind her when she went to get a piece of glowing charcoal to light a fire. The Appellant does not dispute the presence of the victim in his house on the material date. From his account, the Complainant spent several hours **“listening to music”**. Seemingly, he and the Complainant had a good relationship.
26. **PW1** told the court that the Appellant placed her on the bed and undressed her before also undressing wearing a condom and having sexual intercourse with her. She maintained this version in cross-examination. The Complainant also stated to **PW3** when she found her crying that the Appellant had defiled her.

That report was made within hours of the assault and the Appellant himself confirmed that **PW3** was at the plot at the material time, and questioned him about the presence of **PW1** in his room.

27. The offence was reported to police on the same date. The police woman (**PW4**) issued the Complainant with a P3 form (Exhibit 1a). Before the same was completed on 20/12/11 the Complainant was seen at the Naivasha District Hospital where PRC1 was completed. The same (Exhibit 1 (b) is dated 18/12/11 at 10.00 p.m. The significant findings on Exhibit 1 (b) include the broken hymen and evidence of spermatozoa and red blood cells in the HVS taken that day. That no other injuries were noted does not in any way exclude that there was penetration on the material day, because evidence of use of force is not an element of the offence charged.
28. According to Exhibit 1 (a) the injuries noted were 2 days old. The doctor confirmed the vaginal penetration in the P3 form (Exhibit 1a). This evidence was not subjected to any serious challenge at the trial itself.

The Appellant has raised the question of the presence of spermatozoa as being in contradiction of the alleged use of a condom by the Appellant. The spermatozoa was not subjected to DNA analysis, but I do not accept that the presence thereof excludes penetration by the Appellant on the material date.

29. This is how the trial court dealt with the matter;

“The evidence of the doctor save for the presence of spermatozoa, corroborates the Complainant’s evidence that she was penetrated. Hymen was broken and her clothes were blood stained. She was also not able to walk. Red blood cells were also seen.....The doctor concluded she had been penetrated by a penis. As I indicated earlier the presence of spermatozoa can be questioned given that the Complainant indicated that the accused used a condom. However, it’s a well known fact that condoms are not 100% safe in protecting one from contact with male sperms. They

can get torn or would contain holes which can let the sperms through. Given the rest of the evidence which strongly shows the accused penetrated the girl, the presence of spermatozoa where a condom was alleged used raises no reasonable doubt to whether the accused committed the offence or not”

30. The trial court clearly believed the Complainant’s evidence on penetration and sought explanation for the presence of spermatozoa in the HVS. The Appellant’s submissions contain withering criticism of the trial magistrate’s handling of this particular piece of evidence, accusing him of indulging in conjecture and surmises not backed by evidence.
31. I agree with the Appellant that the prosecution through PW5 or other witnesses ought to have explained the presence of spermatozoa notwithstanding the use of a condom. However logically, the question only arises because of another assumption; namely that the condom was effective. The suggestion that the Complainant should have explained whether the condom was torn is ludicrous; the condom was with the Appellant before and after the offence.
32. Had PW1 been a dishonest and malicious witness she would simply have denied the use of the condom. In reaching the conclusion that the condom must have leaked the spermatozoa the trial magistrate was not engaging in conjecture. Rather he gave what was the most reasonable and natural explanation, having believed that the Appellant had sexual intercourse with the Complainant while wearing a condom.
33. The court is entitled under section 119 of the Evidence Act to presume the existence of any fact which it thinks likely to have happened. The section states:

“The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”

To suggest that the Complainant had been with another man but framed the Appellant, one would require a strong motive.

34. From the evidence of the Complainant and **PW1**, they were on good terms. **PW1** admittedly spent long hours that morning exclusively with the Appellant. There was more than enough opportunity for the Appellant to commit the offence while there is no reasonable cause why **PW1**, **PW2** and **PW3** would all frame the Appellant for this offence.
35. On the highlighted contradictions between what **PW1**, **PW2** and **PW3** told the court, not every contradiction is material and I agree with the Ugandan Court’s decision in the case of *Twehangane Alfred vs. Uganda, Criminal Appeal No. 139 of 2001, [2003] UGCA*, where it was observed:

“with regard to contradictions in the prosecutions case the law as set out in numerous authorities is that contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case.”

36. The alleged contradictions do not affect the substance of the evidence of PW1, 2 & 3 or their credibility on my own assessment. Whether PW1’s conduct before and after the incident appeared to suggest consent to the sexual act is irrelevant in this case. From the Appellant’s own defence, it seems that he had an eye on the Complainant and entertained her alone in his room more than once and even neighbours noted the interest he took in the minor.
37. It was only a matter of time before sexual relations could occur, and was probably all along on the Appellant’s mind; hence his preparation as evidenced by being in exclusive company of the minor in a room, the possession of condoms on a table while the Complainant was on the bed. There can be no other explanation for an adult man to allow himself to be in a room alone with a girl, not his relative, for long hours.
38. Regarding the trial magistrate’s treatment of the defence, it was an accurate observation that many of the actions and conversations attributed to PW1 had not been put to her in cross-examination to

confirm or deny. Thus the court was perfectly entitled to view these allegations, especially in denial of the sexual intercourse by PW1 as an after thought by the Appellant.

39. The Appellant gave a long narrative of his involvement with PW1 on the material date, alone in his house. There was also a veiled attempt to suggest that PW3 or other 'nosy' neighbours had questioned that presence. This matter was not put to PW3 or Pw1 during cross-examination. Also, in his defence the Appellant did not indicate that DW2 was in any way involved with him or PW1 on the material date nor did DW2 know where or what the Appellant was doing on the date in question.

40. DW2's evidence in chief consisted of hearsay and what sounded like a collection of local gossip at the plot where the Complainant lived.

He did not enter the accused's house nor indeed monitor his movements on the fateful morning. His evidence did not in any way advance the defence.

41. His evidence is really subsumed in the evidence of the Appellant as DW2's only direct evidence was tendered regarding meeting the Appellant and Complainant at the water tap, and seeing the two head towards the Appellant's house early in the morning. The entire defence was considered by the trial court, found untrue and dismissed. That was a proper conclusion, in my own evaluation. The defence in so far as it denied sexual intercourse was totally dislodged by the prosecution evidence, which the trial court found to be "reliable, and credible.....strong enough and safe to warrant a conviction".

42. Having analysed the evidence tendered, I am satisfied that the conviction was supported by the evidence and that the learned trial magistrate was entitled to conclude as he did that the charge had been proved beyond reasonable doubt.

This appeal has no merit and is accordingly dismissed. The Appellant had served 3 months when he was released on bail pending appeal. He will proceed to serve the remaining part of his sentence.

Delivered and Signed at Naivasha this **20th** day of **May** 2016

C. Meoli

JUDGE

In the presence of:

For the DPP Mr. Koima

For the Appellant Mr. Tombe Holding Brief for Mr. Orina

Appellant present

Mr. Barasa Court Clerk