



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NUMBER 222 OF 2013

ANDREW ONYANGO OWENGA.....APPELLANT.

VERSUS

REPUBLICRESPONDENT.

(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Kibera Cr. Case No. 222 of 2013 delivered by Hon. Wanjala, C.M. on 22nd November, 2013).

JUDGMENT.

Background.

The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act. The particulars were that the Appellant on 29th April, 2013 at Kibera in Nairobi within Nairobi county, unlawfully and intentionally inserted his genital organ namely penis into the genital organ namely vagina of CMM, a child aged eight years. The alternative charge was one of committing an indecent act on a child contrary to Section 11(1) of the Sexual Offences Act. The particulars were that on 29th April 2013 at Kibera in Nairobi within Nairobi county, he unlawfully and intentionally touched the private parts namely buttocks of CMM.

The Appellant was convicted of the main charge and was sentenced to life imprisonment. Being displeased by the court's finding, has decided to lodge an appeal to this court. His grounds of appeal as reflected in the Amended Supplementary Grounds of Appeal, namely that; the trial was a nullity as it was hinged on a defective charge sheet and that therefore, he pleaded to the wrong charge which violated his right to an impartial trial and that the medical evidence did not support the charges.

Submissions.

The Appellant filed written submissions in addition to a Supplementary Grounds of Appeal on which he relied. The gist of the Appellant's submissions was that the trial was a nullity ab initio as it had proceeded on a defective charge. He also challenged the adduction of the medical evidence by PW3, who had not personally prepared the treatment notes.

On behalf of the Respondent, learned State Counsel, Ms. Akuja in her oral submissions stated that the ingredients of the offence of defilement had been proved. On the issue of the defective charge sheet she submitted that the error could be corrected under Section 382 of the Criminal Procedure Code.

Evidence.

The prosecution's case was that on 29th April, 2013 the complainant went to the Appellant's house to enquire for a key to the toilet which was a facility shared by the various members of the area. The Appellant granted her the key which she returned after relieving herself. Later on she again went back and asked the Appellant for the key but this time he sent the complainant to the shops to buy her a match box. He handed her the money and she went to the shop and brought back the match box. She was all along in the company of her brother, B. He then granted her the key and as she was returning it he again sent her to the shop, this time armed with Kshs. 5 for 'juice kola'. She returned with the beverage which he prepared and subsequently shared it amongst themselves. Once they were done with the drinking the Appellant asked PW1's brother to go outside and play.

The Appellant, who was sat on a sofa set requested the complainant to sit on top of his thighs facing away from him. He then proceeded to open his zipper before taking off her trousers and asking her to sit on his penis. She sat for about 5 minutes before one of the kids interrupted them. The Appellant told PW1 to dress up and go outside to play.

Afterwards, the complainant was in pain from her anal region specifically when she defecated. She told I and her brother what had happened. The children were overheard discussing the matter after which the mother to the complainant was called and informed. This was the day after the incident occurred. She rushed home from work and upon examining and interrogating her to no avail took her to the MSF Clinic for examination. The complainant was more forthcoming with the doctor and alleged that the Appellant had inserted his penis in her anus. The doctor then examined her and found tell tale signs of sexual assault. The complainant was given post exposure medication. On the following day they reported the matter at Kilimani Police Station and they were given a P3(Medical) form to be filled out at Kenyatta National Hospital. This was filled out by Dr. Maundu. They were thereafter referred to the District Commissioner's Office at Kibera, where the Children rights office was located where they were issued with a social inquiry report form. She returned the form to Kilimani Police Station after which the Appellant was arrested.

PW1, CMM, was the complainant. Her evidence forms the basis of the summary of the prosecution's case. **PW2, M M M**, was the mother to the complainant. Her evidence entirely corroborated that of PW1. Both **PW3, PACUTUCA AWIYR IRUATI**, a nurse with Medicines San Frontiers (MSF), and **PW4 Doctor Josepy Maundu**, a police doctor examined the complainant and made positive findings. **PW5, Police Constable LILIAN MORAA**, was the investigating officer who summed up the evidence of all the witnesses and after finding the Appellant culpable charged him accordingly.

DW1, ANDREW ONYANGO OWENGE was the Appellant. He gave an unsworn statement of defence in which he distanced himself from the offence. He stated that he lived in Kibera and was previously employed as a security guard. He stated that he knew the complainant only by appearance and her nickname as they lived in the same plot. On 29th March, 2013 he was preparing to go to work when he decided to take a bath. While he was bathing the complainant entered his house. She started watching television in a neighbour's house which was located nearby and there begun all the issues surrounding the matter. He further stated that given the fact that the complainant's family had a key to their toilet he did not understand why the child would ever need to borrow a key from him. He also stated that given the close proximity of the houses on the plot, if the incident in question had occurred someone would have seen or noticed it. He went to work for the next two days and heard nothing about the incident. On Sunday when he returned home he found that the door to his house had been broken and his children evicted. He entered the house where he was attacked by the father to the complainant and another man and he reported the matter to Kilimani Police Station. He later received treatment for the injuries suffered. On 17th April, 2013 he was arrested and taken to Kilimani Police Station where he was charged with this offences. He adamantly denied the charges.

Determination.

At this point I have noted that there is critical variance between the date of the offence as drafted in the

charge sheet and the evidence of all the prosecution witnesses regarding the date the offence was committed. The date of the offence was first brought up by PW2 who clearly set it out as 29th March, 2013. The date is further evidenced by the other witnesses who in describing the events of the incident referred to 29th March, 2016. For instance, PW3 stated that the complainant was at the hospital within 72 hours of the occurrence of the offence on 30th March, 2013. The fact that 29th March, 2013 was the date given in evidence was prejudicial to the Appellant who pleaded to an offence that was committed on 29th April, 2013. Surprisingly, all through the prosecution never raised an eye brow and/or intimate that they intended to amend the charge sheet. This is an issue that was raised towards the close of the prosecution case after the testimony of PW5. At that time the prosecution applied to amend the charge sheet to reflect the date of the offence as 29th March, 2013. After the address to the court by the prosecutor, no response was made by defence and the court entirely ignored that application. What this means is that all through the trial, the appellant was defending an offence that was committed on 29th April, 2016. Incidentally, the prosecutor did not also pursue the issue but instead stated that he had closed his case. This court wonders whether the silence by both the trial magistrate and the prosecutor was deliberate or a mere oversight, yet an amendment to the charge sheet was so critical to the validity of the trial.

A charge that is not supported by evidence definitely is defective. The question herein is whether the defect is curable under Section 382 of the Criminal Procedure Code. It is easy to conclude that the error being of a technical nature (technical in nature) is so curable under the provision. But my view is that even a technical error should be considered on a case to case basis. The present scenario is a unique situation in which the dates referred to, both 29th March and 29th April, 2013 are quite far apart. In a trial, an accused must be certain that the charges he is facing are those he is defending. Although the Appellant gave an unsworn defence it is clear that the same centred around the date of 29th March, 2013 yet he cross examined the prosecution witnesses on an offence committed on 29th April, 2016. It cannot therefore be concluded that the offence as drafted was stated in clear and unambiguous manner as to enable him to defend it or that it did not prejudice him.

For this reason, I conclude that the defect was material and heavily prejudiced the Appellant. The same can only be cured by ordering a retrial. In so doing, I have satisfied myself that the same is likely to result in a conviction. This is so because the identification of the Appellant was foolproof. The age of the victim was well established by a Birth Certificate and the medical evidence also demonstrated evidence of a sexual offence. Further, no prejudice will be occasioned to the Appellant as he has been in prison for only two and a half years against a jail term of life imprisonment. The offence is also very serious and justice demands that the same be heard in a fair manner in the interest of both the victim and the Appellant.

At this point then I need not belabor addressing all the issues raised in detail. The appeal partially succeeds. I quash the conviction and set aside the life imprisonment sentence. I order that a retrial be conducted. I further order that the Appellant be escorted to Kilimani Police Station not later than 3rd June, 2016 for purposes of preparing a fresh charge sheet. He shall thereafter be presented to a court to take plea within the time provided under the Constitution. All the exhibits produced in the trial shall be released to the investigating officer for use in the fresh trial. It is so ordered.

DATED AND DELIVERED IN NAIROBI THIS 26TH JUNE, 2016.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

Appellant in person.

Miss Akuja for the Respondent.

