



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIIAYA

HIGH COURT CRIMINAL APPEAL NO. 52 OF 2015

(CORAM: J. A. MAKAU – J.)

STEPHEN ODUOR OMANYO..... APPELLANT

VERSUS

STATE..... RESPONDENT

(An Appeal from the Original Conviction and Sentence dated 4.3.2015 in Criminal Case No. 145 of 2014 of P.M'S Court at Ukwala By R.M. Oanda (SRM))

JUDGMENT

1. The Appellant **STEPHEN ODUOR OMANYO** was charged with an **offence of defilement contrary to Section 8 (1) (2) of the Sexual Offence Act No. 3 of 2006**. The particulars of the offence are that on 22nd day of March 2014 at [particulars withheld] sub-location in Ugenya District within Siaya County, intentionally caused his penis to penetrate the vagina of **S.A.** a child aged 7 years.
2. After full trial the appellant was found guilty of the offence, convicted and sentenced to life imprisonment.
3. Aggrieved by conviction and sentence the appellant filed this appeal through the firm of M/s. Mugoye and Co. Advocates setting out several grounds of appeal which can be summarized as follows:-
 - a. ***That the trial court erred in law in convicting and sentencing the appellant when prosecution had not proved their case beyond any reasonable doubt.***
 - b. ***That the ingredients of an offence of defilement were not proved.***
 - c. ***That the age of the complainant was not proved.***
 - d. ***That the trial court shifted the burden of proof to the appellant.***
 - e. ***That the trial Magistrate erred in law in proceeding to write judgment without framing issues for determination.***
 - f. ***That the learned trial Magistrate erred in law in handing the appellant death sentence contrary to Section 8(2) of the Sexual offences Act.***
4. At the hearing of the appeal the appellant appeared in person whereas Mr. E. Ombati, Learned Prosecution Counsel appeared for the State.
5. The Appellant relied on his written submission which he handed over to the court. In his written submission he faulted the trial court for convicting him on evidence of a single witness which was not corroborated, for convicting him on poorly investigated matter of the alleged defilement, for convicting him in absence of proof of the offence to the required standard and for failing to consider the appellant's unshaken defence.
6. Mr. E. Ombati appearing for the State strongly opposed the appeal urging that the victim was 7

years old, that the ingredients of defilement were proved to the required standard, thus recognition and/or identification of the perpetrator, penetration and the age of the victim, and that the appellant was sentenced to life imprisonment as provided by law under **Section 8(1) (2) of the Sexual Offences Act No. 3 of 2006.**

7. This is 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 conclusion after giving due allowance. I am in this regard guided by the **Court of Appeal case of Okeno V. Republic [1972] E.A. 32** where the Court set out the duties of a 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”

8. The facts of the prosecution case are that on 22nd March 2014 PW1 S.A., a minor, was on 22nd March 2014 defiled by the appellant, at the appellant's house at his bed sustaining injuries after which the appellant ran away. The victim S.A. after gaining consciousness went to her grandmother's house and informed her what had happened, PW2 and PW4 took PW1 S.A. to Matibabu Hospital for treatment and later at Ukwala Health Centre. PW1 S.A. was referred to Busia Hospital for further treatment where she was admitted. The matter was subsequently reported to Ukwala police station by PW2 and the grandmother of PW1 S.A. - PW1 S.A. was subsequently referred to Nairobi Women Hospital for further specialized treatment. PW3 issued P3 form, recorded statements of the witnesses and following investigation the appellant was arrested and charged with this offence.
9. The Appellant denied the charge and put forward a defence of Alibi stating that on 22.3.2014 he was at a house at [particulars withheld] Estate, Kisumu County, that he was later arrested and arraigned in Court for this offence.
10. The appellant contends the trial court erred in failing to note and hold the complainant's evidence, being evidence of a minor required corroboration and in absence of it, the court was in error in convicting the appellant on evidence of a single witness which was not corroborated.

Section 124 of the Evidence Act provides:-

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with the section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

11. The appellant was charged with a criminal offence involving a sexual offence of a minor and the court can convict an accused on the evidence of the alleged victim of the offence if for reasons recorded in the proceedings the court is satisfied the alleged victim is telling the truth. The trial court's proceedings are sketchy and devoid of details. The trial Court in its judgment did not

hold and find that the only evidence in support of the offence was only that of the minor victim, nor did the court state it was relying fully on her evidence and I believe that the court did not find it necessary to comply with provisions of **Section 124 of the Evidence Act** as there was other evidence.

12. The Victim knew the appellant who called her to his house, defiled her during day time causing serious injuries to her and that after the incident PW1 reported the matter to her grandmother. PW2 was informed of the incident at 3.00 p.m. and proceeded to Matibabu Hospital and found PW1 in company of her grandmother. PW2 noted PW1 was bleeding and her clothes were blood stained. PW1 lead PW2 to her perpetrator's home thus the appellant. PW3 testified PW1 was taken to Ukwala Police Station by her grandmother. PW3 testified the child was bleeding from her private parts. PW3 issued P3 form to PW1 and recorded witnesses statements. PW3 testified PW1 positively identified the appellant. PW4 saw PW1 at 1.00 p.m. with blood-stained clothes and she told PW4 she was defiled by the appellant. PW4 and others took PW1 to the hospital. PW5 testified PW1 went to her crying with blood stained clothes and with whitish stains too and told her she had been defiled by the appellant. PW6 a clinical officer at Ukwala sub-district hospital produced P3 form exhibit P3 which showed an examination of PW1 on her genitalia was sealed with blood, with severe lacerations on the labia majora and minora, vaginal orifice torn including the anal orifice, cervix obliterated by blood clot, fresh blood on vagina, no spermatozoa found, the P3 form showed PW1 had been defiled. PW1's evidence was corroborated by evidence of PW2, PW3, PW4, and PW5 and PW6. I am satisfied that the trial court did not rely on evidence of PW1 alone. The only evidence on record was not that of PW1 nor did it lack corroboration as submitted by the appellant. I am satisfied the evidence as presented by five(5) prosecution witnesses, thus PW2, 3, 4, 5 and 6 corroborated evidence of PW1 and moreso the P3 form produced by PW6 and blood stained clothes of PW1 produced as P1 (a) (b) as well as form from Nairobi Women Hospital and and clinic visits exhibit P5.
13. The Appellant contends the prosecution's case was not properly investigated and the investigation was poorly done, in that PW3 showed he visited the home of PW5 J A and that PW3 did not mention visiting the scene of crime in his evidence and that no investigation was done to ascertain if PW1's injuries were not caused by something else. That no DNA test was done to ascertain the blood in the clothes of the victim linked the appellant with the offence. The appellant urged that failure to carry out proper investigation and have DNA done prejudiced him and resulted in injustice to him.
14. In a **sexual offence** the prosecution is required to call evidence, mainly from the victim, eye witnesses (if any) evidence of investigating officer and the medical officer. PW3 in his evidence received the complaint from the complainant, he issued P3 form to the victim, recorded witnesses statements and the appellant was trailed at Kisumu and arrested. PW3 produced treatment notes from Nairobi Women Hospital, P3 form dully filled, Notification of Birth of the victim, Post Rape Care Form, exhibit P2, P3 form as exhibit P3, Birth Notification exhibit P4. PW3 also visited the victim's home and that of the appellant. PW3 did what was expected of him in the investigation of an offence of Sexual Assault. The failure to carry out DNA test did not adversely affect the prosecution case in anyway. PW2, PW4, PW5 and PW6 noted blood stained clothes of the victim. She was in the blood stained clothes when they saw her, and which blood was clearly stated by the witness was from private parts of PW1 who was injured. PW2, PW3, PW4, PW5 and PW6 were informed by PW1 that she was defiled by the appellant. PW6 evidence is clear that when PW1 was examined by the Doctor she was found to be bleeding from her genitalia. There was no allegation that the blood found in the PW1's clothes was from the appellant. The prosecution case was not based on circumstantial evidence but direct evidence from PW1. There was therefore no need for DNA test as submitted by the appellant. The appellant did not state what it was that was expected of the investigating officer to do that he did not do in respect of the investigation of the offence of defilement. I find no merit in this ground of appeal.
15. The Appellant contends that there was no proof of defilement. In an offence of defilement the ingredients of the offence are penetration, identification or recognition and the age of the victim. In the instant case PW1 testified that the appellant took her to his house. He was a neighbour to the victim who knew the appellant before. She gave his name to PW2, PW3, PW4 and PW5 and even took them to the house of the appellant. I find and hold that PW1 recognised the appellant. PW1 testified she was defiled by the appellant. PW6 produced medical report P3 form which

showed her genitalia was sealed with blood, with severe laceration and tear, on the labia majora and minora, vaginal orifice and anal orifice were torn. The P3 form showed that the victim had been defiled. I therefore find the prosecution proved penetration. On the age of the victim there is evidence from P3 form, Rape care form exhibit P3, P3 form exhibit P3 and Birth certificate notification produced as exhibit P4 showing that PW1 was born on 29.10.2007 hence by the time of the commission of the offence she was 7 years and as such she could not consent to sexual intercourse. The prosecution proved the ingredients of defilement. I therefore find no merits in this ground of appeal.

16. The appellant contends that his defence was unshaken by the prosecution. The appellant's defence was a defence of alibi. He urged on 22.3.2014 at mid-day he was at his house, [particulars withheld] Estate, Kisumu County and not at the scene of the incident. He stated he was with a friend with whom they went to [particulars withheld] in his friend's vehicle. The trial Court considered his defence and dismissed his defence of alibi. I have carefully considered the defence of the appellant. PW1 in her evidence was categorical the person who defiled her was the appellant. Appellant did not in his cross-examination raise the issue of grudge or of being framed by PW1 or her relatives. He did not raise his defence of Alibi early enough during cross-examination but only during his defence. I am live to the fact that an accused person has no obligation to prove his defence of alibi is true but has to raise some doubts to the court's mind. The appellant did not produce any documentary evidence or otherwise to show he was not at the scene of incident at all, the prosecution witness evidence placed the appellant at the scene of crime. He did not cross-examine prosecution witnesses on his defence of not being at the scene nor on the issue of being framed or of there being a grudge. I doubt his evidence and find it to be an afterthought.
17. On sentence the appellant was sentenced to serve life imprisonment. I note with a lot of dismay that in the court file we have two sets of sentences, one sentencing the appellant to "life imprisonment" and the other sentencing the appellant to "**life imprisonment as Death is required.**" The same sentences are issued by the same Judicial Officer who signed the same. In my view there is a grievous error and may be it was due to the failure of the Judicial Officer to clearly peruse his typed judgment before signing the copies of the judgment. Having come to that, I now turn to sentencing. **Section 8 (1) (2) of the Sexual Offence Act** provides for mandatory life sentence. I therefore confirm the appellant was rightly sentenced to serve life imprisonment and point out that death sentence is not provided for under the said Section. This was an error on part of the presiding Judicial Officer.
18. **In view of the above the appeal is dismissed. I uphold the conviction and confirm the life sentence imposed by the trial court.**

I direct the Deputy Registrar of this court to supply copy of the judgment to trial court for the record purposes and information .

DATED AT SIAYA THIS 8TH DAY OF JUNE 2016.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN PRESENCE OF:

Appellant present.

Mr. E. Ombati for State

Court Clerk: 1. Kevin Odhiambo

2 Mohammed Akideh

J. A. MAKAU

JUDGE