



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 50 OF 2015

(CORAM: J. A. MAKAU – J.)

PIUS OTIENO OWUOR APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal against both the conviction and the sentence DATED 20.2.2013 in Criminal Case No. 31 of 2012 in SIAYA Law Court before Hon M.S. Kimani – R.M.)

JUDGMENT

1. The **Appellant PIUS OTIENO OWOUR** was charged with an offence of defilement contrary to **section 8 (1) (4) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence are that on the 2nd day of January 2012 at [Particular withheld] “A” Sub-location in Siaya District within Nyanza Province. Intentionally caused his penis to penetrate the vagina of **V A O**, a child aged 16 years. The Appellant faced an alternative charge of **committing an indecent Act with a child contrary to Section II(I) of the Sexual Offences Act No. 3 of 2006**. The particulars of the alternative charge are that on the 2nd day of January 2012 at [Particulars withheld] “A” Sub-location in Siaya District within Nyanza Province intentionally touched the vagina of **E A A** a child aged 16.

2. After full trial the Appellant was found guilty of the main charge, convicted and sentenced to imprisonment for 15 years. Aggrieved by the conviction and sentence he lodged this appeal setting out three major grounds of appeal being as follows:-

(a) That the learned trial magistrate erred in law and in facts by convicting and sentencing the Appellant though there was no age assessment test done to confirm whether the girl was a minor.

(b) That the Learned trial Magistrate erred in law and in facts by convicting and sentencing the Appellant though he did not defile.

(c) That the trial Magistrate erred in law and facts by failing to note that the investigation officer wrote his statement after the case.

3. At the hearing of the appeal the Appellant appeared in person whereas M/s. M. Odumba Learned State Counsel appeared for the State.

4. The Appellant relied on written submissions dated 20.6.2016 in which he urged that the age of the complainant was not proved through production of documentary evidence, or by age assessment report,

that the finding on penetration was not based on sound evidence, that the Appellant was not recognized by the complainant, that vital witnesses were not called to testify hence evidence against the Appellant was fabricated, and finally urged the prosecutions did not prove their case beyond reasonable doubt as required in criminal cases.

5. M/s. M. Odumba Learned State Counsel opposed the appeal, submitting that the ingredients of an offence of defilement, thus age and lack of consent, penetration and recognition were proved beyond any reasonable doubt, that the trial court found the complainant in its judgment to be straightforward and trustworthy person, that the complainant stated that her age was 16 years and the clinical officer indicated her age in the P3 form to have been 16 years, though no Birth Certificate was produced the victim's age could be determined from him evidence and from the treatment notes and Post Rape Care form, that the Appellant never challenged the complainant's age at the trial and that sentence meted against the Appellant was proper and lawful.

6. I have very carefully considered the Appellant's appeal, his written submission and oral submission as well as the learned State Counsel's submissions and have considered the proceedings and the trial court's judgment as well.

7. I am the first appellate court and as such, have subjected the entire evidence adduced before the trial court to a fresh evaluation and analysis and will draw my own conclusions. I am alive to the fact that I neither saw nor heard any of the witnesses and so cannot comment on their demeanor. I am guided on the duties of a first appellate court by the Court of Appeal decision in the case of **Kiilu & Another V. R (2005) 1 KLR 174** where the Appellate court held thus:-

“an appellant in a 1st appeal is entitled to expect the whole evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision in the evidence. The 1st appellate Court must itself weigh conflicting evidence and draw its own conclusions.”

It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; only then can it decide whether the magistrates finding 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.”

8. The facts of the prosecution case forms part of the record of appeal and I need not reproduce the same as the same can be perused from the record of Appeal, I shall however summarize the prosecution case and the defence herein below.

9. The prosecution case is that PW1 VAO, a child aged 16 years a student at [Particulars withheld] Mixed Secondary School in form 1, on 20.1.2012 at about 9.00 a.m. left home searching for her young cousin, I, aged 6 years, who had gone missing. PW1 entered a certain homestead where she found three (3) women and the Appellant and another man who at that moment volunteered that he knew where I, the missing child, was and one of the women asked the Appellant to take PW1 to where the child was. PW1 left with the Appellant, went to five (5) homesteads where the Appellant claimed the child could be found and whenever they would reach at a homestead the Appellant would claim I was in the next homestead. That the two searched for I from 9.00 a.m. to 6 p.m. but never got him. PW1 asked the Appellant to show her where she could find the area chief, and he did so however, the assistant chief told them there was a child who he had been informed about and asked them to return the following day. PW1 asked the Appellant to show her the way home but he refused insisting she spends the night at the Appellant's home. That they proceeded to the Appellant's home at around 7.00 p.m. where they found Appellant's grandmother.

10. That after a short while Pius, the Appellant told the complainant that she was now going to be his wife henceforth while they were at the Appellant's house. PW1 protested saying she was not ready for marriage which the Appellant refused to hear, locked PW1 inside his house, went away only to return later with maize and beans meal (Nyoyo). They ate and the Appellant asked PW1 to sleep with him but she declined, forcing the Appellant then to grab her and overpowered her, removing her skirt and pants and pinning her on the bed. He removed his clothes then had sex with PW1 by force, the entire night.

That in the morning the Appellant took PW1 to his grandmother telling her PW1 was his wife, to which the grandmother said that was good. The grandmother warned PW1 against leaving the home for if she dared to do so, she would strangle her and leave her with devils. The Appellant also warned PW1 if she does leave the home he will kill himself and his devils will be with her. The complainant was subsequently detained at the Appellant's home from 2.1.2012 till 8.1.2012 when as she was taking a bath while Appellant was standing watching and holding her clothes, she overhead a crowd of people passing by and she heard her uncle's voice as the Appellant was shouting at them, that someone was having a bath and that they should not pass nearby. PW1's uncle proceeded to the place, arrested the Appellant, PW1 and had them taken to Siaya Police station. PW1's uncle recorded statement and PW1 was released to return the following day. PW1 testified that when her uncle found her, he was in company of members of public and that it was during night time. PW1 testified that the days she spent with the Appellant he had sex with her. That the following day thus 9.1.2012 PW1 recorded her statement with Siaya Police Station, was taken to Siaya District Hospital with the Appellant from where she was examined and issued with P3 form MFI – P1, PRC form MFI – P2. She also identified P3 form for the Appellant MFI P3. PW3, Clinical Officer at Siaya District Hospital examined PW1, and the Appellant and found PW1 was defiled. PW2 filled the two P3 forms, on 9.1.2012 as exhibit P1 for complainant and for the Appellant as exhibit P3 and PCR exhibit P2. PW3 received the Appellant from members of public, interrogated him and re-arrested the Appellant. That the following day he escorted both the complainant and the Appellant to Siaya District Hospital for re-examination. He later charged the Appellant with the offence.

11. The Appellant gave unsworn statement and denied the charge stating that on 8.1.2012 at 7.00 p.m. he had gone to nearby center to buy paraffin and near his home he met three young men who were strangers and who enquired from him where he was going and he told them he was going to buy paraffin. That they told him they wanted him to take them to a certain place but, he refused and was bundled into motor vehicle in which he saw the complainant and was told he had relationship with her. That they searched him and got his identity card. That he was taken to another homestead where he was held for 3 hours being asked to admit he had relationship with the complainant. He was later taken to Siaya Police Station, locked in cells and the next day he was taken to the hospital in the company of the complainant. He was arraigned in court later. He denied having met the complainant on 2.1.2012.

12. I have very carefully considered the Appellant's appeal, the written and oral submissions and State Counsel oral submissions as well.

13. The Appellant contends that prosecution did prove that the complainant was defiled. **Section 8(1) of the Sexual Offences Act No. 3 of 2006** provides:-

“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”

On the other hand **“Penetration”** is defined under **Section 2 of Sexual Offences Act** as follows:-

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

14. The three ingredients of the offence of the defilement are, identification of the perpetrator, penetration and age of the victim. The prosecution is supposed to prove the three ingredients to succeed in proving a charge of defilement.

15. In the instant case PW1, VAO testified that she did not know the Appellant before the incident but as from 2.1.2012 from 9.00 a.m. to 6.00 p.m. she spent the whole day with the Appellant searching for her missing cousin I and came to know the Appellant even by his name. PW1 was detained by the Appellant at his house from 2nd January 2012 up to 8.1.2012 when he was arrested by PW1's uncle who was in company of members of public. PW1 and the Appellant spent 6 days and nights together. They had conversation since 2nd January upto 8th January 2012. She was able to see the Appellant clearly and at a close range at the time they were staying together. She was therefore able to recognize the Appellant. I am therefore satisfied that the complainant recognized the Appellant.

16. Whether prosecution proved there was penetration? PW1 testified that the Appellant took her into his house and declared that she will be his wife as he locked her in his house, grabbed her and overpowered her, removed her skirt and pants, pinned her on his bed, removed his clothes, and slept with her and had sex with her by force, the whole night and thereafter on all days PW1 spent with the Appellant. She stated he had sex with her all that time. That from the complaint's evidence though she did not specifically elaborate on what she meant by stating the Appellant had sex with her, I find the only meaning that can be attributed to her statement is that the Appellant had sexual intercourse with the complainant by causing his penis to penetrate her vagina. PW1's evidence is corroborated by testimony of PW2, a Clinical Officer, who upon examination of PW1 concluded that there was penetration as hymen was absent. He specifically stated as follows:-

“From the physical finding the only evidence that denoted penetration was absence of the hymen.”

His evidence is contained in P3 form exhibit P1 which PW2 produced.

17. **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 that 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.”

From the above Section, in Criminal cases involving a **Sexual Offence**, if the only evidence is that of alleged victim of the offence, the court can receive the evidence of the alleged victim and proceed to convict the accused person, for reasons to be recorded in the proceedings, that the court is satisfied that the alleged victim is telling the truth. In the instant case I find there was corroboration of PW1's testimony from the evidence of PW2 the Clinical Officer. Apart from that corroboration I find that the trial court received PW1's evidence and proceeded to convict the Appellant and in doing so the trial court was satisfied that PW1, the alleged victim, was credible, straightforward and trustworthy person and that her testimony was uncontroverted. I am therefore satisfied that the trial court applied the provisions of **Section 124 of the Evidence Act** properly notwithstanding he had found corroboration to the evidence of the complainant, PW1 VAO from the evidence of PW2. That there was sufficient evidence to convict in this case even without corroboration in view of the court finding that the complainant was telling the truth and for reasons he gave in his judgment.

18. Whether the prosecution proved age of the victim? Under **Sexual Offences Act** the age of the victim is of great importance in that it determines the Section under which the perpetrator is charged as the **Sexual Offences Act** under **Section 8 of the Sexual Offences Act**, has set out four separate age categories under which a perpetrator can be charged. The age categories have separate sentences to be meted against the perpetrator upon conviction hence it is important to prove the age of the victim. In addition to the above the prosecution is not only supposed to prove that the victim is a child but prove the age of the child. **Section 2 of the Children Act (Cap 141) Laws of Kenya** defines a child as follows:-

“Child” means any human being under the age of 18 years.”

19. In the instant case PW1 VAO testified that she was 16 years old, a secondary school student in form I. PW2, a Clinical Officer who examined PW1 testified she was 16 years old as of the time of filling the P3 form exhibit P1. PW3 testified that he did not obtain PW1's Birth Certificate or any document to ascertain her age and that he had her subjected to age assessment but did not bring the same to court. The prosecution did not produce any document, nor Birth Certificate to prove the age of the victim.

20. I have very carefully considered the Appellant's contention that the prosecution did not subject the victim to age assessment test to confirm that she was a minor. Indeed I agree with the Appellant that the age assessment Report was not produced to confirm the age of the victim. The age assessment of a complainant in a defilement case cannot in my view be established only through the age assessment by a Medical Doctor or by production of Birth Certificate only. In myriads of cases it has been held that the age of a child can be established through other procedures and/or modes.

21. In the instant case the prosecution called evidence from the victim, on her age, and her academic background and also evidence from PW2, who completed PW1's P3 form giving the age of the victim as 16 years. The Appellant did not in cross-examination of PW1 challenge the victim's age. He did not in his defence or through cross-examination state or pointed out that the victim was over 18 years. He did not state that she was not a minor, that she was above 18 years. I am therefore satisfied that though Birth Certificate was not produced or age assessment Report on the age of the victim, the prosecution proved that PW1, VAO, the victim was a child with the meaning of **Section 2 of the Children Act (Cap 141) Laws of Kenya**. The Appellant faced a charge under **Section 8 (1) (4) of the Sexual Offences Act** which deals with the victim's age bracket between 16-17 years. This was the age bracket under which the victims age fell, thus between the ages of sixteen (16) and eighteen (18) years which carries the least sentence for the offence which the Appellant faced. In view of the forgoing the Appellant having been charged with the offence under the last category of age bracket as set out under **section 8 of the Sexual Offences Act** and the prosecution having proved that the victim was a child, thus not above, 18 years, I find that the Appellant was not prejudiced by failure of the prosecution to produce Birth Certificate as the evidence produced though it was not specific on the exact age of the complaint, it proved that the victim's age was below 18 years. That after all the purposes of proving age as pointed out is to ascertain the Section under which the perpetrator should be charged with and the sentence to be meted upon conviction. The least sentence for defiling a minor is under **Section 8 (1) (4) of the sexual offences Act**, the section under which, the Appellant was charged . I find no prejudice was suffered by Appellant for failure to produce Birth Certificate by the prosecution.

22. The failure to produce Birth Certificate or other documents to ascertain the exact age of the victim, should not in my view be taken as fatal to the prosecution case especially where there is sufficient evidence from which the age bracket of the victim can be ascertained. Applying such an approach and insisting on production of Birth Certificate in a case involving a victim whose age bracket falls squarely under the age bracket between 16 – 18 years in my view would be denying the victim of defilement justice and would be basing a decision purely on procedural technicalities which would go against **Article 159 (2) (d)** of the constitution which advocates for substantive justice as it provides that justice shall be administered without undue regard to procedural technicalities. In this regard I am guided by the decision of court of Appeal in the case of **Isaac Nyoro Kimata & Another V R CRA No. 187 of 2009 (NRB)** where court of Appeal held:-

“A Court of law should not be hyper technical but should strive to do substantive justice in each case. That was the command under Article 159 of the constitution.”

I also note that the **Sexual Offences Act No. 3 Of 2006** came into force before the enactment of Constitution of Kenya 2010. The constitution roots for substantive justice rather than determining cases on the basis of technicalities. In my view basing a decision purely on age of the victim and denying to do substantive justice would be against the spirit and the letter of the Constitution. It is for that reason I have come to the conclusion that I have as regards the importance of doing substantive justice rather than basing a decision on a technicality and denying a victim of sexual violence justice on the basis of a technicality when there is glaring evidence in support of the charge on all other necessary ingredients of the offence.

23. The Appellant contends further that the learned trial Magistrate erred in law and fact by failing to note that the investigating officer wrote his statement after the case. The investigating officer gave evidence as PW3. The Appellant did not apply for the investigating officer's statement to be produced as defence exhibit nor did he put to the investigating officer that he had not made his statement before the case. No evidence was availed by the Appellant to demonstrate that indeed the investigating officer's statement was

made after the case. The trial court cannot therefore be faulted as it did not act contrary to the law. The Appellant gave unsworn statement in which he did not pursue that issue and had he done so the same would have been given a lot of value but he gave unsworn statement which could not be tested and its veracity be determined through cross-examination. Unsworn testimony is not evidence as such. I therefore find no merits in this ground of appeal.

24. The upshot is that the appeal has no merits, I proceed to dismiss the appeal, uphold the conviction and confirm the sentence.

DATED AND SIGNED AND DELIVERED AT SIAYA THIS 21ST DAY OF JULY, 2016

J. A. MAKAU

JUDGE

Delivered in Open Court in the Presence of:

Appellant in person present

M/s. Mourine for State.

C.C. 1. Kevin Odhiambo.

2. Mohammed Akideh.

J. A. MAKAU

JUDGE