



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

HIGH COURT CRIMINAL APPEAL NO 28 OF 2016

DOUGLAS OUMA OGWEMBO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from original conviction and sentence in Busia CM Criminal Case Number 114 of 2015 by R. M. Washika, SRM on 4th April, 2016)

JUDGMENT

1. The Appellant herein was charged with attempted defilement contrary to Section 9(1) as read with Section 9(4) of the Sexual Offences Act. It was alleged that on 20th July, 2015 at about 7:30pm at [Particulars Withheld] Village, within Busia County, he intentionally attempted to cause his penis to penetrate the vagina of M. A. O., a child aged 13 years. He pleaded not guilty to the charges.

2. The trial took its course and the Appellant was found guilty and convicted of the offence and thereafter sentenced to ten years imprisonment. Being dissatisfied with the conviction and sentence, the Appellant has preferred this appeal. He raises six grounds of appeal. He accuses the trial court for relying on contradictory testimony of the prosecution witnesses; relying on hearsay and circumstantial evidence and disregarding the glaring anomalies on the primary evidence; adopting the expert evidence including the medical evidence filed in contravention to the Evidence Act; totally ignoring the defense and the defense evidence; and ignoring gross violations, infringements, denials and threats to his constitutional rights.

3. The role of this Court as a first appellate court is well settled. Its duty is to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own conclusion but always bearing in mind that unlike the trial court it did not have advantage of observing the demeanor of the witnesses and hearing them give evidence.

4. The powers of a first appellate court were explained in **Okeno v R [1972] E.A. 32** 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 v. R.*, [1957] E.A. 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 v. 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 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 v. Sunday Post*, [1958] E.A. 424.”

5. In her evidence, the complainant who testified as PW1 started off by telling the Court that she knew the Appellant who was a neighbour. She recalled how on the 20th July, 2015 at around 7:30pm whilst she was going to visit her grandmother, she met the Appellant at a deserted house which belonged to a deceased person. The Appellant beckoned her and she heeded his call. She went with him to the house. It was dark but she could see him as there was moonlight. She could also recognize his voice. She narrated how the Appellant blocked her mouth. She had a tight skirt on and the Appellant had a rough time attempting to pull it down. As this was going on, Patrick, a villager approached the scene and it is then that Appellant threatened her. She did not utter a word and it is the said Patrick who disclosed the incident to Cosmo who thereafter told her mother. Her mother took her to the area chief then to Osiego A.P. Camp and thereafter to Port Victoria Police Station from where she was escorted to Port Victoria District Hospital for examination. According to the complainant, this was the first time the Appellant had attempted to defile her. She told the Court that Patrick was able to see the happenings of that day as one side of the house was broken and open.

6. PW2 the complainant's mother narrated how she received information from one Cosmo that the Appellant had attempted to defile her daughter. She thereafter confronted PW1 who seemed scared and took time to disclose the events as the Appellant had threatened her. She took her daughter to the chief, then to Port Victoria Police Station and thereafter to hospital. PW1 stated that she knew the Appellant as they were from the same area.

7. PW3 Omar Osundwa, a clinical officer based at Port Victoria produced a treatment booklet for the complainant. His opinion was that the complainant was in good health.

8. PW4 APC Martin Milimo testified that on 22nd July, 2015 whilst at work he received a report from PW2 about the events that had happened to her daughter. With the help of the area chief, the Appellant was arrested and handed over to Port Victoria Police Station.

9. PW5 PC Paul Kamau Mwangi told the Court that he was the investigating officer and narrated to the trial court how he received a complaint from PW1 in the company of PW2. He was told that the Appellant had waylaid her and pushed her to a deserted house where he tried to pull down her skirt and innerwear in an attempt to defile her. After conducting investigations he charged the Appellant with the offence of attempted defilement.

10. Upon being placed on his defence the Appellant opted to remain silent.

11. The Appellant through his written submissions argued this appeal. The State conceded the appeal. The Appellant raised the fact that PW1 never reported the incident to her mother. He pointed out that it was not even Patrick who allegedly found the Appellant in the act but a third party, one Cosmo, who reported the alleged incident to the victim's mother. It is the Appellant's case that the said Cosmo and Patrick were never called as witnesses to give an account of what transpired and to confirm if indeed Patrick witnessed the incident. The Appellant further attacked the evidence adduced by the clinical officer and submitted that the treatment sheet availed did not contain anything to show that there was indeed an attempted defilement.

12. Looking at the evidence adduced, it is apparent that the prosecution failed to discharge its mandate of proving the case beyond reasonable doubt. It was said that there was an eye witness to the events that transpired on that day. No reason was given by the prosecution why it failed to call the said witness. Even Cosmo, whose evidence was bad for being hearsay, was never called to testify.

13. As already stated there is no explanation on record as to why Patrick, in particular, was not called to testify. One is likely to infer that had these witnesses been called they could have given evidence that would have been inconsistent with the prosecution case. In a case like this, the caution by the Court of Appeal in **Bukenya and others v. Uganda [1972] E.A. 54** comes into play. In that case the Court stated that:

“It is well established that the Director has a discretion to decide who are the material witnesses

and whom to call, but this needs to be qualified in three ways. First, there is a duty on the Director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. Secondly, the Court itself has not merely the right, but the duty to call any person whose evidence appears essential to the just decision of the case (Trial on Indictments Decree, s. 37). Thirdly, while the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the Court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case. If they had disappeared, the prosecution could easily have called evidence to show that reasonably exhaustive enquiries had been made to trace them, but without success.”

14. In **Kimanzi Mwandikwa & 2 others v Republic, Garissa HC Criminal Appeal No. 44 of 2012**, I observed that the proviso to Section 124 of the Evidence Act did not take away the onus placed on the prosecution to prove its case beyond reasonable doubt. This is what I said:

“I am alive to the proviso to Section 124 of the Evidence Act (Cap 80) which allows the conviction of an accused person based on the sole evidence of a victim of a sexual offence. However, I suspect the proviso to Section 124 of the Evidence Act was not introduced so as to take away the onus placed on the prosecution of proving a case beyond reasonable doubt. I think that the said proviso was passed in light of the fact that sexual offences are normally committed in privacy and it would be hard to prove the same if corroboration is demanded. The proviso does not, in my view, provide shortcuts to the investigating officer. Where there is evidence to corroborate the testimony of a victim of a sexual crime, that evidence should be availed to the Court or reasons given as to why the witnesses have not been called. Sexual crimes now carry heavy penalties and care should be taken to ensure that innocent people do not land in jail. Thorough and exhaustive investigations should therefore be conducted so that only those who are culpable are punished.”

15. The onus of establishing that a crime has been committed belongs to the prosecution and failure to call crucial witnesses will create doubts in the mind of the court as to the credibility of the prosecution case. The State’s concession to this appeal was thus in order. The appeal succeeds. The conviction is quashed and the sentence set aside. The result is that the appeal succeeds and the Appellant is set free forthwith unless otherwise lawfully held.

Dated, signed and delivered at Busia this 25th day of October, 2016

W. KORIR,

JUDGE OF THE HIGH COURT