



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA
HIGH COURT CRIMINAL APPEAL NO. 88 OF 2015
(CORAM: J.A. MAKAU – J.)

LUCAS OMONDI OMOLE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against both the conviction and sentence dated 21.9.2015, in Criminal Case No. 843 of 2014 in Bondo Law Court before Hon. M. Obiero – PM)

JUDGMENT

1. The Appellant **LUCAS OMONDI OMOLE** faced a charge 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 29th day of August 2014 at around 14.00 hours at *[particulars withheld]*, Rarieda Sub-County within Siaya County intentionally caused his penis to penetrate the vagina of CAO a child aged 17 years. The Appellant faced an alternative charge of **committing an Indecent Act with a Child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006**. The particulars of the alternative charge are that on the same date, same time and place within the same County intentionally touched the vagina of CAO a child aged 17 years.

2. After full trial the Appellant was found guilty of the alternative charge, convicted and sentenced to serve ten (10) years imprisonment.

3. The conviction and sentence on the alternative charge provoked the Appellant to lodge this appeal through the firm of M/s. Odongo Awino and Company Advocates setting out seven (7) grounds of appeal being as follows:-

(i) The Learned Magistrate erred in law and in failing to appreciate that the charge sheet was defective.

(ii) The Learned Magistrate erred in law and in fact in failing to appreciate that the charges against the Appellant had not been proved beyond reasonable doubt.

(iii) The Learned Magistrate erred in law and in fact in failing to appreciate that the prosecution's evidence was riddled with material contradictions and incapable of sustaining a conviction.

(iv) The Learned Magistrate erred in laws and in fact in failing to appreciate that the medical evidence was inconclusive on the fact of penetration and thus cast doubt on the entire

prosecution case.

(v) The Learned Magistrate erred in law and in fact by convicting the Appellant on findings made out of suspicion, speculation and guesswork.

(vi) The Learned Magistrate erred in law and in fact in failing to consider the defence by the Appellant.

(vii) The Learned Magistrate erred in law and in fact relying on contradictory evidence to convict the Appellant.

4. I am first appellate court and 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 conclusions after due allowance. I am guided by the case of **Kiilu and Another V. R (2005) 1 KLR 174** where the court of Appeal 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.”

5. The facts of the prosecution case form part of the record of appeal and I need not reproduce the same herein. I will however summarize the prosecution case and the defence.

6. The prosecution case is that PW1, CAO, the complainant herein on 26.8.2014, was accompanied by her uncle to the home of Lucas, the Appellant herein. The complainant's uncle P O left her there. PW1 entered the house and L O locked the door and the complainant stayed there upto 8.00 p.m., that the Appellant defiled PW1 and that was her first time to have sex and she felt pain and screamed. That the Appellant defiled PW1 for about five (5) days as he used to lock her in the house while going to school as he was a student at **[particulars withheld]** Secondary School. That eventually PW1's mother and Police found PW1 locked at the Appellant's house. PW1 birth certificate MFI – P1 showed that she was born on 25.5.1999. The Appellant was arrested outside his house as he opened the door to his house. The complainant was also arrested, both taken to Ndigwa A.P. Camp, and on 3.9.2014 to Aram Police Station and eventually to Madiany Hospital for treatment and examination. The treatment chits identified and marked MFI P1 and P3 MFI P2.

7. The Appellant denied the charge and in his unsworn statement stated that on 29.8.2014 at 2.00 p.m. he was at his brother's house studying when the complainant came and requested him to give her a book. That he left her at his brother's house and proceeded to get the book and on entering into his mother's house Policemen came and arrested him for reasons that he did not know. He stated that he did not know where the complainant come from.

8. Mr. Odongo, Learned Advocate, for the Appellant urged the grounds of appeal, thus ground No. 1 and ground number 5. He urged that the charge sheet was defective as it did not disclose any offence. He urged the particulars of the charge did not satisfy the definition of **indecent Act** as set out under **Section 2 (1) of the Sexual Offences Act** as the organ which purportedly was touched, the vagina of the complainant was not disclosed and such failure makes the charge defective and as such it does not disclose any offence. He urged in the trial Court's judgment the trial Court found the appellant committed the indecent act as the two slept together and that the court was in error as it did not find the two had sexual intercourse as the medical Report did not support complainant's allegation. He urged the definition of indecent act was not satisfied by the prosecution.

9. M/s. Odumba Learned State Counsel opposed the appeal both against conviction and sentence, urging that the charge sheet was not defective and it satisfied the definition of indecent Act as set out under **Section 2 (1) of the Sexual offences Act**. She urged PW5 testified there was some indication of infection, that PW1 testified she was defiled for about five days. M/s. Odumba urged from the evidence of PW1 and PW5 there was some contact with the genital organs of the complainant and as such the charge was not defective. She concluded that the appellant was properly convicted on the evidence on record.

10. The offence of indecent Act is provided for under **Section 11 (1) of the Sexual Offences Act No. 3 of 2006**. **Section 2 (1) of the Sexual offences Act** defines “indecent act” to mean as follows:-

“indecent act” *means an unlawful intentional act which causes-*

(a) any contact between any part of the body of a person with

the genital organs, breasts or buttocks of another, but does

not include an act that causes penetration.”

11. It therefore follows for an offence of “indecent act” to be proved the prosecution has to prove the following:

(a) The act is unlawful and intentional act

(b) contact between any part of a body of a person with genital organs, breasts or buttock of another

(c) The contact does not causes penetration

12. In the instant case PW1 testified that when she entered into the Appellant’s house he locked the door and she stayed there upto 8.00 p.m. and the Appellant defiled her and it was her first time to have sex. She felt pain and that the Appellant defiled her for five (5) days.

Section 8 (1) of the Sexual Offences Act defines “defilement” as follows:-

“8. (1) A person who commits an act which causes penetration

with a child is guilty of an offence termed defilement.”

13. PW2, mother to the Complainant, testified that on 2.9.2014 she went to the Appellant’s place and found the Complainant inside the house and arrested both the complainant and the Appellant. PW1 informed PW2 that the Appellant had defiled her. PW1 also told PW3, her father, that the Appellant had defiled her. PW5 the Clinical Officer, who produced P3 form stated that the complainant’s genitalia was normal externally, that there were no injuries and produced treatment note exhibit 4 and P3 form. He testified there were no discharge nor was there indication of forceful penetration and that the hymen was broken.

14. I have perused the treatment note and the P3 form and considered the evidence of PW1, PW2 and PW5. It is clear from the medical documents the complainant’s genitalia was normal, no bruises nor lacerations but the hymen was absent. The trial Court found that there was no penetration and as such proceeded to convict the Appellant with an offence of indecent act and stated in his judgment.

“My considered opinion is that the evidence of PW1 and Pw2 is well corroborated and the same demonstrate that the complainant was in the accused person’s house between the 26th day of August, 2014 and the 2nd day of September, 2014. During that period, the two were sleeping together. The complainant has stated that the accused had sexual intercourse with her although

the medical report did not confirm this allegations.

From the evidence on record and the circumstances of this case I am satisfied that the accused person committed indecent act with the complainant.”

15. In proving an offence of indecent act, the prosecution is not supposed to prove penetration no causing of bruises or lacerations to the genital organs of the victim. The prosecution is supposed to prove unlawful intentional act which caused contact between any part of the body of a person with the genital organs, breast or buttock of the complainant.

16. The definition under **Section 2 (1) of the Sexual Offences Act No. 3 of 2006** do not require as submitted by the Appellant's Counsel the part of body of the person whose body comes into contact with the victim's genital organs or breast or buttock to be specifically stated in the charge sheet. The Complainant in her evidence though she did not specifically state the part of the Appellant's body which touched her genital organs thus her vagina, she stated the Appellant defiled her and that was her first time to have sex and she felt pain, penetration whether was achieved or not is immaterial as long as part of the body of the perpetrator came into contact with the genitalia of the complainant. PW1 was categorical that the Appellant defiled her and had sex with her. Defilement is well defined under **Section 8 (1) of the Sexual Offences Act** and all the complainant meant was that the Appellant's genitalia came into contact with her genitalia, thus vagina as stated in the charge sheet. The Appellant took part in the prosecution before the trial Court and understands the nature of the charge he was facing as an alternative charge of Indecent act in which it was stated he had touched PW1's vagina. He was not prejudiced by failure of the prosecution to state in the charge sheet which part of his body touched the Complainant's vagina. I therefore do not find the charge defective.

17. In the case of **Isaac Nyoro Kimita & Another V R CRA No. 187 of 2009**, Court of Appeal at Nairobi held as follows:-

(i) A court of law should be hyper technical but should strive to do substantive justice in each case. That was the command under Article 159 of the Constitution.

(ii) The Court should however, not ignore the requirements of the law. Section 134 of the Criminal Procedure Code required in mandatory terms that every charge should be precise and abundantly clear to the appellant.

(iii) The defects in the charge sheet were minor and did not prejudice the appellant. They did not occasion any miscarriage of justice or violate the appellants' constitutional right to a fair trial. Therefore, that being the Court of Appeal's view of the matter they departed from the holding in the Paul Mwangi Murunga v R [2008]eKLR.

(iv) The law was clear that the evidence of the complainant, a minor, required corroboration. In sexual offences, however, where the minor was the victim of the offence, the evidence of that minor, if believed by the trial court, could without corroboration, found a conviction.

18. In the instant case I have no doubt that the omission of stating the part that touched genital organs of the complainant thus the vagina though not specifically stated in the charge sheet, the appellant understood the alternative charge that was preferred against him to have been that on the material date he intentionally touched the vagina of the complainant and had engaged in an illegal enterprises. The complainant testified she had been successfully been defiled by the appellant for five days at his home where he had locked her up for five days. This was confirmed by the appellant's extensive cross-examination of the prosecution witnesses. The defect in the charge sheet by not naming the part which touched the complainant's genital organs did not prejudice the appellant nor did that occasion any miscarriage of justice nor violated the appellant's constitutional right to a fair trial. The complainant's evidence was well corroborated by evidence of her mother PW2 and her father PW3. PW2 found PW1, the complainant, locked at the appellant's house. PW1 informed PW2, PW4 and PW9 that she had been defiled for the five days she was held at the appellant's house. I find the appellant's part which touched

the complainant's genital organs was disclosed in the complainant's evidence and the failure to state the part in the particulars of the charge which touched the complainant's genitalia is a technical objection on the part of the appellant's submissions and as stated in the case of **Isaac Nyoro Kimita & Another V R (Supra)** a Court of law should not be hyper technical but should strive to do substantive justice in each case. In having sex between a female and a male it means the genital organs of a male and female coming to contact, whether there is penetration or not could be a different issue altogether. The **Constitution of Kenya under Article 159 (2) (d)** enjoins Courts to administer justice without undue regard to procedural technicality. The charge which the appellant faced was precise and abundantly clear. There is no requirement under **Section 2 (1) (a) of the Sexual Offences Act**, the perpetrator's part that touches or comes into contact with genital organs, or breasts or buttock of the victim be specifically stated in the charge sheet though it is reasonable to do so.

19. In proving an offence of indecent act, the medical Report is not necessary nor is it mandatory. The evidence of the victim can suffice and needs no corroboration so long as the trial court records reasons in the proceedings that the court is satisfied that the alleged victim is telling the truth and sets the reasons for such holding. (see **Section 124 of the Evidence Act**) In the instant case PW2's evidence corroborated that of PW1 as she found the victim having been defiled at the Appellant's house where she had been held in captivity for five days. PW1 told PW2 and PW3 that the appellant had defiled her for 5 days having locked her at his home for 5 days. In view of the evidence of PW1, PW2, the medical evidence, was not necessary for the court to found a conviction on a charge of indecent act nor was it necessary for the perpetrator's part of the body which came into contact with victim's genitalia in having sex to be specifically stated in the charge sheet for the same to be said to be a proper charge. The part that must specifically be stated is that of the victim. I find failure to state the part of the body of the perpetrator that came into contact with the genitalia of the complainant did not make the charge defective nor was the trial court's judgment based on suspicion, speculation or guesswork but on evidence of the prosecution witnesses.

20. The upshot is that the appeal is without merits, I dismiss the same and I uphold the conviction and confirm the sentence.

DATED AND SIGNED AT SIAYA THIS 24TH DAY OF NOVEMBER, 2016.

J.A. MAKAU

JUDGE

Delivered This 24th Day of November, 2016.

In Open Court in the Presence of:

Appellant present.

Mr. Odongo for Appellant.

Mr. M. Odumba for State.

C.A.1. K. Odhiambo

2. L. Atika

J. A. MAKAU

JUDGE