



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 17 OF 2015

ERICK ODHIAMBO ORWA APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal from the conviction and sentence of the Principal Magistrate's Court at Bondo (Hon. J. W. Onchuri RM) dated the 22nd July 2011 in Bondo PMCCR No. 2007 of 2009)

JUDGMENT

The appellant was on the main charge charged with defilement of a girl contrary to section 8(1) as read with Section 8(3) of the Sexual Offences Act the particulars being that on 30th November 2009 at **[particulars withheld]** Sub-location in Bondo District within Nyanza Province he unlawfully defiled a girl namely P N O aged 12 years.

The alternative charge was one of Indecent act contrary to section 11(1) of the Sexual Offences Act and the particulars were that on 30th November 2009 at **[particulars withheld]** Sub-location in Bondo District within Nyanza Province, he unlawfully and intentionally committed an indecent act with P N O a child aged 12 years by touching her vagina.

The appellant denied both charges and in the ensuing trial the Court heard that on the material day the Complainant, born in 1997, felt thirsty and went to the home when where the appellant, also a minor, worked to drink water. She found the appellant who gave her water and then asked her to enter the house which she did. He locked the house and warned her not to scream whereafter he removed her underpant and then his trousers. He then lay on top of her and did what she described as bad things. J A R (PW2) returned home and curiously found her cattle near the fence. She called out the appellant's name but there was no response so she went and knocked on his door and when he opened she saw the complainant seated on a chair. She locked the door from outside and went to call someone who could identify the girl as she did not know her. However by the time she returned the appellant had broken out of the house using a panga and spear and let himself and the complainant out. J A (PW2) nevertheless went to the complainant's home the next day and reported the matter to her mother. In the meantime the complainant had on the material day complained of malaria to her mother and had been taken to hospital. She was also bleeding in her private parts for which her mother gave her cotton and panadol. She did not however stop bleeding. It was not until 7th December 2009 that Jane (PW2) told her what she had encountered that she reported the matter to the village elder and area chief. The appellant was arrested and the complainant was taken to a doctor who examined her and found her labia minora was intact though she had a foul smelling fluid. Her hymen was also broken. He opined that it was not the first time she had had sex.

On his part the appellant gave an unsworn statement in which he narrated his arrest on 8th December

2009 by their area Assistant Chief.

After evaluating the evidence by both sides the trial magistrate found the appellant not guilty on the charge of defilement but convicted him of indecent act and sentenced him to ten years imprisonment as though a minor he had been convicted for a similar offence before. Being aggrieved he filed this appeal and relies on the following grounds (set out in his amended petition of appeal):-

1. **THAT the learned trial magistrate erred in law and fact by failing to appreciate that the charge sheet was incurably defective hence fatal to the prosecution's case leading to the judgment being an nullity.**
2. **THAT the trial magistrate made an error of law on the face of the record and/or made an error of fact by failing to take a voire dire (viva voce) examination of PW1 the said minor before weighing on how she should give evidence either sworn (or) unsworn hence bad in law.**
3. **THAT the trial magistrate misdirected himself to convict and sentence the appellant to ten years term/jail on indecent Act notwithstanding that the standard of cogent proof of the same as required by the law to be beyond all reasonable doubt was lacking hence the evidence tendered was wanting to convict leading to a mistrial.**
4. **THAT the trial magistrate made a non-direction by failing to observe that the appellant's arresters being the Assistant chief and the chief were not summoned before Court to enlighten the Court on what offence the appellant was arrested for and that the appellant upon arrest was not informed of the true reason of arrest as enshrined in Article 49(1)(a)(i) of the Constitution of Kenya 2010, a fundamental error leading to an injustice.**
5. **THAT the trial magistrate made a studied misdirection by failing to observe that the investigation was too poor, shoddy, parodry and hotchpotch of prevarication of a made up case as envisaged in the whole episode of evidence tendered which evidence was insufficient, inadequate, inappropriate, inordinate, distorted and of the weakest kind mered with flaws of drawbacks, lacunals, inconsistent with material contradictions that weakened the inference of the appellant's guilt leading to a miscarriage of justice.**
6. **THAT the trial magistrate erred in law and fact by mismanaging the case for the prosecution by convicting and sentencing the appellant on the alternative count basing on the evidence of a single testimony without cogent proof and/or using the previous convictions to pin the appellant on the cross hence bad in law.**
7. **THAT the learned trial magistrate erred in law and fact by rejecting the appellant's alibi defence without giving cogent reasons for such rejections hence failing to evaluate and examine the same by weighing it on the whole episode of evidence of the prosecution witnesses as the prosecution failed to comply with section 212 of the C.P.C. to call evidence to rebut the defence case but made scorn of the defence, made sarcastic and denigratory remarks on the defence hence the appellant was fundamentally prejudiced completely as he shifted the burden of proof on the appellant which burden remains on the prosecution and never shifts to the accused hence bad in law.**

The appeal was canvassed before me on 22nd June 2015 with Miss Wakio representing the state and the appellant acting in person.

As the first appellate Court I have considered and evaluated the evidence so as to arrive at my own conclusion while bearing in mind that I did not see or hear the witnesses. To prove a charge of defilement it must be proved that there was penetration. It is instructive however that the word of the victim is sufficient provided the Court believes her (Section 124 of the Evidence Act). There need be no corroboration. In this case I, just like the trial magistrate, find that penetration was not proved at all.

Apart from saying that the appellant removed her underpant and his trouser and lay on her she did not disclose what he did to her. She did not describe what the bad things he did to her were. I go a bit further and find that even the charge of indecent act was not proved. Nowhere did the complainant state that the appellant touched her vagina either with his hands, genital organ or any other part of his body. She only stated that he did bad things to her and that she felt pain. It strikes me that she was not a truthful witness. Indeed the case was riddled with contradictions and inconsistencies. Whereas she alleges that Jane (PW2) went to her rescue upon hearing her screams this was contradicted by Jane who was emphatic that she did not hear any screams. Her evidence that upon hearing her screams PW2 went and locked the door from outside was contradicted by PW2 who stated that it was after the appellant opened the door and she saw the complainant sitting on a chair inside that she bolted the door from outside and went to look for someone who could identify her. PW2's evidence that she informed the complainant's mother about it the next day was further contradicted by the girl's mother who testified that it was not until 7th December 2009 that she told her. The cause of the complainant's bleeding was not explained and seems not have been brought to the attention of the doctor (PW5) who examined her.

Consequently there was no nexus between the alleged defilement and bleeding established. The charge of indecent act was not proved beyond reasonable doubt in view of the deficiency in the evidence of the complainant and the contradictions in the evidence of the other witnesses.

Accordingly I allow this appeal, quash the conviction and set aside the sentence and unless otherwise lawfully held the appellant should be set free forthwith.

Signed, dated and delivered at Kisumu this 30th day of July 2015

E. N. MAINA

JUDGE

In the presence of:-

for the state

Appellant in person

CC: Moses Okumu

