



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MARSABIT
CRIMINAL APPEAL NO. 27 OF 2015

DAVID OKOMAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence in Criminal Case No.646 of 2015 of the Principle Magistrate's Court at Marsabit by T.M Wafula– Resident Magistrate)

JUDGMENT

The appellant, **DAVID OKOM**, was convicted on one count of indecent act with a child contrary to section 11(1) of the Sexual Offences Act . He was then sentenced to ten years imprisonment the minimum penalty. This was after he was acquitted on the two counts he had been charged with.

The particulars of the offence were that on 8th August 2014 at *[particulars withheld]* village in Loiyangalani sub county of Marsabit County, intentionally and unlawfully attempted to cause his penis to penetrate the vagina of **N.L** and **A.S**, girls aged 8 years. He was charged on two counts of attempted defilement contrary to section 9 (1) (2) (sic) of the Sexual Offences Act No. 3 of 2006.

The Appellant raised two grounds of appeal as follows:

- 1.That the evidence of the clinical officer did not link him to the offence of rape; and
- 2.That he was not in a position to understand proceedings.

The state opposed the appeal through Mr. Mwangangi, the learned counsel.

Briefly the facts of this case were that the two complainants had gone to lake Turkana to fetch some water when they met the Appellant. He took them to his house and attempted to defile them. The Appellant in his defence contended that he could not remember doing anything.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated Case of **OKENO VRS. REPUBLIC 1972 EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

“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) EA. (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) EA. 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 vs. Sunday Post [1958] E.A 424."

I wish to point out that the charges in both counts were wrongly drafted; a nonexistence section was cited. It ought to have read:

"... contrary to section 9(1) as read with section 9(2)..."

Since no prejudice was occasioned, I will not comment further on the same.

The evidence of the prosecution is rife with very many material contradictions. This explains why the trial magistrate made a finding that the offences in both counts were not proved.

A.S (PW2) testified that she had gone to the lake with **N.L (PW1)** to fetch some water. This is contrary to what **CPL. Albert Mwarabu (PW5)** testified to. He said after an interview with the parents of both girls, he was informed that both had been sent to get some fish.

PW1 testified that the Appellant attempted to defile her while **PW2** was outside the house. However, **PW2** said that the Appellant took both of them to the house. He put his legs on hers while holding **PW1's** hand. At another instance she said that the Appellant pulled **PW1** into the house as she (**PW2**) was washing her hands.

PW2's first version gives an impression that she was the first to be defiled. She later changed and said she peeped from outside while the Appellant was lying on top of **PW1**.

The clinical officer who examined both girls is **Diba Diqa Hallo (PW6)** testified that there was no evidence of defilement. This contradicted the evidence of **PW2** who said:

"When we entered the house he put his legs on mine while holding the PW1's (name withheld) hand. He tore my clothes with his hands and then caused his penis to penetrate my genitals."

Clearly, the complainants did not portray themselves as witnesses that could be relied upon. This brings to mind the decision of the Court of Appeal in the case of **NDUNGU KIMANYI -V- REPUBLIC [1979] KLR 283**, **MADAN, MILLER and POTTER JJA** held:

"The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence."

I am persuaded that this is the reason why the trial court acquitted the Appellant on both counts.

There are instances when a trial court can convict an accused person for an offence other than the one he is charged with. This is provided by section 179 of the CPC which states:

"(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it."

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it"

What emerges from this section is that other offence that the accused may be convicted of must be a minor one compared to the one charged but which was not proved.

In the instant case, the Appellant was charged under section 9(1) as read with section 9(2) of the Sexual Offences Act. This section states:

"(1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.

(2) A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years"

Section 11(1) of the same Act under which he was convicted provides as follows:

" (1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years."

Offences under these two sections carry a minimum sentence **of not less than ten years**. It was not open to the trial court to substitute the charge the way he did. The two sections create offences with the same gravity.

For the avoidance of doubts, the prosecution evidence lacked credibility to base any conviction on. In a nutshell, the conviction of the Appellant was unsafe. I therefore quash the conviction and set aside the sentence. He is set at liberty unless if otherwise lawfully held.

DATED at Marsabit this 8th day of December 2015

KIARIE WAWERU KIARIE

JUDGE