



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL APPEAL NO.2 OF 2010

BETWEEN

LAMECK OKEYO ONYANGO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from original conviction and sentence of the SRM's court at Homa Bay in

Criminal case No.1124 of 2009 by Hon. J. Ong'ondo (RM) dated 29th December 2009)

JUDGMENT

Introduction

1. The appellant herein Lameck Okeyo Onyango was the accused before the Senior Resident Magistrate's Court at Homa Bay in Criminal Case No.1124 of 2009. He was charged with defilement contrary to **section 8 (1)** as read with **section 8 (3)** of the **Sexual Offences Act No.3 of 2006**. The particulars of the charge were that on diverse dates between 25th and 27th July 2009 at [particulars withheld] beach in Suba District within Nyanza Province he unlawfully had carnal knowledge by inserting his male organ namely penis into the female vagina of C A a girl aged fifteen years.
2. In the alternative, he was charged with indecent Act with a child contrary to **section 11 (1)** of the **Sexual Offences No.3 of 2006**. The particulars of the charge were that between 25th and 27th July 2009 at [particulars withheld] Beach in Suba District within Nyanza Province he indecently assaulted C A a girl aged 15 years by touching her private part namely vagina. The appellant pleaded not guilty and the case went through a full trial.

The Facts and the Evidence

3. The prosecution's case was that on the 25th July 2009 the complainant C A O a Std 8 pupil at [particulars withheld] Primary school was going to buy Kales at the [particulars withheld] beach at 11.00 a.m. when she met the appellant who asked her to accompany him to his house so he would give her something to take to somebody unknown to her. When she was at his house he engaged her in some conversation before he forcefully threatened the complainant and then defiled her. He locked her in the house until the night of 27th July 2009 when the complainant was rescued by the area chief. The appellant was arrested and charged with the offence the subject of this appeal. The complainant was later issued with a P3 form dated the 29th July 2009 which was filled on the same day.

4. PW1 was the complainant (a minor) C A O. After the court conducted a voire dire examination and established that she understood the nature of an oath and the importance of stating the truth she gave a sworn testimony. She told the court that on 25th July 2009 at 11.00 a.m. she was sent by her grandmother E O (not called as a witness) to buy some kales and airtime at [particulars withheld] Beach. On her way back, she met the appellant who requested her to accompany him to his house so he could give her something to take to someone unknown to her. On reaching the appellant's single roomed, rental house at [particulars withheld], the appellant informed her that he wanted her to spend the night with him. She declined because she wanted to go back to school for weekend studies at 2.00 p.m.
5. It was then that the appellant refused to let her go and in turn she wanted to shout but the appellant threatened her by telling her she would face the music if she dared scream. The two later left the appellant's house for the lake and came back at around 8 p.m. On coming back to appellant's house, the appellant expressed his intention to marry her, an offer which she declined for the reason that she had not sat for her KCPE. He refused to take her home and threatened to kill her if she dared scream. Later when they went to sleep he forced her to have sex with him.
6. PW1 stated further that on Sunday night they just slept without having any sex. On Monday they stayed in his house the whole day but at night when they went to bed he had sex with her again. On Tuesday morning he took her to his sister's house in in Lambwe East, Aringo. Once they had their supper they spent the night at another homestead when at around 10.00 p.m. she heard a knock on the door. When the appellant opened the door, she saw the assistant chief Charles of Ngothe, her teacher W N and the youth leader of her area Charles Aloo.
7. It was PW1's testimony that the Assistant Chief (PW3) her teacher, W O N, (PW2) and the youth leader entered the house; whereupon the assistant chief tied the accused with a rope and they all went to the chief's house at Ngothe. She spent the night at another person's house and the chief informed her that they would go to the police station the following day. The following day they proceeded to Mbita police station. She recorded her statement and was later taken to hospital where she was treated. She identified her P3 form and also identified the appellant in court.
8. PW2 was W O N P W1's teacher. He confirmed that on 24th July 2009 PW1 was in school, but on Monday 27th July 2009 the day for rehearsing for the District Evaluation Test for class eight she failed to come to school. He tried to inquire from her classmates but nobody knew where she was.
9. PW2 also stated that PW1 failed to turn up for the evaluation tests which started on Tuesday, 28th July 2009. That is when he called PW1's sister who was in standard five to inquire about PW1's whereabouts. He was informed that PW1 left home on 20th July 2009 to buy pumpkin and vegetables but she never returned home. PW1's sister informed him that her grandmother had been told that she was seen at a beach called [particulars withheld] and it appeared she had got married.
10. PW2 then called a boy staying at the beach named Joshua Owato. Joshua confirmed to PW2 that he had seen a girl who stayed with a boy called Ochieng. PW2 left for the beach but did not find PW1. He informed the beach officials who upon investigations told him that PW1 had been there from Saturday upto Monday night but she had left on Tuesday morning. He left the beach with instructions to arrest the two if they were seen.
11. PW2 went back to the beach at around 7.30 p.m. when the beach manager came with a boy known as Ochieng. At PW2's instance Ochieng was taken to the assistant chief's residence and on Ochieng's information the chief went to [particulars withheld] village at around 10.00 p.m. At midnight, the chief returned with the appellant and PW1.
12. PW3 was Charles Angoi Otieno the assistant chief Ngothe sub location. He corroborated PW2's testimony that on 28th July 2009 at 7.00 p.m., PW2 informed him that one of his standard 8 candidates had disappeared therefore missing her mock examinations. That when Victor Ochieng was brought to his office by PW2, he told him that the appellant who stayed in his house was the one who had been seen with PW1 and that the two, PW1 and the appellant were at Lambwe.
13. PW3 then proceeded to Lambwe at 8.30 p.m. arriving there at around 11.00 p.m. on a motor bike. He inquired from one Meresike a relative of the appellant who led her to the house where appellant and PW1 were sleeping. On arrival, he found the appellant and PW1 in a grass thatched house consisting of two make-shift single rooms. He found them naked. He arrested them, took

- them to Mbita police station the following morning. PW3 identified the appellant in the dock.
14. PW4 was Havolyn Gichaba Nyasimi a clinical officer at Mbita sub district hospital. She told the court that on 29th July 2009 at 13.40 hours, she was on duty when PW1 went to hospital accompanied by her father and police. PW1 alleged to have been sexually assaulted by someone known to her while going back home from buying food.
 15. PW4 stated that at the time PW1 went to hospital she had changed her clothes and was in fair condition. Upon systemic examination on the neck, thorax, abdomen and upper limbs they appeared to be normal. On examination of urinary tract system the external genitalia, labia majora/minora were normal. The hymen was however missing. Upon conducting a vaginal swab nothing was found because it was past 24 hours but on conducting a urinalysis, pus cells were found indicating she had a bacterial infection. They conducted a pregnancy test which was also negative. PW4 concluded that PW1 had been sexually assaulted and produced the P3 form as **exhibit No.1**.
 16. PW5 was No.86101 PC Wambani Oduya attached to Mbita police station crime section. He told the court that on 29th July 2009 at 14.30 hours while in his office he received PW3 in the company of PW2 and PW1. He recorded PW1's statement and after conducting investigations he charged the appellant accordingly.
 17. At the close of the prosecution's case, the appellant was put on his defence. He chose to give an unsworn statement and called no witnesses. He told the court that: on 23rd July 2009 he received a letter from a certain girl by the name Baby. The girl Baby told him that PW1 had given her the letter to give to him. According to the appellant PW1 had indicated in her said letter that on 25th July 2009 she would pay him a visit and on the material date Baby came to the lake and took him to her house where he met PW1. Afterwards one Dan Okumu brought PW1 to his house and the three of them chatted up to 12.00 p.m.
 18. Afterwards PW1 left his house but she informed him that she was not going home as her grandmother and brothers were saying that they did not want to see her there. She then told him that she wanted to stay with him and even rang his father informing him that she was the appellant's wife. The appellant admitted that PW1 stayed in his house between 25th and 27th July 2009, and on the 28th they left together for his sister's home, one M O to inform her of what was going on. That night he admitted to sleeping with her on the same bed but at 10.00 p.m. PW3 arrested them. On 30th July 2009 he was charged with defilement. He produced the letter PW1 allegedly wrote to him which was marked **D. Exhibit 1**.
 19. After carefully evaluating the above evidence, the trial court dismissed the appellant's defence with specific reference to the letter he produced by stating that the Sexual Offences Act renders the consent of a complainant no defence to a charge of defilement. The trial court then proceeded to convict the appellant on the main count and sentenced him to 20 years imprisonment.
 20. The appellant being dissatisfied with the conviction and sentence preferred an appeal to this court. In his petition of appeal he has raised the following grounds of appeal:-
 1. *That the learned trial magistrate erred in law and facts in accepting and recording that the prosecution had proved its case beyond any reasonable doubt at the close of the trial.*
 2. *That the learned trial magistrate erred in law and facts in not recognizing that the conclusive medical examinations like comparing the findings of specimen from the complainant and that of the appellant was not done to rule out any doubt.*
 3. *That the learned trial magistrate misdirected himself by not warning himself of the possibility of witch hunt in a case of this nature.*
 4. *That the learned trial magistrate misdirected himself grossly in placing undue trust and importance upon the evidence adduced before court thereby overlooking the technical fabrications advanced so as to defeat and fix the appellant herein.*
 5. *That the sentence of twenty (20) years as imposed herein is overly harsh and excessive in the circumstances of this case.*

The Submissions

21. When the matter came up before me on 15th October 2013 learned counsel for the appellant Mrs.

- Asati submitted firstly that the prosecution did not prove its case beyond any reasonable doubt to warrant a conviction as no evidence was led by the prosecution to prove that PW1 was a child as defined under the Children's Act. In other words that there was no proof that PW1 was under 18 years old.
22. Secondly she submitted that the actual age of the child at the time of the alleged offence has to be strictly proved because the Sexual Offences Act gives specific and mandatory sentence for the specified ages as penalty differs depending on the age. That though the complainant was said to be 15 years old, and that she was a class 8 pupil there was no other evidence to prove those allegations that PW1 was 15 years old.
 23. Thirdly that it was important for the complainant to produce her birth certificate or some other direct evidence such as the clinical record or an age assessment report. She relied on **Jon Cardon Wagner-vs- Republic & 2 others [2011] e KLR at page 14.**
 24. On ground 5 she submitted that the sentence of 20 years was unlawful because **section 8 (3) of Sexual Offences Act** requires the court to be sure of the age of the complainant. She also urged the court to consider the provisions of **section 8 (5) (b) of the Sexual Offences Act** where the appellant gave evidence and stated complainant wrote a letter to him (**D. Exhibit 1**) and that it was the complainant who presented herself to the appellant making him believe that she was ready to live with him as a wife and she accordingly told his father in a telephone conversation that she was now married to the appellant.
 25. The appeal was opposed by Mr. Imbali learned counsel for the State. He submitted that consent of a minor to engage in sexual relationship does not legalize the relationship and that appellant's purported defence that he received a letter from the victim through friends is not sufficient to nor does it amount to consent by PW1 to be defiled by the appellant. Counsel also submitted that because the appellant did not give sworn testimony, he could not be cross examined on his averments.
 26. Counsel further submitted that PW1 already testified and gave her age to be 15 years, the appellant had earlier on stated that he was 17 years but on being taken to hospital his age was established to be 21 years and if court had any doubts about the complainant's age it had the discretion of giving orders to ascertain the truth of the matter and in this case the court did not doubt the victim.
 27. In conclusion counsel submitted that the evidence in this case was water tight without any contradictions and in the unlikely event that the court is swayed by submission made on behalf of the appellant, he urged the court to invoke the provisions of **Article 159 (2) (d)** so that justice may be seen to be done since the hand of the learned magistrate concerning sentence were tied.
 28. Mrs. Asati in reply submitted that PW1 was never locked up in the appellant's house and repeatedly defiled as there was evidence they went to the beach together and there was also evidence that on 27th July 2009 the two had moved away from the house where they were staying and gone to the appellant's sister's house.
 29. Secondly counsel submitted that the burden of proof is always on the prosecution so that whether appellant called witnesses or not it was incumbent upon the prosecution to prove the claims against appellant beyond any reasonable doubt.
 30. Thirdly, Mrs. Asati submitted that the court ordered age assessment of the appellant on request of the prosecution and wondered why the prosecution did not make similar request for complainant to be taken for age assessment as such a step would have brought out the right age of complainant.
 31. Fourthly, counsel submitted that PW1's grandmother was never called to testify so as to ascertain the age of the complainant and accordingly the complainant's age was never determined.
 32. Fifthly and in reference to **Article 159 (2) (d)** of the **Constitution**, counsel submitted that the article should apply equally to both victim and appellant and not be used to cover the inadequacies in the prosecution case.
 33. After listening carefully to the contending submissions in this case, the issue that arises for determination is whether the complainant's age was proved beyond any reasonable doubt as to warrant the conviction and attendant sentence.

Findings and Conclusions

34. This being a first appeal, this court is under a duty to reconsider and evaluate the evidence afresh

- with a view of reaching its own conclusion in the matter. The court is not to simply scrutinize the evidence, but must, as it were, rehear the case. The only caution I must exercise in this regard is that I do not have the opportunity of seeing and hearing the witnesses in the same way that the trial court did. See **Okeno –vs- Republic [1972] EA 32** and **Pandya –vs- R[1957] EA 336**.
35. It is an undisputed fact that the charge sheet and the complainant's own evidence show that the complainant was aged 15 years. Furthermore, the evidence of PW2 who was the complainant's teacher pointed to the fact that the complainant was a standard 8 pupil. However, as correctly pointed out by counsel for the appellant Mrs. Asati before the trial in the lower court even commenced the appellant had indicated the fact that he was only 17 years old and the prosecution in turn requested the court to order age assessment on the appellant. The age assessment report was later produced in court and the appellant's age was established to be 21 years.
36. In contrast, no age assessment was conducted on the complainant (PW1). Her word about her age seemed to convince the trial court since no birth certificate or baptism or even her grandmother the lady alleged to be her guardian adduced evidence in court to establish the complainant's age.
37. In **John Otieno Obwar –vs- Republic High Court Criminal Appeal No.34 'B' of 2010** Makhandia J (as he then was) held:-

“Defilement is a strict offence whose sentence upon conviction is staggered depending on the age of the victim. The younger the victim, the stiffer the sentence. Accordingly, it is important that the age of the victim be proved by credible evidence. In the circumstances of the case, the charge sheet talks of the complainant being 14 years. Other than that allegation, there was no other proof. The clinical officer who examined her never assessed her age. It would have been easy for the prosecution to tender in evidence like the complainant's birth certificate to prove her age. This was not done with the consequence that the age of the complainant was not proved as required.”

38. So, what evidence was placed before the trial court regarding the age of PW1? PW2 only stated that PW1 was a class 8 pupil in his school and was due to take KCPE examination in 2009. PW4 on the other hand simply examined PW1 with a view to establishing whether she (PW1) had been defiled. She made a finding to that effect but though the P3 Form – **P. Exhibit 1-** indicates that PW1 was 15 years old, PW1 was not taken through any scientific medical examination to prove and confirm the fact that PW1 was indeed 15 years old. The evidence of the P3 form cannot therefore be said to be other direct evidence to prove the age of PW1. I take judicial notice of the fact that in this country, and particularly in areas where poverty levels are high, children start school much later than children from well to do families.
39. I entirely agree with the sentiments by Makhandia J. in the above cited case. The situation is no different in the instant case as the complainant's age was not established. The charge of defilement cannot therefore stand, and consequently, the sentence meted out on the appellant cannot also stand.
40. What about the alternative count of committing an indecent act with a child? There is evidence on record that the appellant and PW1 spent three nights together during which they had sexual intercourse. In part of her evidence, Pw1 stated thus:-

“It was 10.00 p.m. He forced me to have sex with him. He told me to remove my blouse, skirt and petticoat. I remained with the pant. I hanged them on a line in the house. He removed his shirt and trouser (long). He remained with the pant. We slept for a while almost half an hour. He woke me and said/told me to remove my pant. He wanted to have sex with me. He removed his pant also and lied on me. I was sleeping on my back and he was facing down lying on me. He held his penis and inserted [it] in my vagina for about 15 (fifteen minutes).”

41. From the above evidence, it is clear in my mind that the appellant touched PW1's vagina as he held his penis and inserted it into her vagina. In my humble view therefore, there is sufficient evidence to prove the allegations of the alternative count of committing an indecent act with a child. It does not matter that PW1 may have written a letter to the appellant. This court has itself read through the letter allegedly written to the appellant by PW1 and notes that nowhere does the author suggest that she was ready and willing to live with the appellant as his wife. To the

contrary the author of the letter stated:-

“Don’t worry about our friendship. I am still busy at school.”

42. Even if it were to be accepted that PW1 wrote the alleged letter, she is clear in her mind that she was still busy at school. Such a statement does not translate to her saying she was ready to live with the appellant as his wife.

43. In the circumstances, I allow the appeal with regard to the conviction and sentence on the main count, quash the conviction and set aside the sentence of 20 years imprisonment. I substitute the above with a conviction on the alternative count of committing an indecent act and sentence the appellant to serve ten (10) years imprisonment.

44. Right of appeal to the Court of Appeal within 14 days from today explained to the appellant.

45. It is so ordered.

Dated and delivered at Kisii this 23rd day of January, 2014

RUTH NEKOYE SITATI

JUDGE

In the presence of:

Mrs. E. Asati (present) for the Appellant

Miss Cheruiyot (present) for Respondent

Mr. Bibu - Court Clerk