REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 89 OF 2014

JAPHETH OKINDA ANGAGA.....APPELLANT

VESUS

REPUBLIC.....RESPONDENT

[From original conviction and sentence in the Principal Magistrate's Court at Maseno Criminal Case No. 1092 of 2012]

J U D G M E N T

The appellant Japheth Okinda Angaga was charged at Principal Magistrate's court at Maseno with the offence of Defilement contrary to section 8 (1) of the Sexual Offences Act.

Particulars of the offence were that the appellant intentionally caused his penis to penetrate the vagina of J K (the complainant) between 10th September 2012 to 25th September at [particulars withheld] village, South Bunyore Location within Vihiga County. The appellant was also charged with an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act. The matter was heard by Principal Magistrate A.R. Kithinji who convicted the appellant and sentenced him to 10 years imprisonment. Those findings provoked this appeal.

It is thus this court's duty to reevaluate the evidence and make its own conclusion. In the often citied case of **Okeno -VS-Republic [1972] EA 32 at 36** the East Africa Court of Appeal stated on the duty of the court on a first appeal:

> **"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) EA 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 -VS- Republic [1957] EA 570. It is not the function of a first appellate court merely to scrutinise 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 it own conclusions. Only then can it decide whether the magistrate's findings should be supported. In do 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] EA 424"**

This is therefore why it is necessary to reevaluate the evidence and reach a conclusion bearing in mind that I have not had the benefit of hearing or seeing the witnesses, an advantage only the trial court has.

The prosecution case was that on 10th September 2012, the complainant PW1 left home at around

6.00 a.m as though going to school but she was not to return in the evening. Upon leaving home, she went to the appellant's house and refused to return home as she had a fall out with her father PW2 due to her bad behaviour at school. According to the complainant, the appellant was her fiancee and she stayed with him for two weeks during which time they engaged in sexual intercourse.

Upon failure of his daughter's return, PW2 began a search for her even informed the area chief (PW3) and the police that her daughter was missing. He later got word that his daughter was living with the appellant who was his workmate. He reported the findings to the assistant chief and they went to the appellant's house.

The appellant told them that the complainant was not in his house and refused to let them in. nevertheless, the were able to gain entry into the house and they found the complainant inside the house. It would appear that the complainant had been living with the appellant for the whole time when she was missing. They escorted the appellant to Luanda police station where they found PW4 the investigating office. PW4 remanded the appellant and referred the complainant to Emuhaya District Hospital.

Mr. Aggrey Ambesa PW5, clinical officer at Emuhaya District Hospital carried out physical examination on the complainant and filled in a P3 form which he later produced in court as exhibit No. 5. in his report, the complainant was in perfect health with no physical injuries. There were no bruises in her private parts and neither was there spermatozoa in her birth canal. The test also came negative for pregnancy but it would appear that the complainant was pregnant at some point as hospital records were produced as exhibits showing that she was pregnant and was attending pre-natal care before she lost her pregnancy. PW4 charged the appellant on 26th September 2012. That was as far as the prosecution case went and upon its closure it was found that a case had been made out which the appellant should answer.

The appellant in a sworn statement testified in his defence that on the material day, he was arrested by assistant chief and administration police and taken to Luanda police and the following day he was taken to court and charged with an offence he did not know.

The learned trail magistrate considered the prosecution case and that of the defence and on believing that the case had been proved to the required standard convicted the appellant.

The appellant filed his petition of appeal on 3rd September 2014 through his advocate and later filed a supplementary petition on 24th November 2014. when the appeal came for hearing, Mr. Omondi counsel for the appellant argued the appeal under three limbs. It was his argument that the appellant's constitutional right to a fair trial enshrined under article 50 (m) had been breached. Article 50 (m) stipulates that every accused person has a right to have an assistance of an interpreter without payment if the accused person cannot understand the language used in trial. It was counsel's submission that the proceedings of the trial court are silent on the language that was used during trial and that as a result the only recourse was to order a retrial. He argued that the complainant having been so close to the age of majority, the appellant had reason to believe that she was over 18 years and as such this court ought to look at the circumstances surrounding the offence also bearing in mind that there was no presence of spermatozoa in the complainant's birth canal and that she was in perfect health. Counsel concluded by stating under the circumstances a sentence of ten years was excessive.

Mr. Ketoo, learned state counsel, supported both conviction and sentence. He stated charge was read out to the accused person in kiswahili and it is indicated that the charge was interpreted in kiswahili the language that the accused understood. He further submitted that the appellant should have ascertained the age of the complainant instead of making assumptions. Further that the lack of spermatozoa did not go to negate defilement as the clinical officer who examined the complainant testified that there was evidence of defilement.

When the matter first came up for plea taking, the appellant admitted to committing the offence and a plea of guilt entered. At this point the charge was read and interpreted in swahili. On 28th November 2012, the appellant decided to change his plea. The court record shows that a plea of not guilty was substituted. There was no indication whether the charge was read out again and if it was translated. When

the matter came up for hearing the prosecution witnesses testified the appellant cross examined them. No issue was raised to suggest that he did not understand the language used either during plea taking and during examination in chief.

It is now trite law that an allegation for a breach of a constitutional right must be raised in the mealiest opportune time. The court of appeal in **Bonface Olunga -VS- Republic [2014]eKLR** has sated:

> **"The position in law is that an allegation on breach of constitutional rights must be raised at the earliest opportunity to afford the trial an opportunity to interrogate the issue and take evidence.....**
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> **In a case such as the one leading to this appeal where the allegation on breach of constitutional rights was not raised either at the earliest opportunity before the trial court or at all in that trial and considering, also that the appellant was represented during the trial we are of the considered opinion that the appellant lost the opportunity to raise the issue which issue cannot now be taken before us as we are not equipped to carry out an investigation on why the appellant was held in custody and not produced before court".**

In the present case, the charge was read and interpreted in swahili. That way, the appellant understood what he was being charged with and based on that he was able to change his plea to a plea of not guilty. He even went ahead to cross examine prosecution witnesses throughout the trial. He did not at any time complain that he did not understand the language that was being used. It would appear to me that this ground was an afterthought.

The other issue is that the complainant was so close to the age of majority that the appellant assumed she was over 18 years. Section 8 (5) of the Sexual Offences Act provides that:

> **It is a defence to a charge under this section if:-**
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> a. **it is proved that such a child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and**
> b. **the accused reasonably believed that the child was over the age of eighteen years.**

In this case, this defence was not raised by the appellant at trial. To my mind this court exercising its appellate jurisdiction cannot ordinarily receive new evidence except under certain circumstances. Its duty is to reevaluate the evidence adduced at the trial court but not to act as a trial court. The appellant should have raised this defence during the trial, now it is already too late in the day and again it appears to be an afterthought.

On the issue of the sentence, the trial magistrate sentenced the appellant to 10 years imprisonment instead of the minimum sentence of 15 years. This was clearly wrong. However the respondent did not demand for its enhancement and from the submissions of the learned state counsel it appears that he was comfortable with the same. It is now trite law that in such a situation it would be unfair to enhance the sentence considering the fact that the appellant was not forwarded. This was held to be the case in **JJW - VS- Republic, Kisumu C.A Criminal Appeal No. 11 of 2011 Kisumu**, where the court rendered itself as follows:

> **"The court did not warn the appellant of the possibility or in any case there is no record of such a warning if any issued, yet all of a sudden, in the judgment, the learned judge enhances the sentences from seven years to ten (10) years. The need for prior information to be given to the appellant in such a situation is to enable him to prepare and argue his side of the case as regards such intended enhancement".**

The upshot of all the above analysis is that the appeal ought to fail. The same is dismissed.

Dated, signed and delivered at Kisumu this 16th day of December, 2014.

H.K. CHEMITEI

JUDGE