



REPUBLIC OF KENYA

Cases in Magistrate Courts

Criminal Appeal 1 of 2013

JACOB ODHIAMBO NYANGWARA.....APPELLANT

V

REPUBLIC.....RESPONDENT.

[Appeal from the Conviction and sentence in Criminal case of the Principal Magistrate's court dated 14.10.2010 at OYUGIS: HON. YALWALA ESQ., - R.M.

IN

PM'S C. OYUGIS NO. 4 OF 2008]

JUDGMENT OF THE COURT.

The Appellant was charged with Defilement of a girl aged 7 years C/Sec 8(1) and 8(2) of the Sexual Offences Act with an alternative charge of Indecent Act with a child C/Sec 11(1) of the Sexual Offences Act.

Upon trial by the Senior Resident Magistrate in Oyugis Cr. No. 4 of 2008 he was found guilty and convicted on the charge of defilement and sentenced to life imprisonment. Being aggrieved he has appealed against the conviction and sentence.

The record of Appeal was prepared by M/S O.M. Otieno & Co. Advocates who represented him then but who did not turn up at the hearing and so he elected to proceed himself. This was after the matter was adjourned for none attendance of his Advocate

The grounds of Appeal are as follows:

1. The learned Trial Magistrate erred in law and in fact by failing to properly evaluate the evidence before him this reaching erroneous decision.

2. The learned trial magistrate erred in law and in fact by conducting proceedings in a language the

Appellant did not understand thus occasioning miscarriage of justice

3. That the learned trial magistrate erred in law by failing to appreciate that the identification parade was not properly done.

4. The learned trial magistrate erred in law and in fact by failing to appreciate that the charges facing the accused person were defective.

At the hearing the Appellant intimated that he had filed written submissions on which he wished to rely. He did however add another ground which was to the effect that the prosecutor had gone to the cells and asked him not to cross examine witnesses. He asked to be allowed to cross examine them. When the court sought clarification on the issue of the written submissions, the Appellant confirmed that what he was referring to is the “Amendment petition grounds of Appeal” which he filed which he filed here on 27.2.2013. If I may summarize his submissions he first requests the court to consider the additional grounds together with what is already on record. He then faults the trial magistrate for convicting him even though he pleaded not guilty on both counts. Secondly he submits that the trial magistrate erred in law and facts by not considering that he did not cross examine any of the witnesses as he was misled by the prosecutor that the girl is young and he should not ask her any question. As a result he got confused and so he did not cross examine any witness. He asks for a retrial so as to enable him to cross examine witnesses. He relied on the case of **MUIRURI VS. REPUBLIC [2008] KLR 552.**

He submitted that this is a good case for retrial as the ends of justice demand not (sic) and then urges this court to set aside the conviction and sentence and remit the case to another court for plea taking and retrial.

The facts of the case as set out in the evidence of the 7 prosecution witnesses are that on 20.5.2008 the complainant (PW1) aged 7 years and her friend – also a child were playing when the appellant found them, beat PW2 and chased her away. He then pulled the complainant to a bush where he removed her skirt and underpant before lying ontop of her and inserting his male organ (penis) into her vagina. When she screamed he covered her mouth with his hand. When he was done he went away. The complainant who was bleeding profusely walked home slowly and told her brother (PW3). Together they reported the matter to their mother (PW4) who took her to Rachuonyo District Hospital where she was examined and then admitted for treatment. The matter was then reported to Oyugis Police Station. Both PW1 and PW2 told PW4 that although they did not know the accused they could identify him. PW2 described the clothes the accused was wearing to PW4 who made enquiries in the village. Her inquiries led them to Rachuonyo District Hospital where PW2 pointed the accused to PW4. When he noticed their presence he attempted to flee but PW4 raised the alarm and he was apprehended and taken to the police station. Subsequently an identification parade was conducted and PW1 and PW2 picked out the accused person. The clothes and underpant that the complainant wore during the incident were produced in evidence. They were bloodstained. The underpant she wore thereafter was also produced and the trial court noted that it was also bloodstained.

The age of the complainant was assessed by a doctor who opined that she was aged between 7-9 years. Medical evidence also confirmed that she had been defiled.

In his defence the accused stated that he was arrested at Rachuonyo District Hospital. That he resided at his uncle's place and had been informed that his brother had been taken ill. He went home but when his brother's condition deteriorated they took him to Rachuonyo District Hospital. He was then charged with the offence herein. He denied the offence.

Now as the first Appellate court I am required to reconsider and evaluate this evidence so as to reach my own conclusions – see **OKENO VS. REPUBLIC [1972] E.A. Pg. 32**

This incident occurred at about 5pm and hence in broad daylight. PW1 and PW2 were together. Indeed the assailant beat PW2 and chased her away before he pulled the complainant (PW1) to the bush where he defiled her. PW1 and PW2 both struck me as credible and truthful witnesses. They both were consistent in the narration of the events before the incident occurred. Both did intimate to PW4 that they did not know the assailant before but that they could identify him were they to see him. PW1's evidence as to what transpired after the ordeal were corroborated by her brother (PW3) as well as by her mother (PW4). When the identification parade was held PW1 picked out the accused person. PW2 was also very consistent in her testimony. It was her description of the assailant to PW4 that eventually led to his arrest at Rachuonyo District Hospital. Indeed she picked him out of a crowd at the hospital and told PW4 that he was the one. She was also able to identify him at the identification parade which was conducted by PW6.

The clothes that the complainant was wearing during the assault were produced in evidence. They were bloodstained. The medical evidence tendered at the trial confirmed that she was defiled. She was bleeding when the doctor examined her. Her age was assessed to be 7 to 9 years hence a child under the age of 11 years. Having evaluated and reconsidered the evidence I am satisfied that the complainant was defiled. I am also satisfied that although the Appellant denied the offence when put on his defence, he was positively identified as the culprit. As I have already stated this offence occurred in broad daylight hence PW1 and PW2 had ample opportunity to see and identify the Appellant. They positively identified him when they appeared at the Identification parade. They also identified him in the dock. There can be no doubt that the Appellant is the one who defiled the complainant. I am satisfied that the conviction was based on adequate and ample evidence of the prosecution witnesses. The record shows that the trial magistrate proceeded correctly to examine the evidence adduced. He did so thoroughly and in detail and I am satisfied that he reached the correct decision.

Although the Appellant alleges that the proceedings were conducted in a language he did not understand, the record shows that the languages used through out were English, Kiswahili and Dholuo. As submitted by the state counsel the Appellant did himself in this court state that he understands Dholuo. That ground must therefore fail.

As for the identification parade, I am satisfied that it was properly conducted. The officer who conducted it testified as PW6. From his testimony it is clear that the parades were conducted strictly in accordance with the Police Force Standing Orders.

On the ground that the charges were defective, it will be noted that the alleged defects were not pointed out and none have been noted by this court.

At the hearing of the Appeal the Appellant stated he wished to rely on written submissions but what he supplied to the court also contained additional grounds of appeal. Miss Valery for the Republic did not object although in her submissions she did not respond to the additional grounds.

The first additional ground was that the trial court convicted him despite his pleading not guilty. That ground cannot stand because it was because he pleaded not guilty that he was tried.

Second additional ground is that he was misled by the prosecutor into not cross examining the witness. That ground cannot stand either. Much as he may say that he was misled the record shows that on 28.7.2009 the prosecution sought to substitute the charges and once that was done the charges were read to the accused in Dholuo and once he entered plea he was asked if he wished to recall any of the witnesses for further cross examination. His response was that he did not wish to do so. It will be noted that by then he had already been released on bond and was therefore no longer in custody. If indeed he had been intimidated into not cross examining the witnesses earlier he would have seized the opportunity when the court told him he could do so. Moreover his plea for a retrial cannot stand as a retrial can only be ordered where a trial is illegal or defective. The trial here was neither defective nor illegal.

The charge of defilement was proved beyond reasonable doubt and I accordingly dismiss the appeal and confirm the sentence imposed by the court below.

Signed, dated and delivered at Homa Bay this 21st day of March, 013

E. N. MAINA,

JUDGE.

In the presence of:

Miss Valery for the Republic/Respondent

Eudice Okombo Dholuo interpreter

Appellant in person.