



REPUBLIC OF KENYA

High Court at Kakamega

Criminal Appeal 208 of 2011

WATSON SAMMY MUSI alias MOI APPELLANT

VERSUS

REPUBLIC RESPONDENT

(An appeal against both conviction and sentence of the Chief

Magistrate's court at Kakamega in Criminal Case No. 1988 of 2010

[M.I.G. MORANGA, SRM] dated 6th September, 2011)

JUDGMENT

The appellant **WATSON SAMMY MOSI (alias MOI)** was charged in the subordinate court with defilement of a child contrary to Section 8 (2) of the Sexual Offences Act No. 3 of 2006 Laws of Kenya. The particulars of the offence were that on the 7th day of August 2010 at [PARTICULARS WITHHELD] within Western Province unlawfully inserted a male genital organ namely his penis into the female genital organ namely vagina of BKO a child aged 10 years. In the alternative, he was charged with indecent act with a female contrary to Section 11 (1) of the same Act. The particulars of the alternative charge were that on the same date and place unlawfully and indecently assaulted BKO by touching her private parts namely vagina, breasts and thighs. He pleaded not guilty to both counts. After a full trial, he was found guilty of the main count of defilement and convicted. He was sentenced to serve life imprisonment.

Being aggrieved by the decision of the trial court, he filed this appeal against both conviction and sentence. His supplementary grounds of appeal are as follows;-

1. That the magistrate erred in convicting him, without finding out the source of the case as there was a long standing grudge between the father of the complainant and the appellant.
2. That the magistrate erred in failing to consider that the case was a frame-up and a fabrication and had no probative value.
3. That the magistrate erred in law and fact by failing to consider that the prosecution failed to account for the lapse of period to the medical check-up of the complainant of 3 days, thus affecting the credibility of the evidence and the required standard of proof beyond reasonable doubt.
4. The trial court erred in failing to consider and find that there was no medical officer from N sub-district hospital who testified on the treatment history of the complainant.

5. The learned magistrate misdirected herself by considering the evidence of the Clinical Officer which was questionable on the age of the complainant.

6. The learned magistrate did not consider the glaring contradictions between the date when the complainant was attended at Navakholo sub-district hospital as disclosed by PW4 and PW5 in their respective evidence to clear doubt in the prosecution evidence as required by law.

At the hearing of the appeal, the appellant submitted that PW2 lived in N Location, while he lived in Bunyala West Location. He submitted that he did not know what happened in the home of PW2 on the material day. He submitted also that the case involved a person called Alias MOI whom he did not know. He further submitted that the prosecutor objected to his wife being his witness. He also submitted that the case was done in Chambers and that other witnesses sat therein. Lastly, he submitted that he had a domestic problem with PW3 who framed him.

The learned State Counsel Mr. Oroni opposed the appeal. Counsel submitted that the complainant PW1 was a minor aged 9 years and knew the appellant and his son very well. The Clinical Officer PW5 conducted medical examination and came up with findings that confirmed the commission of the offence. In counsel's view, the evidence against the appellant was sufficient to sustain the conviction.

In response to the State Counsel's submissions, the appellant submitted that on being questioned, PW5 stated that he did not know anything about the case.

The facts of the prosecution case in brief are as follows - on 7/10/2010 at about 3 p.m. the complainant PW1 a girl of 9 years was with her younger siblings when a son of the appellant called Gideon came and informed her that the appellant was calling her. When she went there, the appellant chased his children away and told them to go to the kitchen. These children were named Vale and Gideon. When the appellant and complainant were alone in the main house, the appellant placed her on the bed removed her underpants and had intercourse with her. He then gave her Kshs.10/= and told her not to tell anyone. The next day, the wife of the appellant came and told the complainant's mother that her children had informed her that the complainant was with the appellant the previous day. On being questioned by her mother (PW2), the complainant revealed what had happened. The complainant was then taken for medical attention at N sub-district hospital. Medical treatment notes were made for the treatment, and a P3 form was filled. According to the P3 form the complainant was said to be HIV positive. PW2 and 3, who are complainant's mother and father respectively admitted that the appellant had a physical confrontation with PW3 before the alleged incident.

The appellant was arrested and charged with the offences.

When put on his defence, the appellant gave sworn testimony. He stated that he was a farmer and "boda boda" cyclist at Nambacha in Bunyala West Location. He was arrested on 29/10/10 at 6.45 a.m. by police from his house, on allegation that he had not paid WO the price of a bag of "Wimbi" as agreed. Prior to the arrest, Obima had beaten the wife who had run to the house of the appellant for refuge and Obima (PW3) said he would do something to the appellant because his wife slept at the appellant's house till the next day. He was surprised to be charged with different charges from the alleged failure to pay for "wimbi".

The prosecution did not cross-examine him. On being questioned by the court, he stated that WO was the father of the complainant. That it was infact the said Wycliffe who was under Bunyala custom to compensate him for shedding blood in his house.

Faced with this evidence, the learned trial magistrate found that the prosecution had proved its case against the appellant beyond reasonable doubt, convicted him on the main count of defilement and sentenced him to serve life imprisonment. It is then that the appellant filed this appeal.

This is a first appeal. As a first appellate court, I am duty bound to re-evaluate the evidence afresh and come to my own conclusions and inferences – see **Okeno -vs- Republic [1972] EA 32.**

I have re-evaluated the evidence on record. The conviction of the appellant is predicated on the evidence of a single witness who is the complainant, a child of tender years aged about 9 years – see **Section 2 of the Children Act No. 8 of 2001** which defines a child of tender years as a child below the age of 10. It is also evidence of a single witness, the complainant, in a sexual offence. **Section 124 of the Evidence Act (Cap 80)** provides in the provisos that such evidence of a child victim need not be corroborated provided it is believable. The proviso to the said section states –

124 “.....

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

In the present case, the complainant is said to have been defiled by the appellant at his house. The medical evidence shows that the complainant had a broken hymen. However, no fresh injury was noted. She was said to be HIV positive. The prosecution position was that she was infected by the appellant. However, the laboratory reports were not produced and the laboratory technical person who took and examined the samples of blood did not testify. Though the appellant was said to have infected the appellant, his HIV status report was not produced in court. In addition, the appellant raised issues to do with the HIV status of the parents of the complainant in his cross-examination. Though they were said to have been examined the reports on their HIV status was not produced in court. There was also evidence of an existing grudge between the appellant and the father of the complainant arising from a previous scuffle. The above lapses and loose ends in the evidence together with the existing grudge, in my view, are enough to show that the prosecution did not prove beyond reasonable doubt that the appellant committed the act alleged against him. The evidence of the minor victim is doubtful and not believable as it is doubtful whether the incident occurred and none of the children of the appellant nor the siblings of the complainant, who were said to be aware of the incident and made the initial report to the wife of the appellant and the mother of the complainant (PW2) testified.

In my view, the learned trial magistrate relied on the P3 form to sustain this conviction. In the absence of any evidence tendered by any of the persons who treated the complainant, examined her, or carried out medical tests, the conviction cannot stand. In particular, the learned magistrate stated thus in the judgment –

“I therefore cannot make any conclusive finding on whether the accused infected her with the HIV virus. In any event there are no charges to that effect as is provided for under section 26 of the Sexual Offences Act No. 3 of 2006.

Having so observed, I find that PW1’s testimony was corroborated and consistent to the findings of the clinical officer in exhibit P2, the P3 form. The prompt information relayed to PW2 and PW3 was credible as this was confirmed by clinical officer PW5. The tests were conducted the third day and confirmed defilement.”

In my view, the above was a misdirection. PW5 neither examined the complainant nor filled the P3 form nor conducted medical tests on blood samples. He merely produced the documents filled by others. He could therefore not provide corroboration to the evidence of PW1, PW2 and PW3, as he had no primary knowledge as to the contents of the P3 form and other medical evidence produced.

The third reason why the appeal will succeed is that the appellant gave sworn testimony denying commission of the offence. The prosecution elected not to cross examine him. In that event his testimony stands uncontroverted as it has not been challenged in any way. The burden is always on the prosecution to prove a criminal case against an accused person beyond any reasonable doubt – see **Woolmington -vs- DPP [1935] AC 462** and **Leonard Aniseth -vs- Republic [1963] EA 206**. In my view, once an accused person has given his defence on oath denying the offence and also giving his reasons why he has been brought to court, which reasons differ from the prosecution version, then the

prosecution is bound to cross-examine him if they want to sustain their position. The absence of cross-examination itself creates reasonable doubt as to his guilt. That doubt has to be resolved in favour of the accused which I hereby do. On that reason also the appeal will succeed.

Consequently, I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Kakamega this 14th day of March, 2013

George Dulu
J U D G E