REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO.133 OF 2012

JOHN OMONDI OGUTU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant – **JOHN OMONDI OGUTU** was convicted in the Lower **COURT (C.A KUTWA, R.M, TAMU)** for the offence of defilement contrary to Section 8(1)(3) of the Sexual offences Act No.3 of 2006. The charge stated that on 16/9/2011 [particluars withheld] District, Kisumu County, intentionally caused his penis to penetrate the vagina of **L A B** , a child aged 14 years.
2. There was also an alternative charge, which was causing indecent act contrary to S.6(a) of the Sexual offences Act No.3 of 2006. The particulars of the charge were that on 16/9/2011 [particulars withheld] District, Kisumu County, intentionally and unlawfully touched the vagina, a private part of **L A B ,** which was indecent.
3. The trial proceeded, with the prosecution calling 5 witnesses while the appellant gave his defence on 15/10/2012.
4. The resulting judgment ended in conviction of the appellant for the main count of defilement. The appellant was then sentenced to 20 years imprisonment.

5. This appeal is against that conviction and sentence. The appellant says the proceedings were conducted in a language he didn't understand, that the magistrate erred in not clarifying whether he found him guilty of the main or alternative count,that the trial magistrate also erred in finding that the complaints testimony was corroborated, that there was a further error in failing to appreciate that medical evidence is not conclusive proof of the charges as the date on P3 form differed materially from the date on the charge sheet, and that the decision of the magistrate was against the weight of evidence. The sentence meted out was also said to be harsh and excessive. The appellant would wish the conviction to be quashed and the sentence set aside.
6. The appeal was argued before me on 14/10/2013. The appellant sought to rely on his written submissions. Kiprop for prosecution gave oral arguments.
7. The appellant's submissions raised many issues. The charge was faulted for not bearing O.B number. The appellant sought to rely on Section 385 of C.P.C and purported to quote it thus: "***the errors or mistakes in the charge sheet is a substantial one which cannot be cured under the law"***. The court was then referred to the case of **OKENO V R (1972) E.A. 32** with the following quotation attributed to the case "***the charge sheet raised against the appellant was defective."***

8. The complainant was also said to have been unwilling to testify until she was put under duress in order to come to court and give false evidence. This is said to appear on page 3 lines 20,21 and 23 in the record of appeal.

9. Contradictions were also cited with P.W.1 said to have intimated that he had sent the complainant to the shops while P.w.2, the complainant, said she was coming from the latrines.

The case of **RUWALA V R (1937) E.A.C.A 570** was said to be apt on the issue of contradictions with the following quotation purportedly lifted from it.

"When a witness causes contradictions and inconsistent testimonies, the evidence should not be admitted as true".

10. More on contradictions was highlighted, with P.W.1 said to have heard of somebody crying outside while P.W.2, the complainant, said she didn't scream. Another case, **RICHARD APELA V R 1984 E.A.C.A 945** quoted as follows:

"Held that two contradictory statements cannot be admitted in Court of law"

11. Issue was also taken that a lady said to have been at the scene was not called to testify. The lady's name was M A . The case of **KINGI OLE YENKO V R 1121/71** has the following quotation attributed to it concerning an issue like his:

"failure to call crucial witness give the impression that the evidence would have been prejudicial.

12. The appellant further said that he couldn't possibly defile in presence of an adult woman (like M A). He also said the trial COURT was biased and issue was taken with the date of 18/8/2011 appearing on the stamped part of complainants P3 form. That date was said yo be an error of great magnitude, which prejudiced the case against the appellant.

13. Kiprop for the prosecution attacked the appellants grounds of appeal. He dismissed the issue of language, saying the appellant cross-examined the witness. He pointed out that some witnesses - like P.W.1 – testified in dholuo and the appellant has that language as his vernacular.

14. As to the issue of which charge the appellant was convicted of, Kiprop pointed out the appellant was convicted of the main count brought under S.8(1) (3) of the Sexual Offences Act.

15. It was also the appellants argument that there was no corroboration. Kiprop countered this by pointing out that the evidence of the other witnesses corroborated that of the complainant. He also pointed out that the medical evidence, which the appellant said was not conclusive proof of defilement, was backed by the evidence of the clinical officer (P.W.5)

16. Kiprop further said the evidence adduced by the prosecution was sufficient and the sentence meted out was said to be the minimum prescribed by law. The Court was asked to dismiss the appeal.

17. This is a first appeal and I have the duty to look afresh at the evidence availed to the lower court. I have to do so taking into account that I didn't see, hear or observe the witness and therefore can't vouch for their demeanour.

18. The complainant (P.W2) said, she left the house to go to the toilet on the material date at around 7.30p.m. She met the appellant, who made to greet her. She declined his greetings and proceeded to the latrine.

The appellant then grabbed her from behind, covered her mouth and pulled her to a vacant house at the scene. He removed her pants and had carnal knowledge of her. The complainant didn't scream. There was a lady, M A, who saw the appellant grabbing the complainant. The father of the complainant then came and the appellant ran away. He was however chased and arrested.

19. The appellant has then taken to a place where there was light. He was still naked and one Ooko gave him clothes to wear. The complainant was taken to Muhoroni sub-district hospital for treatment. The appellant was arrested by police. The complainant said she didn't know the appellant before the incident.

20. P.W.1 said the complainant is her niece. On the material date at about 8p.m, he sent her to the shops. About 20 minutes later, he heard somebody crying outside. He went to check. He found the appellant who had removed his clothes and also found his niece crying. P.w.2 grabbed the appellant and raised an alarm. His two neighbours came. Police also came shortly and re-arrested the appellant.
21. P.W.3 is one of the police officers who rushed to the scene. He took the appellant to the police station. At the station, the appellant was received by P.W.4 who booked the report in the O.B and also issued the complainant with P3 form. P.W.4 also visited the scene and conducted investigations.

22. P.W.5 was a clinical officer at Siaya District Hospital at the time of testifying but said he used to work at Muhoroni sub district Hospital before. He examined the complainant and found signs of penetration.

23. The appellant gave his defence and said he had gone to Koru Centre to buy sugar on 16/9/2011 at 6.30p.m. At some point he started to make a call but a man emerged from nowhere and started beating him. A girl then appeared and started to shout.

The appellant's friends also came and helped him to fight back. Police officers then came and he was arrested. At the police station, he got to learn that he was alleged to have defiled the complainant. He said he didn't defile the complainant.

24. It is on the basis of this evidence that the trial Court delivered judgment convicting the appellant.

25. I have considered the evidence of the lower court and the defence given by the appellant in that Court. I have considered too the appellant's grounds of appeal and his written submissions. The appeal was opposed and I have considered what the prosecution said.

26. The appellants first issue concerns the language used. The allegation here is that the appellant didn't understand it and there was no interpretation. If this was the case, a question arises as to why the appellant didn't raise the issue during trial. But it is clear. This is an after thought by the appellant. Proceedings show the charge was read to the appellant in dholuo, which is his mother tongue language. P.W.1 testified in dholuo. The appellant cross-examined the witnesses and the cross-examination shows that it was based on what the witness had said. Quite clearly the appellant is not telling the truth on this issue. When the prosecution therefore terms this as an after-thought, I wholly agree.

27. The other ground raised concerns clarity as to whether the appellant was found guilty of main or alternative Court. The appellant was charged with the main count which was brought under Section 8(1)(3) of the Sexual Offences Act. That Section addresses the Offence of defilement. The appellant also faced an alternative count of indecent assault under Section 6(a) of the Sexual Offences Act.

This is what the magistrate said in his judgment.”***I have critically looked at the evidence as a whole and I have no doubt the accused defiled the complainant....”***

And just before that, the trial magistrate has mentioned Section 8(1) (3) of the Sexual Offences Act which is the one dealing with defilement. It is clear therefore that the conviction is for the offence of defilement. The appellant is therefore raising an issue that is not supported by the record. I therefore reject this ground.

28. The appellant alleged that the evidence of the complainant was not corroborated. The complainant said the appellant accosted her, took her to a vacant house and had carnal knowledge of her. The evidence of P.W.5 is that the medical examination revealed signs of penetration. The P3 form shows the complainant had broken hymen. She also had whitish jelly-like discharge from her genitalia. P.W.1 arrested the appellant at the scene. The complainant herself was at the scene. Some evidence shows the appellant was naked. It is easy to ask: Isn't all this corroboration? What kind of corroboration does the appellant have in mind? With evidence as shown here, it is very difficult to agree with the appellant.

29. Medical evidence was not conclusive proof of defilement, the appellant said. And the trial magistrate did not appreciate this. This is another lie from the appellant. It is clear from the judgment of the trial magistrate that conviction was based on consideration of all the evidence. The magistrate didn't single out medical evidence as the one leading him to convict. He expressly says in his judgment that conviction was on the basis of his consideration of the entire evidence. This ground also fails.

30. There is an issue taken concerning the date of 18/8/2011 appearing at the back of the P3 form where the stamp of Muhoroni sub-District Hospital appears. According to appellant, that date is wrong and misleading.

What the appellant does not say is this:

Just below the stamp, right where the date is supposed to be put, the date that appears is 18/9/2011.

At the start of the P3 form, the date of issue is stated as 16/9/2011. The date of offence is stated as 16/9/2011. the date of report to police is indicated as 16/9/2011. The treatment notes were availed together with the P3 form and are dated 17/9/2011.

Quite clearly, the whole episode covers the dates of 16th/17th/18th September 2011. The date of 18/8/2011 is obviously a simple mistake. But the appellant would have the court believe that that is the date that matters. The appellant is wrong and his argument is rejected.

31. The conviction is said to be against the weight of evidence. I have undeavoured to set out in summary the evidence laid before the lower COURT. From the appellant's defence, he was attacked by somebody from nowhere while a girl from nowhere also emerged and started shouting. It baffles that total strangers from nowhere can emerge and attack an innocent person for no reason at all. Ordinarily, things don't happen that way.

Contrast this with the prosecution evidence. P.W.1 hears his niece-PW2 – crying and rushes out of the house to find the appellant who tries to run away. The appellant is however chased and arrested. The complainant then complains he has defiled her. She is taken to hospital and examined. She is found to have been defiled.

It seems to me the more credible story is that of the prosecution witnesses. If the defence is believed, one would then have to believe that the appellant was framed-up. But what reason would the complainant (PW2) the complainant's uncle (PW1) and the police (PW3 and PW4) have for framing up the appellant whom they didn't even know before . It seems to the trial magistrate took pains to appreciate well the evidence before him. And that evidence was good and credible.

32. The sentence is said to be harsh and excessive. As the prosecution pointed out, the provisions under which the appellant was charged provided for a minimum sentence of 20 years. The appellant was sentenced to serve 20 years. How is that excessive? It is not. It is the minimum provided under the law.

33. It is necessary to look now at the appellant's submissions. The charge sheet is faulted for not having O.B number. The appellant refers the court to Section 385 of C.P.C to guide it concerning

errors and mistakes in the charges. I have looked at Section 385 of C.P.C. It does not say what the appellant says although he even purports to quote it. Section 385 talks about magistrates empowered to hold inquests. It is not related at all to errors or mistakes in the charges.

Instead, I am only aware of S.382 of C.P.C which excuses errors and mistakes in the charge sheet where they don't occasion a failure of justice.

To illustrate his point further, the appellant asked this Court to see the evidence in **OKENO V R (1972) EA 32** and he purports to quote some of it as follows:-

"The charge sheet raised against the appellant was defective".

I have looked at that case. Just like the misleading information given about Section 385 of CPC, this is yet another instance of misleading information. The case didn't deal with defective charge. Infact the issue of defective charge didn't arise at all.

The case concerned an appellant who was convicted of stealing goods in transit. The issue of defective charge never arose. The appellants purported quotation is fiction.

34. There was said to be a contradiction between the evidence of P.W.1, who said he had sent the complainant to the ships and the complainant (P.W2) who said she was coming from the latrine. The court was told to note the contradiction. It was then referred to the case of **RUWALA V R (1937) E.A C.A 570**. A quote from the case if given as follows:

"When a witness causes contradictions and inconsistent testimonies, the evidence should not be admitted as true".

35. In view of the plain lies told by the appellant while trying to quote some provisions of law and decided cases earlier, I am now wary about what the appellant purports to quote. I have tried to get this case together with others mentioned by the appellant but I have not succeeded in getting them. It was the duty of the appellant to avail the judgments of the cases he purports to be quoting or relying on. That is the normal procedure. He has not done so and I cannot therefore afford him any benefits.

36. In any case, the appellant is also wrong on this issue of contradictions. Not all contradictions will affect the truthfulness of evidence. The court has to consider whether such contradictions affect the care incriminating facts.

37. A distinction therefore needs to be drawn between material and immaterial contradictions. Material contradictions are those that would affect inculpatory facts while immaterial contradictions are merely peripheral and do not go to the root of the case.

38. In this particular case, the issue is one of going to the shops or going to the latrines from the house these two versions were not given by the same person. And the core issues were whether the complainant was defiled in the evening of 16/9/2012, and if she was, who did it?

I don't think that this discrepancy goes to the root of the case.

39. The same issue of contradiction was said to arise when P.W.1 says the complainant was crying while P.W.2, the complainant said she was not shouting. In this, I see no contradiction. P.W.1 didn't say the complainant was crying. Unless the appellant thinks crying and shouting are the same, I don't see how anyone can say there is contradiction here. There is shouting without crying. There is also crying without shouting. The complainant said she didn't scream. But she didn't say she was not crying.

40. The appellant suggested that M A, the woman said to have witnessed the appellant grab the

complainant should have been called as a witness. He wonders why she was not called and suggests that her evidence would have been prejudicial to the prosecution.

It is true that in her evidence the complainant, P.W.2 said that M A was at the scene and saw the appellant grab her. During cross-examination of P.w.2 by the appellant, she was asked why M A didn't help her. She said she couldn't tell why.

41. Now this is a witness who didn't help at that crucial time when her intervention might have saved P.w.2's situation. If she didn't help at that time, could she be expected to come and give evidence? Not all. I refuse to accept that this was a crucial witness to be called by the prosecution. Her alleged behaviour at the scene shows she might not have been a useful witness. There was therefore no need of calling her.

42. The appellant further said there is no link between him and the alleged penetration of the complainant, that he couldn't defile her in presence of an adult (M A)

43. The court's appreciation of what happened in this case, the analysis of the appellant's submissions and grounds of appeal, and consideration of what the prosecution said in rebuttal reveal that it still stands out clearly that the complainant was defiled in the evening of 16/9/2011. She was defiled by the appellant who was arrested at the scene at, or around the same time that the incident occurred. The appellant's denial is hollow and untrue.
44. The inevitable and inescapable conclusion therefore is that the appellant's appeal is lacking in merit and is for dismissal. I hereby dismiss the appeal.

A.K. KANIARU – JUDGE

31/10/2013

<u>31/10/2013</u>

A.K.Kaniaru – Judge

Dianga G – C/C

Appellant – Present

interpretation – English/Dholuo

Sang for State.

COURT: Judgment read and delivered in open **COURT.**

Right of Appeal – 14 days.

A.K. KANIARU – JUDGE

31/10/2013