



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEAL NO.102 OF 2009

BARACK OSIDA ONAM.....APPELLANT

VERSUS

REPUBLICRESPONDENT

[Appeal From Original Conviction and Sentence of SRM's Court Nyando

in Criminal Case No.622 of 2008.)

J U D G E M E N T

On the 26th of June, 2008 the appellant herein was charged before the Senior Resident Magistrate in Winam Court in Criminal Case No.622 of 2008 with the Offence of Attempted Defilement of a child contrary to Section 9(1) as read with Section 9(2) of the Sexual Offences Act of 2006. The appellant was also faced with an alternative count of Indecent Assault of a child contrary to Section 11(1) of the said Act.

The particulars of the Offence of Defilement are that: on the 23rd day of June, 2008 in Nyando District within Nyanza Province, the appellant attempted to have Carnal knowledge of **C. A** a child aged 4 years.

The particulars of the alternative count are that: on the 23rd of June, 2008 in Nyando District within Nyanza Province unlawfully and Indecently assaulted **C.A** a child aged 4 years with touching her private parts namely Vagina.

The appellant pleaded not guilty to the charges, was tried, convicted of the 1st count and sentenced to 15 years imprisonment. The appellant was dissatisfied by the judgment and he preferred this appeal on the following grounds as enumerated in the amended petition of appeal.

- **The trial magistrate failed to consider that the appellant had no previous record and failed to treat him as a first offender.**
- **That the 15 years sentence imposed upon the appellant was too harsh.**
- **That the minor they suppose the appellant defiled did not testify to satisfy the material evidence brought before court.**
- **The investigation failed to prove the recovery.**
- **The trial magistrate failed to weigh the prosecution and defence to bring about the truth.**
- **The appellant over stayed in the police cells.**
- **The trial was conducted without the appellant being accorded a translator.**
- **The sentence was inordinate and manifestly excessive.**
- **The charge sheet was excessive.**

In his argument in support of the appeal **Mr. Odunga** for the appellant submitted that although the charges were read in Dholuo there is no indication that any translation was thereafter done; the appellant was arrested on the 23rd of June, 2008 and his first appearance in court was on the 27th of June 2008. That the appellant ought to have been brought to court within 24 hours; minimum sentence for the offence is 10 years yet the appellant was sentenced to 15. He ought to have been sentenced to the minimum period.

Miss Oundo appearing for the state objected to the appeal on the following grounds; although she conceded that the charge was read and translated to the appellant in Dholuo and that witnesses testified in variety of languages as indicated in the proceedings, she however submitted that the appellant cross examined the witness, which cross-examination was relevant, and the appellant gave his defence in Dholuo which was relevant to the case and the evidence adduced and that at no time during the proceedings did he complain that he did not follow the same; that the accused was arraigned in court 1 day later because he had to be taken to hospital due to the injuries he sustained when members of the public hit him.

On the issue of sentence, learned State Counsel conceded that the minimum sentence is indeed 10 years, however she submitted that the court in meting out the sentence took into account the age of the victim and the fact that the appellant was not remorseful. She stated further that the sentence was within the discretion of the court. She submitted that the appeal lacked merit and ought to be dismissed.

This being the 1st appellate court it has a duty to re-consider, examine, analyse and evaluate the evidence on record a fresh in order to come to an independent opinion bearing in mind that the trial magistrate had an opportunity to see and hear the learned witnesses. In the case of **Ngui versus Republic (1984) KLR at 729** the Court of Appeal stated, thus in regard to the duties of the first appellate court:

“The first appellate court must re-consider the evidence, evaluate it itself and draw its own conclusions in order to satisfy itself that there was no failure of justice. It is not sufficient for it to merely scrutinize the evidence to see if there was some evidence to support the trial court’s findings and conclusion.”

The brief facts of the case as laid out by the prosecution are that; on the 23rd of March, 2008 at about 9.30 a.m. the parents of the child (victim) were alerted by a neighbour who heard her cry at Moi’s house. The

parents knocked at the door of the said house. A man answered but did not immediately open the door and when he opened, the appellant was found in the house with the child besides him crying. The man was dressed only in his underwear. A woman pulled the child's dress, she did not have a panty or biker that her mother had dressed her in and she was bleeding. The accused person was escorted to the police station by members of the public. The public beat him up in the process.

PW2 J.A.O stated:

- **That on 23/6/2008 at about 9.30 a.m. after sweeping her house on her way to throw rubbish she heard the voice of a child from Moi's house.**
- **She recognized the voice of the child. She left and alerted the child's mother.**
- **The mother knocked on the door it was not opened and mother went to the child's father.**
- **The child's father knocked hard people gathered and the door was opened.**
- **The person in the house came wearing only his innerwear. This person she said was the accused (now appellant).**
- **The child was next to him crying.**
- **The child's dress was stained with blood.**
- **Accused was taken to the police.**

PW3 C.A. She stated in evidence as follows:

- **She is the victim's mother.**
- **PW1 alerted her of the incident.**
- **She went and knocked on Moi's house which was not opened.**
- **She called her husband who also knocked and the person inside refused to open out on the third knock he opened.**
- **She checked and her child had no panty, or slippers.**
- **She noticed blood on the child's thighs.**
- **She took the child to Ahero sub-district hospital. The child was treated and issued with a P3 form.**

PW4 H.O.N stated:

- **His wife PW2 called him. He kicked opened Moi's house.**
- **Their child ran out while crying.**
- **He then saw the appellant seated on the bed.**
- **They checked the child and she did not have a panty on.**
- **The appellant did not have his shirt on.**
- **Appellant was beaten by the public and escorted to the police station.**
- **He was known to the appellant for long.**

PW5 P.C. Fredrick Ojwang stationed at Ahero Police Station Crime Section stated that:

- **On 23rd June, 2008 the appellant was brought to the station by the public along side a child C.A in the company of the child's parents.**
- **It was alleged that the appellant had had carnal knowledge of the child.**
- **He accompanied the appellant to the house the scene of crime and therein recovered a pair of slippers, and inner wear parents alleged to be those of the victim.**
- **The slippers, pair of panties and the biker were identified to be the victim. They were all found under the mattress.**

PW6 Turoitich Kiprono a clinical officer attached to Ahero sub-district hospital produced the P3 form on behalf of his colleague **Mr. Paul Jamera**.

- **He stated that he was familiar with his colleague's handwriting.**
- **Examination done on 23rd June 2008 at about 9.40 a.m No blood stains noticed. .**
- **Victim a minor.**
- **No tears and no penetration.**
- **She had bruises.**

The suspect was examined.

- **Was drunk.**
- **Trouser smelling urine.**
- **No penetration detected**
- **No sperm.**

On his part the appellant gave an unsworn statement as follows

- **He is related to PW3 who is his brother's son.**
- **He was to give him a portion of land as PW3 lives in a swampy area.**
- **PW3 was to give him money.**
- **There was bad blood between them.**
- **On 23/7/2008 he was at Moi's house when PW3 and others entered the house and assaulted him.**
- **It is at the police station that he heard of the allegation of raping.**

The onus of proving the prosecution case beyond all reasonable doubt squarely lies on the prosecution. See the case of **Woolington versus D.P.P.(1935) A.C; 462** any scintilla of doubt must go to the benefit of the accused.

The issue for determination having considered the evidence on record is whether the prosecution proved the offence of defilement or that of the alternative count of indecent assault against the appellant to the required standard.

The parties are in agreement that the appellant was arrested on the 23rd of June, 2008. According to the charge sheet he was arraigned in court on the 26th of June, 2008. The prosecution gives reason for delay as being the fact that the appellant had been taken to hospital due to the injuries he sustained when beaten by members of the public. I find the explanation satisfactory. The issue was first raised on appeal and therefore the explanation cannot be said to have been made belatedly. In any event this cannot be a reason for an acquittal. The appellant still has an avenue to redress this grievance by seeking for compensation.

On the grievance relating to lack of a translator, there is no indication on the record as to whether or not the appellant was indeed accorded a translator. However the appellant did not raise an issue, at the trial, he cross-examined at length and gave a relevant defence. Thus the argument that the proceedings were conducted in a language not understood by the appellant is an after-thought and a failed ground in view of the appellant's participation in the proceedings.

Did the prosecution prove the offence, the appellant was charged with and on which he was convicted?

PW1 stated:

- **PW2 knocked Moi's house but there was no response.**
- **She went and called her husband. He also knocked.**
- **People came and the door was opened.**
- **She saw an old man. He was only wearing an inner wear.**
- **Next to him was a child.**
- **The child's dress was stained with blood.**

PW2:

- **Knocked whoever was inside refused to open.**
- **Of her husband she stated "he knocked once, twice and the third time the door was open."**
- **Saw the man sitting on the bed.**
- **The man was bare-chested.**
- **Noticed blood on the child's thighs.**
- **The child did not have a panty.**

PW3:

- **Kicked the door open.**
- **The child ran out crying.**
- **Saw the old man sitting on the bed.**
- **He did not have a shirt.**
- **Checked the child and saw she had no pant.**

PW4:

- **In the company of police officers we took the suspect to his house.**
- **Conducted a search and therein recovered a pair of slippers and inner pants which were alleged to belong to the said child.**
- **The same were identified by the child's parents.**
- **They were found under the mattress.**

PW5 stated of the victim:

- **There were no blood stains and no other stains noted.**
- **No tear or penetration occurred.**
- **She had mild bruises.**

Of the appellant:

- **No stains or tears.**
- **Drunk and smelled of alcohol.**
- **No penetration occurred owing to presence of smegma on perile retraction.**

The above witnesses **PW1-PW3** all concurred in their evidence that the appellant was found with the victim in Moi's house around 9.30 a.m. The appellant had no shirt and the victim had her panty biker and slippers missing. **PW4** confirmed having found the same in the house under the mattress upon investigation.

The evidence of blood stains on the clothes or thighs remain uncorroborated by PW5's evidence as there was no tear or evidence of penetration upon examination. The presumption that since the appellant was found with the child so he must have been guilty of attempted defilement cannot be a basis for conviction made purely based on an assumption.

In convicting the appellant the trial court stated:

“I find that none of the prosecution’s witnesses witnessed the accused touching the said child. However, the child, at her age could not have removed her inner pants on her own. And in the circumstances in which she was found with the accused person, I am inclined to believe that he is the one who had removed them. This being the case, why else would he have removed the said child’s inner wear, if not with intention of either defiling her or indecently assaulting her.”

I concur with the finding and sentiments set above however, it is not clear why the trial magistrate settled on the 1st count and not the alternative.

The P3 under 2(a) Section C as relates injuries in the genitalia states there were mild bruises seen although no penetration. There was definitely interference with the child’s genitalia for the child to have sustained the bruises. The removal of the inner wear and this interference in my view contributed to the child’s crying.

PW1, PW4 & 5 are not known to the appellant. There are independent witnesses and I see no reason why they would have lied against the appellant. I am convinced that the prosecution proved the alternative charge of indecent assault beyond any shadow of doubt. The offence carries a sentence of not less than 10 years.

In the circumstances the appeal succeeds only to the extent that this court finds the appellant guilty of the alternative count. The same attracts a lesser punishment.

The 15 years imprisonment is therefore substituted with 10 years.

Dated and delivered at Kisumu this 13th April, 2011

ALI-ARONI

J U D G E

In the presence of:

..... **counsel for state**

.....**Appellant in person.**

