



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL APPEAL NO. 61 OF 2008

V.O.J.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

[FROM THE CONVICTION AND SENTENCE OF A.O. OSODO, PM, IN BUSIA P.M.CR.CASE NO.161 OF 2006]

J U D G E M E N T

The appellant, V.O.J., was charged with the offence of Defilement contrary to Section 145(1) of the Penal Code. In the alternative he was charged with Indecent Assault on a Female, contrary to Section 144(1) of the Penal Code. After full trial, he was convicted of the main charge of defilement and sentenced to 10 years imprisonment. He appealed against the conviction and sentence.

The prosecution evidence in summary is as follows:- The appellant, on 16.1.2006 at 6 p.m, approached PW3, T.N.O., to allow the complainant and her sister, S.W., to accompany him to his house, purportedly to go and sleep with his young daughter over night, because he was going away for a funeral. PW3 to that end, released her daughter PW1 and her sister, PW2 to accompany, the appellant to his house as requested.

At his house, at 9.00 p.m, the appellant who did not go to the alleged funeral, is said to have separated the complainant from her sister PW2 whom he took to his brother O's house. PW2 then requested him to escort her and her sister, the complainant, back home to their mother, because there was no funeral, he refused. Instead, the evidence shows, the appellant took the complainant with him to his house.

PW2, after the appellant left to his house, decided to run back home where she told her mother how the appellant had treated them at his home. She expressed fear for the complainant. The result was that PW2's mother, PW3 and her older sister M., who did not testify, accompanied PW3, back to Appellant's house about 10.30 p.m, the same night, to collect the complainant back home.

It was in PW3 further evidence that when they arrived at the Appellant's house and she called out complainant's name, the latter finally came out crying, but gave no explanation at the time, why she was sleeping alone in appellant's house with him. She accompanied PW3 back home and PW3 allowed her to join PW2 and M. to sleep in the kitchen.

It is in evidence also that in the morning M. told their mother that the complainant had during the night told them that the appellant had sexually assaulted her before their mother collected her. The mother, PW3, had testified further, that she then had informed other women neighbours of the allegation and she and the women further questioned the complainant. The latter in turn, confessed having been defiled but feared telling their mother so, when she was collected. She said that the appellant had threatened her with death, if she revealed that he had defiled her. The women had then checked her vagina and noticed a liquid that looked like men's semen.

It is in PW3's further evidence that she then went back to the Appellant's home but he had disappeared. That she then reported the matter to Funyula Police Station after which she took the complainant to Lwanya Dispensary and later Busia District Hospital where a P3 form was filled. It is not clear why the police did not take the complainant's under pants for medical examination.

The complainant's evidence, in addition to what PW3 testified, is that when she and her sister PW2 arrived at the house of the appellant at about 9.00 p.m on 14.1.2006, they did not find appellant's daughter D. in the house, as anticipated. The appellant then left the complainant in his house stating that he was going with the complainant's sister to the house of his brother, O., to collect D. his daughter from there before he could leave to the funeral, as earlier stated.

She further testified that when he returned later, he came back alone. That he had then stated that he was not going to the funeral and that D. had refused to come to join the complainant. That when she requested to be escorted back home, appellant refused and threatened to kill her if she screamed. That he had then placed a knife on the table. That he then carried her to his bed, removed her pants while making her face upwards. That he laid on her and had sexual intercourse with her after pulling off his trousers. That after ejaculation into her vagina, he ordered her to cover herself with another blanket. That soon thereafter she heard her mother calling for her. He warned her not to utter a word about what he had done to her, otherwise he would kill her.

PW1 further stated that thereafter, her mother took her home. She however, added that she did not bleed and no blood showed on her pants which she later showed the police.

PW4, was P.C Jared Mbeha of Funyula Police Station. On 15.1.2006 at 2.00 p.m he received a report of defilement from PW3, the mother of the complainant. The defilement was reported to have taken place the day before and the name of the suspect was given. He went to the home of the suspect at Buyibo village but could not find the suspect at his home. He issued a P3 to the complainant which was later filled at Busia District Hospital. The suspect was later on 17.1.2006 arrested by Administrative Police who escorted him to Funyula Police Station and later he was charged with the offence of defilement.

PW6, Aburili Misengo, was a Clinical Officer at Matayos Health Centre who on 15.1.2006 medically examined the complainant. He found that there was no trauma on the complainant's vagina. He could not find the hymen as it was missing. A vagina examination and laboratory test showed negative results. While urine had some dead cells, a vaginal swab had negative result. There were some pus cells but no spermatozoa were found. There was no evidence of sexual intercourse although the tests were done within 12 hours of the alleged sexual assault.

On being put on his defence appellant gave a sworn defence. He said that he did not commit the offence because he was not at the scene of crime at the material time and date. He said that he was arrested while attending a funeral. He believed the frame-up was due to a land dispute with the complainant's father.

The trial magistrate concluded from the evidence of the Clinical Officer, PW6, that he found no hymen in the complainant's vagina. Noting that PW6 found no evidence of sexual intercourse, despite the presence of pus cells, he nevertheless went ahead to conclude that because the evidence of the complainant was straight forward and cogent, he had to believe it. Believing it meant that the story of the complainant that the appellant actually had sexual intercourse with her was true. Upon that alone, the trial magistrate convicted the appellant.

I have carefully considered the evidence. There is no doubt that the evidence of the complainant is straight forward and quite attractive to believe. It agreed with the evidence of others in every material details except on the aspect of sexual intercourse. All the relevant aspects of the evidence are indeed corroborated except that of the actual act of intercourse whose evidence remains only that of the complainant.

The complainant testified that the appellant carried her to the bed, removed her pants and had sexual intercourse at the climax of which, the appellant ejaculated sperms into her. No such sperms could be found early the next morning when her mother and other women examined her vagina. There was no evidence that the appellant had tried to wear a condom before he had the intercourse with the complainant. Nor was there evidence that she washed herself, which if she did, she could have not failed to record, considering the meticulous method in which she gave her evidence. And even more surprising, the medical laboratory tests failed to detect any spermatozoa in the complainant's vagina while the tests were done within 12 hours. It is now a known scientific fact that spermatozoa can last in the vagina even up to 48 hours after sexual intercourse.

In my view and finding, spermatozoa was not found in the complainant's vagina only because it had not been deposited there by the appellant as claimed by the complainant. At the minimum, the trial magistrate in these circumstances should have given the appellant the benefit of doubt. Indeed conviction entered by the trial court, clearly went against the lack of basic evidence to prove sexual intercourse.

It is not deniable that every aspect of planning by the Appellant that evening show, if it is true, that he really planned to commit the offence. That would in most aspects support the complainant's final statement, that the appellant committed sexual intercourse. And yet scientific evidence actually negated sexual intercourse. It, in a way, backs the appellant's evidence that he was not at the scene of crime and did not commit the offence.

For the above reasons, I find that this appeal has merit and must be allowed. The conviction is quashed and the sentence of 10 years set aside. The appellant is ordered released from jail unless otherwise lawfully therein detained. Orders accordingly.

Dated and delivered at Busia this 14th day of July 2011.

D.A. ONYANCHA

JUDGE.