



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**CRIMINAL APPEAL NO. 87 OF 2010**

*(Appeal from the Judgment of the SRM'S Court Bondo in CR. CASE NO. 1205 OF 2009)*

**MOI OWITI OWITI.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

This is an appeal preferred by the appellant **MOI OWITI OWITI** from the Judgment of the SRM's Court in Bondo that was delivered on the 28<sup>th</sup> of May, 2010. The appellant had been charged with the offence of defilement contrary to Section 8(2) of the **Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that on the 13<sup>th</sup> of July, 2008 at N[...] Sub-Location in Bondo District within Nyanza Province, unlawfully he defiled **E.A.Oa** child of 10 years. The appellant also faced an alternative count of Indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars were that on 13<sup>th</sup> of July, 2008 at N[...] Sub-Location aforesaid he committed an Indecent Act with a child **E.A** a child of 10 years by touching her private parts. The trial magistrate found the appellant guilty of the first count and sentenced him to life imprisonment.

Being dissatisfied with the judgment meted out the appellant preferred this appeal based on the following grounds:-

- 1. That the trial magistrate erred in law and facts by not observing that the appellant's fundamental rights were violated by the police officers under Section 72(3).**
- 2. That the learned trial magistrate erred in law and facts by not observing that neither the appellant nor the complainant was tested to prove the case beyond any reasonable doubt.**
- 3. That the lower court erred in law and facts by not noting that no eye witness testified before court and that there was no independent witness who came to testify.**
- 4. That the appellant was arrested based on rumors and the one who narrated the alleged incident to the villagers did not testify.**

5. That there was no direct evidence to link the appellant with the case.

6. That the learned trial magistrate failed to establish that there was contradictions between the witnesses.

7. That the learned trial magistrate failed to observe that this case was of recognition and that there was an existing grudge between the appellant and PW1.

8. That the trial magistrate did not consider the appellants defence which was strong enough to secure an acquittal.

At the hearing of the appeal the appellant relied on written submissions and briefly reiterated the same orally. In brief his submission touches on the standard of proof. He contended that no tests were done on him or the complainant to prove the case beyond reasonable doubt, secondly there was no eye witness who testified. That crucial witnesses were left out. He contented further that his arrest was based on rumors as none of the witnesses named was called to testify, no exhibits in support such as the panty alleged to have been left behind was produced and the trial court failed to consider the defence.

On its part the prosecution vehemently opposed the appeal. It was their case that the appellant was known to the complainant and therefore this was a case of recognition. That when the complainant escaped from the appellant she ran and informed her aunt who took her to hospital. That the appellant escaped from the village and was not arrested until after a year of going underground. That the evidence of defilement was obvious and the case against the appellant overwhelming. That further the action of disappearing by the appellant is inconsistent with the actions of an innocent person. He urged for dismissal of the appeal.

This being the first appellant court it has a duty to re-consider the evidence on record afresh, examine and analyze the same in order to arrive at an independent opinion bearing in mind that the trial magistrate had the benefit of seeing and hearing the witnesses and thus must be taken into account. See **OKENO VS R (1972) E. A at P. 32, ACHIRA VS R (2003) KLR at 707.**

The brief facts of the case as set out by the prosecution was that on the 13<sup>th</sup> of July, 2008 at about 5 pm the complainant (PW2) then aged 10 years walked to the river to take a bath, when the appellant who is known to her held her and took her to his house. He promised her some money and on reaching his house he defiled her. The complainant's screams attracted children who threw stones at the appellant's house. The appellant got out of the house to chase the children at which point the complainant ran off. The complainant informed her aunt of the incident. She was taken to hospital, examined and issued with a P3 form. The matter was reported to the police. The appellant escaped and was apprehended on 30<sup>th</sup> July, 2009 after a year of hiding.

The prosecution called several witnesses whose evidence is as follows:-

**PW1 R.A.O** the complainant's mother stated:-

- On 13.7.2008 her daughter left to take a bath. She had not returned by 8 pm.
- When she returned at about 8 pm she was trembling.
- She informed her that **Moi** son of **Owiti** took her to his home.
- She took her to the hospital.
- A letter was issued for the arrest of **Moi** (the appellant).

- On cross – examination she stated that her daughter was defiled.
- She denied that she was framing the appellant because he owed her money.

**PW2 E.A (the complainant)** On her part stated:-

- She is a standard 4 pupil.
- On 13.7.2008 at 5.00 pm she went alone to take a bath, she was alone.
- The appellant took her to his house. She knew him as he used to go to their home.
- He told her he was going to give her money.
- He then to her surprise when they got to his house on he pushed her on the bed, he removed his clothes, her skirt and panty then did sinful things.
- She screamed.
- Some children came and started throwing stones on the iron sheet roof.
- The appellant opened the door to chase the children.
- She got an opportunity and ran off screaming. She ran all the way home.
- She took her skirt but left the pant.
- A man assisted her.
- She informed her aunt.
- She was taken to hospital and was found to have an infection.

**PW3 FREDRICK OLALE OGUTA** a paralegal with Kenya community Paralegal Association. He stated:-

- He learned on the 14/7/2008 that a child had been defiled in the village.
- He visited the child's home, spoke to the aunt and the child.

- He accompanied them to the Chief and D.C.O and later Bondo Police.
- He knew the appellant as a village mate.

**PW4 DOMNIC ADEDE** Assistant Chief of Nyaguda Sub-Location. He stated that:-

- On 30/7/2009 he was patrolling the area.
- They arrested the appellant at the Market as he had defiled a child in 2008.
- He knows the appellant who ran away to Suba Island after the incident.
- He was aware of the defilement as it had been reported to him.

**PW5 – P.C NIXON RUKWE** from Bondo Police Station on his part stated:-

- On 30/7/2009 while at Bondo Police he received information that the accused had been arrested in relation to a case of defilement dating way back on 13/7/2008.
- The victim was 10 years.
- He was arrested by the Assistant Chief.

**PW6 – DR. PETER OMONDI OYOO**, Medical Superintendent Bondo District Hospital testified on behalf of Dr. Ogutu who who examined PW2 and prepared the P3. He stated that Dr. Ogutu's observation were as follows:-

- There were blood stains on the entrance to the vagina.
- There were lacerations inside the vagina.
- There were also bruises on the thighs.
- There was also a growth on the inside of the vagina consistent with a vaginal wound which is a normal occurrence and has nothing to do with the defilement.
- Urine analysis show signs of infection.

The court put the appellant on his defence. He was the sole witness and had this to state:-

- On 30/7/2009 the complainant's mother went to get money from him. He owed her Kshs 2,000/=.
- She threatened him when he failed to pay the debt.
- On the same day while at the beach the Assistant Chief called him, asked him about the debt, took him to the Camp and later to the A. P. Camp and finally to Bondo Police Station.
- He denied having defiled the child.

From the evidence of PW6 & the P3 form there is no doubt that the victim PW2 was indeed defiled on the date stated, the 13<sup>th</sup> of July, 2007. The question for determination is whether the prosecution has discharged its duty of proving the guilt of the appellant beyond any reasonable doubt. The P3 is conclusive that the child (PW2) was defiled. However the appellant was not examined in order to link him through semen etc to the offence. The complainant is known to the appellant. She testified that he took her to his house with a promise of giving her money but to her surprise he turned against her. She knew him before as he frequently visited their home.

In this regard, I do concur with the prosecution that indeed this was a case of recognition. The victim was able to give the name of her assailant to her aunt immediately she arrived home. She gave the same name to PW4 and the doctor who examined her. She was consistent and I therefore rule out the possibility of a mistaken identity. The incident took place during the day and the victim knew where she was taken.

Although now in the absence of medical examination to corroborate her statement it is the victim's word as against the appellant, I have warned myself of the danger of relying on the evidence of a sole witness and I find the evidence of **PW2** credible and reliable.

In **Abdalla bin Wendo** and Another V R E.A.C..A at P 163 the court stated:-

**“ Subject to certain well known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the condition favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.”**

Coupled with the above and taking into account that this is a criminal matter and I must be convinced beyond any reasonable doubt I have considered the action of the appellant – disappearing from his usual abode to a different location for a period of one year. The prosecution argued that this was not consistent with the action of an innocent man.

In the case of **Molowa V R** (1980) KLR the Court of Appeal saw no reason to differ with the finding of the Court of 1<sup>st</sup> instance, they concurred with the trial court that the conduct of the appellant in disappearing immediately after the incident he was accused of and appearing after 6 months corroborated the prosecution evidence.

The action of disappearance by the appellant in that case is on all fours with the conduct of the appellant in this case, I find his conduct of disappearance inconsistent with that of an innocent person and that it corroborates the evidence of PW2 the complainant.

In this regard, I do concur with the finding of the trial court that indeed he was the defiler. I see no reason therefore to interfere with the finding of the trial court. I do equally find him guilty of the offence.

Section 8(2) provides

**“A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to life imprisonment.”**

The sentenced meted out was lawful. I accordingly confirm the same. This appeal is dismissed.

**DATED AND DELIVERED THIS 23<sup>RD</sup> DAY OF SEPTEMBER, 2011.**

**ALI-ARONI**

**JUDGE**

**In the presence of:**

..... **for State**

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