



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEAL NO. 40 OF 2011

JACOB OMONDI OGINO APPELLANT
VERSUS
REPUBLIC.....NDENT

JUDGMENT

This is an appeal from the judgment of **E. K. Mwaita**, SRM Ukwala in case No. 152 of 2010. The appellant had been charged with the offence of Defilement contrary to Section 8(1) (3) of the **Sexual Offences Act No. 3 of 2006**. The particulars of the offence being that on the 10th of April, in 2010 Ugenya District within Nyanza Province the appellant defiled **L.A.A.**, a child aged 10 years by penetrating his organ namely penis into her anus, he also faced an alternative count of Indecent Assault contrary to Section 11(1) of the Sexual Offences Act, the particulars being that on the 10th of August, at M, Sub-Location, Ugenya District within Nyanza Province he committed an indecent act with **L.A.A.** a child of 10 years by rubbing his penis against the child's buttocks.

The appellant pleaded not guilty and the matter proceeded to hearing. He was convicted of the first count and sentenced to 10 years imprisonment. The appellant being dissatisfied with the judgment preferred this appeal on the following grounds:-

- 1. That the learned trial magistrate erred in law and facts by failing to find out that the offence was not proved beyond reasonable doubt as there was no corroboration by the evidence by the complainants. (sic)**
- 2. That the learned trial magistrate erred in law and facts in convicting by evidence adduced by the complainant (minor) which was inconclusive thus no option could be based on and it was fabricated on the basis of an existing grudge between PW2 which is indicated in my defence.**
- 3. That the evidence before court did not have the required standard of proof as the evidence lacked probative value which led to the unsafe conviction.**
- 4. That the learned trial magistrate erred in law and facts in not considering that there was lack of a key-witness i.e the investigating officer which could have enabled the appellant cross-examine him and made a fatal blow by also not considering that there was no link between me and the offence.**
- 5. That the evidence adduced was purely circumstantial evidence which was not sufficient to sustain the charge.**

The appellant further filed a supplementary grounds citing *inter alia*;

- **Contravention of Section 50(2) (b) (c) (1) of the Constitution.**
- **Lack of a medical report and**
- **Lack of corroboration of the complainant's evidence.**

At the hearing of the appeal the appellant relied on his written submissions that may be summarized as follows:-

- **The learned trial magistrate failed to comply with Sections 50(2) (g) and (i) of the Constitution.**
- **The appellant did not receive the witness statements on time.**
- **There were contradictions in the prosecution evidence.**
- **Lack of corroboration.**
- **There was breach of the appellant's rights under Article 50(2) (b) (c) & (1) of the Bill of Rights.**
- **The defence evidence was ignored.**

The prosecution conceded to the appeal for the reason that a medical report had not been produced to corroborate the evidence on record.

This is the first appellate court the matter having been appealed from the Principle Magistrate's Court. This court is under a duty to re-consider the evidence, examine and analyze the same with a view to coming up with its own decision. See the case of **Okeno vs Republic** (1972)E. A.

The facts briefly from the prosecution are that the complainant's mother left the complainant aged 10 together with a younger child in the care of the appellant who was a worker. The mother **PW2** went to a funeral and did not return on the material evening. After supper the complainant and her sibling went to sleep. The complainant locked the door but the appellant who sleeps in a different house returned knocked, tricked the complainant so that she could open the door, upon entering he refused to leave, he then forcefully removed the complainant's clothes and defiled her. The following morning the complainant reported to her mother upon the mother's return. The mother took her to hospital and thereafter the appellant was arrested.

The complainant **PW1**, her mother **PW2**, **PW3** the arresting officer all testified between the 23rd of August and the 14th of October, 2010 approximately within a month; very commendable in my view. However on the said 14th of October, 2010 the prosecution asked for an adjournment to avail his last witness. The matter was adjourned to the 28th of October, 2010. On the said day the clinical officer was not available as he/she was in a seminar. The matter was adjourned to the 5th of November, 2010 where he was absent again. A last adjournment was given to the 15th of November and thereafter to the 28th of November, 2010 after which the prosecution was asked to close its case.

Cases of sexual offences rarely have eye witnesses and ordinary a medical report assists in corroborating the victim's evidence. It is recommendable that courts quickly dispose of matters however the lower court appeared to be in haste in giving very near dates for summoning of the clinical officer/doctor. The prosecution also did not seem diligent and serious in the way the matter was handled which may have informed the courts reaction.

The complainant (**PW1**) and her mother **PW2** appear credible witnesses. **PW1** was clear and consistent in her testimony. The law envisages justice both to the victim and the offender, I am of the view that the hasty manner and action of the court left the prosecution case incomplete. Even as we dispose of matters quickly, we cannot shut our eyes to the circumstances under which we operate. The appeal is meritorious however the evidence of the doctor that was not adduced left a gap in the prosecution evidence. To allow the appeal and set free the appellant in a matter as serious will be a travesty and mockery of justice. I do not think that this is a proper case to merely set aside the lower court's judgment and set free the appellant in the circumstances set above.

I therefore do allow the appeal, however I return the file to the lower court for retrial before another magistrate. In the meantime the appellant remains incarcerated unless out on bond on terms to be set down by the trial court.

DATED AND DELIVERED AT KISUMU THIS 27TH DAY OF OCTOBER, 2011.

ALI-ARONI
JUDGE

In the presence of:

..... for the Appellant

..... for the State