



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEAL NO. 125 OF 2010

(Appeal from the Judgment of the RM'S Court Tamu in CR. CASE NO. 322 OF 2010)

ELISHA OLOO OYUGI APPELLANT

-VERSUS-

REPUBLIC RESPONDENT

JUDGMENT

The appellant **Elisha Oloo Oyugi** was convicted of the offence of defilement contrary to Section 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars were that on the 25th of November, 2008 at K.trading centre in Nyando District within Nyanza Province, he had sexual intercourse with a girl aged 12. The matter went to trial. He was convicted and sentenced to 20 years imprisonment. Being dissatisfied with the judgment the appellant preferred an appeal to this court on the following grounds:-

1. That the magistrate erred in law when he failed to notice that the charges were duplex.
2. That the magistrate erred in law when he failed to appreciate the unexplained failure by the prosecution to produce evidence of any medical comparison and examination of spermatozoa found on the complainant with those of mine. This was fatal to the prosecution side.
3. That the magistrate erred in law and facts when he convicted me basing on evidence that were contradictory, especially PW2 and 3.
4. That the magistrate erred in law and facts when he failed to appreciate the submission tendered by my counsel after the prosecution had closed their case.
5. That the magistrate erred in law when he failed to appreciate my sworn defence statement. This led to a wrong conclusion.

He also filed a supplementary petition which repeated some of the grounds and in addition raised the following issues:-

- **Contradiction in the prosecution case.**
- **The court relied on the evidence of a single witness.**
- **Section 19 of the Oaths and Statutory declaration was not complied with.**
- **That the prosecution was not clear on the offence committed.**
- **The trial magistrate failed to comply with Section 169 of the Criminal Procedure Code.**

In his submissions the appellant acting in person stated as follows:-

- The P3 form relied upon was inadequate – age of the girl and injury were not specified.
- No proper investigation done.
- Copy of P3 form of the appellant's examination was not produced and the maker summoned.
- Evidence of the complainant remained uncorroborated.
- Alibi and defence evidence were not considered.

In opposing the appeal the prosecution stated that the appellant was positively identified by the victim **PW1**. The missing report of the appellant is a misnomer. Conviction was well founded and the sentence within the law.

This court is under a legal duty to reconsider the evidence afresh, examine and analyze the same in order to arrive at an independent decision. See **Okeno vs R** (1972)E.A, **Ngui vs R** (1984) K.L.R.

The brief facts of the case as presented by the prosecution are that on the 25th of November, 2008 at K. trading centre, the victim **PW1** went out to clean utensils at about 8.30 pm. The appellant who is their neighbour asked her to go behind a shop owned by one [particulars withheld]. He followed her and had sexual intercourse with her after which told her to go back home. When she got home her mother interrogated her. The mother beat her up which made her narrate what happened to her mother. In the company of her mother the matter was reported to K Police Station. The victim was taken to Muhoroni District Hospital where she was examined and a P3 form filled. The appellant was later arrested.

The evidence on record was as follows; **PW1** the victim was a standard 6 pupil aged 12 years. On the 25th November, 2008 at 8.30 pm. She took out utensils for washing. The appellant asked her to go behind a neighbours shop where he followed her and they had sexual intercourse. They had previously done the same. Later, on being beaten and interrogated she told her mother of the incident. The matter was reported to the police, she was examined and issued with a P3 form.

PW2 M.A the victim's mother stated that on 25th November, 2008 at about 8 pm they had just had supper when her daughter decided to wash dishes. **PW1** 10 minutes later she did not hear anything going on out, and she checked and did not find **PW1**. On **PW1**'s return she interrogated and beat her. **Pw1** then told her of the happening behind mama Jackline's shop where she had sex with the appellant. She reported the matter to the police and took **PW1** to be examined. She saw sperm on **PW1**'s panty but no blood stain. She denied having any differences with the appellant.

PW3 Christopher Kipkoach Ruto – a Clinic Officer in-charge of Muhoroni Sub District Hospital stated that. On 28th November, 2011, he filled **PW1**'s P3 form. She was 13 years. On examination he found the victim in a sad mood. He found fluid in the genitalia. There were bruises at the labia and reddening of the same. Lab investigation and high swab were done. There were spermatozoa, some infection. Pregnancy and HIV negative tests were negative. He concluded that the victim had been defiled. The victim was not a virgin.

PW4 JKM. A neighbour of **PW2** and the appellant. She heard **PW1** screaming as she was being beaten by **PW2**. **PW1** told her that the appellant had sex with her.

PW5 Corporal Patrick Lemeli stated that on 25th September, 2008 at 9 pm he received a report from **PW1 & PW2** that **PW1** had he defiled by a neighbour. He visited the scene and took the child to Muhoroni Sub District Hospital for examination. He issued **PW1** with a P3 form. He later charged the appellant in court.

The appellant on being put on his defence gave a sworn statement as follows. He owns a studio next to the complainant's home in the same compound which doubles up as his home. He is married with children. On the material day he closed the studio at 8 pm and left to go home to his parents in K. But before he got far his wife ran to him and informed him that his neighbour **PW2** was beating her child and request him to go and help. He did not do so. The following day while in Kisumu he received a call from his wife that the police were looking for him. He communicated with his lawyer and was given an assistance to accompany him to K Police. On his way to K Police Station he boarded a matatu, but was arrested taken first to Central Police and later to K Police station. He denied knowledge of the alleged offence. He denied being a boy friend of **PW1**.

DW2 Julius Omondi Otieno – he worked with the appellant in his studio. On 25.11.2008 they closed the studio at 8 pm, they left with the appellant to their respective homes in K. The next day they left for Kisumu the appellant received a call from his wife and was told that police were looking for him. They sought assistance from the appellant's advocate. They were arrested as they boarded a bus.

PW3 Ruth Akoth Oloo – wife to the appellant stated that on the material day the studio was closed at 8.00 pm and the appellant and **DW2** left for home. She heard **PW1** scream seeking help. She checked and saw her mother beating her. She tried to intervene in vain. At about mid night the police knocked on her door looking for her husband. On the following day at 11 am she informed him of the visit by the police. Later she learnt that he had been arrested. She stated that the appellant did not leave the studio between 4 pm and 8 pm on the alleged date of the offence.

The issue for determination is whether or not the complainant **PW1** was defiled and if so whether there is sufficient evidence to the required standard linking the appellant to the offence.

From the evidence of **PW1** she had sexual intercourse with the appellant on the material night. There is no eye witness to this. **PW1** confessed after interrogation and beating by **PW2** of her whereabouts. She told her mother (**PW2**) minutes after occurrence of the offence that the appellant had defiled her. She told her neighbour **PW4** and other neighbours the same. She repeated the same information to the Police Officer at the point of reporting. She appeared consistent and truthful. However despite this there is always a danger in relying on the evidence of one witness. I have warned myself accordingly and will consider if there is any corroborating evidence. The complainant was examined at the Muhoroni Sub – District by **PW3** who stated that on examination:-

“The child was in a sad mood. On general examination, there was fluid, white in colour around the genitalia and in her panty. There were bruises at the labia and reddening of the same. Lab investigation was done and high vaginal swab was done and the results were spermatozoa ---- The conclusion was that the child had been defiled.”

The findings of the Clinical Officer (**PW3**) as found in the P3 form in my view corroborate **PW1**'s evidence. I therefore find as a fact that **PW1** was defiled.

The next is to see if there is any evidence that linked the appellant to the offence. The complainant **PW1** pointed a finger at the appellant. In my view there is evidence on that fortifies this case; one the appellant and his witness **DW2** were informed by **DW3** that **PW1** was being beaten and she wanted him to go and assist but he asked her to go back. He appeared unconcerned to his neighbour's problem this was strange and odd. He then left for Koru and the next day for Kisumu. Thealibi by the appellant, like the trial magistrate noted was not brought to the notice of the prosecution.

These above action of disappearing by the appellant left him culpable, it was not the actions of an innocent man. It gave the impression that he was a person running away. The strong inference I deduce from his action is that he was guilty and on the run.

The defence evidence in my view did not misplace the prosecution case. The incident is said to have happened around 8 pm. It is around this time the appellant closed his shop.

I do not doubt the complainant. I see no reason why she would have picked on the appellant.

It is true that the examination of the appellant would have fortified the prosecution case. Nonetheless the evidence on record against the appellant is overwhelming. The conviction was therefore safe. I also find that the conviction was within the law and I do not wish to interfere with the same and I also find the sentence was within the law.

For the reasons above mentioned I dismiss the appeal.

DATED AND DELIVERED THIS 4TH DAY OF NOVEMBER, 2011.

**ALI-ARONI
JUDGE**

In the presence of:

..... for State

..... Appellant present in person.