REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 93 of 2006

(From original conviction and sentence of the Chief Magistrate's Court at Nakuru in Criminal Case No. 1413 of 2004 [T. Matheka {S.R.M.})

ALEX MATUNDA OMAYO……...……...……...APPELLANT

VERSUS

REPUBLIC……..……RESPONDENT

JUDGMENT

The appellant, Alex Matunda Omayo was charged with the offence of defilement contrary to Section 145(1) of the Penal Code. The particulars of the offence were that on the 30th April 2004 at ***[particulars withheld***] in Nakuru District, the appellant unlawfully had carnal knowledge of E N L, a girl under the age of fourteen years. The appellant was alternatively charged with indecent assault of a female contrary to **Section 144(1)** of the **Penal Code.** The particulars of the offence were that on the same day and in the same place, the appellant indecently assaulted E N L by touching her private parts. The appellant pleaded not guilty to the charge and after a full trial, was found guilty as charged and sentenced to serve twelve years imprisonment with hard labour. The appellant was aggrieved by his conviction and sentence and has appealed to this court.

In his petition of appeal, the appellant raised several grounds challenging the decision of the trial magistrate in convicting him. He was aggrieved that the trial magistrate had not considered the fact that the appellant had not been medically examined to determine whether he was HIV positive since the complainant was established to be HIV positive. The appellant was aggrieved that he had been convicted based on doubtful evidence of identification. He faulted the trial magistrate for convicting him based on insufficient and incredible evidence of the prosecution witnesses. He was further aggrieved that the trial magistrate had failed to take into consideration all the facts of the case before she arrived at the erroneous decision convicting him. At the hearing of the appeal, the appellant, with the leave of the court presented to the court written submissions urging this court to allow his appeal and consequently quash his conviction. Mr. Mugambi for the State did not make any submissions either opposing or conceding to the appeal.

The duty of this court as the first appellate court was set out in **Okeno vs Republic [1972] E.A 32** at page 36 where it was held that;

"***An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (****Pandya vs Republic [1957] E.A 336****) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own***

conclusion (Shantilal M. Ruala vs R.[1957] E.A 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses, see Peters vs Sunday Post [1958] E.A 424."

In the present appeal, the issue for determination by this court is whether the prosecution established its case to the required standard of proof beyond reasonable doubt that indeed it was the appellant who had defiled the complainant. I have carefully considered the submissions made before me by the appellant. I have also re-evaluated the evidence adduced by the prosecution witnesses. Before giving the reasons for my judgment of this appeal, I will briefly set out the facts of this case.

The complainant in this case was at the material time aged seven years. She was at Standard one pupil at ***[particulars withheld]*** Primary School. She lived with her mother PW1 T L and her father. She was the only daughter to her parents. She testified as PW3. According to her evidence, she was defiled on two occasions by the complainant. The first time she was defiled was on the 30th April 2004 when she was accosted by the appellant as she was walking towards the nearby military barracks. She told the court that the appellant took her to a nearby kiosk and defiled her. After she was defiled, she walked back home. She did not inform her parents or siblings that she had been defiled. She only gave the information to her mother after three days. She told her mother (PW1) that she would be in a position to recognise her assailant if she saw him again. PW1 made a report to the police. She was issued with a P3 form and instructed to take the complainant to the Provincial General Hospital, Nakuru.

The complainant was examined by PW4 Dr. Riro Mwita on the 2nd May 2004. He made the following observations; he observed that there were lacerations on the labia minora, the hymen was torn, the labia majora was intact, the perineum was intact, there was a foul smelling discharge noted from the vagina. Dr. Mwita directed the complainant to be examined with a view to determining if she had been infected with a sexually transmitted disease. The HIV test was positive. From the tests, Dr. Mwita reached the conclusion that the complainant was HIV positive even before the alleged offence of defilement was committed on the 30th April 2004.

The complainant testified that she was again defiled on 9th June 2004 by the appellant. On this occasion she testified that the appellant got hold of her as she was going to visit her aunt at the nearby military barracks. She recalled that the appellant took her to a maize plantation and defiled her after which he gave her Ksh.10/= to buy mandazi. The complainant did not however tell anyone that she had been defiled until after two days when she informed her mother (PW1) of the alleged incident. Her mother again reported the incident to the police and she was issued with another P3 form. She took the complainant to the Provincial General Hospital where the complainant was again examined by PW4 Dr. Riro Mwita. He observed that the labia majora was normal, the labia minora were normal, there was no hyperaemia, and there was evidence of lacerations noted. The hymen was however found to be absent. There was still a foul smelling discharge which was whitish in colour from the vagina. Tests were conducted. She was again found to be HIV positive.

Dr. Mwita made the following observations pursuant to his examination;

"*This child had a similar history of defilement, the above tests were done, and she was found to be positive. It is unlikely that she contracted this disease from this particular episode. However I recommend that the culprit be presented to the hospital for screening too. It should also be noted that there was delay in bringing the patient for examination, particularly the high vaginal swab, and therefore some crucial evidence may not have been obtained. The alleged act took place on 9th June 2004; patient presented 48 hours later. This patient should be followed up in our comprehensive care centre in view of her immuno compromise status.*"

The police did not however act on the recommendation by the doctor when the appellant was arrested on

the following day. He was not taken to the hospital for his HIV status to be determined.

According to the mother of the complainant (PW1), the complainant identified the appellant in a building site near their home as the person who defiled her. Upon the appellant being identified, he was arrested by PW2 PC Michael Agutu. The appellant was arrested at night in the house of DW3 James Mengo Ouko. He was later taken to Central Police Station, Nakuru where he was charged with the present offence.

When the appellant was put on his defence, he testified that on the 30th April 2004 he was in his rural home but came to visit his uncle at Lanet on the 7th May 2004. The evidence by the appellant that he came to Nakuru on the 7th May 2004 was corroborated by the testimony of DW2 Job Obiero Mizure and DW3 James Mengo Ouko. It was apparent that the appellant was detained at the police station from the date of his arrest i.e. on the 10th June 2004 until the 18th June 2004 when he was arraigned before the subordinate court for plea.

I have re-evaluated the evidence that was adduced before the trial magistrate's court and also carefully considered the submissions made before me by the appellant. It was clear to this court that the appellant was convicted based on the evidence of the alleged identification by the complainant. The appellant was not known to the complainant prior to the said incidents of defilement. Her evidence of identification cannot therefore be said to be that of recognition. The two incidents took place about a month apart. The appellant was however charged in respect of the first incident which allegedly occurred on the 30th April 2004. Was the evidence of identification such that this court would be left in no doubt that the complainant had positively identified the appellant? I do not think so. It should be noted that the complainant was a child of tender years at the time the defilement was alleged to have taken place.

At the time she testified before court she was aged seven years. This court is aware that it can convict the appellant based on the evidence of a complainant without the necessity of corroboration due to the fact that this was a sexual offence. However, this court must be convinced that the complainant positively identified the appellant during the said defilement. That the complainant was defiled was in no doubt. PW4 Dr. Riro Mwita confirmed that indeed the complainant had been defiled. The issue for determination by this court was therefore who defiled the complainant. Although the mother of the complainant (PW1) testified that the complainant had told her that she could identify her assailant if she saw him again, it was evident that the complainant did not give the description of the alleged defiler to her mother or to the police.

Certain aspects of this case are disturbing. In the two instances that it was alleged that the complainant was defiled, the complainant made no report to her mother or to the police until after at least two days. The evidence of identification by the complainant was that of a single identifying witness. As was held by the Court of Appeal in the case of **Maitanyi vs Republic [1986] KLR 198** at page 200;

"***Although the lower courts did not refer to the well known authorities*** *Abdulla Bin Wendo & Another vs Reg [1953] 20 EACA 166* ***followed in*** *Roria vs Republic [1967]* ***EA 583, it may be that the trial court at least did have them in mind. It is important to reflect upon the words so often repeated and yet bear repetition***:-

'Subject to 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 conditions 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'."

The incident in which the appellant was said to have defiled the complainant (*the first incident*) occurred late in the evening. The circumstances of the said defilement were not stated by the complainant. The

complainant did not say if there was sufficient light to enable her identify the appellant as the alleged defiler. Her conduct after the alleged incident was puzzling. While she testified that after the incident she went home crying, no one testified that she had been seen crying when she arrived home. In fact, the whole incident was not disclosed to her parents until after three days when she was taken to the hospital. PW4 observed that the complainant had been defiled and infected with the HIV before the alleged defilement incident of the 30th April 2004.

After re-evaluating the evidence, it was clear to this court that the appellant was not properly identified as the person who defiled the complainant. It was also evident from the testimony of the doctor that the complainant had been defiled before the alleged incident of 30th April 2004. She was tested and found to be HIV positive. PW4 was emphatic that the complainant could not have been infected with the said HIV by the appellant. PW4 recommended that the appellant be examined to either confirm or rule out the possibility that he could be HIV positive. The prosecution did not deem it necessary to have the appellant tested to determine his HIV status for the purpose of this case. This raised doubt that the appellant could have indeed infected by the complainant with the HIV. Further, the police failed to investigate the finding by the doctor of the possibility that the complainant could have been defiled and infected with the HIV long before it was alleged that she had been defiled by the appellant. This court finds that the evidence of identification of the appellant by the complainant to be unsatisfactory. It does not rule out the possibility that it could have been a case of mistaken identity.

The appellant raised an alibi defence which was corroborated by DW2 and DW3. He told the court that he was not within the Lanet area on the 30th April 2004. He told the court that he arrived at Lanet on the 7th May 2004 to live with his uncle. This alibi was not displaced by the prosecution witnesses. In the premises therefore, there was a possibility that the appellant was not within the Lanet area on the 30th April 2004 when the complainant was alleged to have been defiled.

The upshot of the above reasons is that the appeal by the appellant has merit and shall be allowed. His conviction on the charge of defilement contrary to **Section 145(1)** of the **Penal Code** is hereby quashed. The appellant is acquitted of the charge. The sentence of twelve (12) years imprisonment with hard labour is hereby set aside. The appellant is ordered released from prison forthwith and set at liberty unless otherwise lawfully held.

DATED at NAKURU this 5th day of September 2007

L. KIMARU

JUDGE