

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
Criminal Appeal 90 of 2004

GODWIN OSCAR SANDE IMONJE APPELLANT

VERSUS

REPUBLIC PROSECUTION

JUDGMENT

The appellant, Godwin Oscar Sande Imonje, was charged with the offence of defilement of a girl contrary to **Section 145(1) of the Penal Code**. The particulars of the offence were that on the 10th of August, 2003 at [*particulars withheld*] in Kericho District, the appellant had carnal knowledge of DL, a girl of under the age of sixteen years. The appellant was alternatively charged with the offence of indecent assault of a female contrary to Section 144 of the Penal Code. The particulars of the offence were that on the same day and at the same place, the appellant unlawfully and indecently assaulted DL by touching her private parts. The appellant denied the charges. After a full trial, the appellant was convicted as charged on the alternative charge of indecent assault. He was sentenced to serve seven years imprisonment. Being aggrieved by his conviction and sentence, the appellant has appealed to this court.

In his petition of appeal, the appellant has raised several grounds in support of his appeal. He was aggrieved that he had been convicted by the trial magistrate in the absence of any evidence that could have established a case against him to the required standard of proof beyond reasonable doubt. He faulted the trial magistrate for convicting him on uncorroborated and contradictory evidence of the prosecution witnesses. He was aggrieved that his alibi defence had not been considered by the trial magistrate before she reached the decision convicting him. He finally faulted the trial magistrate for failing to properly analyse the evidence on record and thus reached an erroneous decision convicting him against the weight of the evidence adduced by the prosecution witness.

At the hearing of the appeal, the appellant denied having committed the offence for which he was convicted. He urged the court to allow his appeal, quash his conviction and set aside the sentence. Mr. Koech, Learned State Counsel left all the issues that were raised by the appellant for the determination by the court. I shall consider the grounds of appeal raised by the appellant and the arguments made thereto after briefly setting out the facts of this case.

PW1 (*the complainant*) DL a girl aged fourteen years at the material period, testified that on the 10th of August, 2003 as she was walking home at 7.00pm after watching television at Kapkoros, she was enticed by the appellant and another man called Joshua Oloo. The complainant claimed that she was accompanied by her sister called EW. She testified that they agreed to go to the house of Joshua Oloo. They cooked supper and ate it. She testified that EW slept in the inner room, presumably with the said Joshua Oloo, whilst herself she slept with the appellant in the spare room. It was her testimony that she was not forced to remove her clothes. Neither was she forced to remove her underpants. She however complained that the appellant had sexual intercourse with her. She then slept in the said house until the following morning. On the following morning, she let herself out and went to her uncle's house where she slept.

Meanwhile PW2 PKM, the mother of the complainant testified that on the 10th of August, 2003, after work, she went to her house but did not find the complainant. She did not find EW whom she testified was not her daughter.

She waited for them but they did not return home that night. On the following day she went to the house of the uncle of the complainant and found her there. The complainant told her that she had slept in the house of the appellant. PW2 took the complainant to the Kericho District Hospital three days after the incident. PW3 Yego Kirwa, a clinical officer examined the complainant and established that the complainant had had sexual intercourse. She had also been infected with a sexually transmitted disease.

The P3 form duly filled was produced in evidence by PW3. PW 4 Police Constable Lucy Okumu investigated the case and established that there was sufficient evidence to charge the appellant for the offence of defilement. She consequently charged the appellant.

When the appellant was put on his defence, he denied that he had either defiled or indecently assaulted the complainant. He denied that he was at Kapkoros on the night that it is alleged that he had defiled the complainant. He testified that he had attended a football competition at Bungoma and could not therefore have committed the offence.

This is first appeal. As the first appellate court in criminal cases, this court is mandated to reconsider and re-evaluate the evidence adduced by the witnesses before the trial magistrate so as to reach an independent determination whether or not to uphold the conviction of the appellant. In reaching its determination, this court is required to put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore cannot be expected to make any finding as to the demeanour of the witnesses. (See *Okeno versus Republic [1972] EA 32*). Having re-evaluated the evidence on record and also considered the grounds of appeal put forward by the appellant, the issue for determination by this court is whether the prosecution proved its case against the appellant to the required standard of proof beyond reasonable doubt.

The charge brought against the appellant would stand or fail depending on the reevaluation of the complainant's evidence. On re-evaluation of the said evidence it is clear that the same is contradictory, uncorroborated and full of loopholes that raises doubt that the appellant actually defiled or indecently assaulted the complainant. The complainant in her testimony was not sure whether she slept in house of the appellant or in the house of Joshua Oloo. The complainant was not sure whether she was forcefully defiled or not. She was further not sure if the appellant had had sexual intercourse with her or not. What is however certain is that the complainant willingly and without any coercion went to the house of one Joshua Oloo while accompanied by EW. It is evident that EW and Joshua Oloo were lovers. It is also certain that the said Joshua Oloo and EW slept together in Joshua Oloo's house.

There is however no evidence that the appellant slept with the complainant or had any sexual intercourse with her, either consensually or otherwise. It is apparent that the complainant was compelled to disclose where she had spent the night of the 10th of August, 2003 by PW2, her mother. This is when she came up with her story that she had been defiled by the appellant. Although PW3 confirmed that the appellant had had sexual intercourse, there was no evidence to suggest that it is only the appellant who could have had sexual intercourse with the complainant. It could have helped if the prosecution had secured the attendance in court of EW and Joshua Oloo who could have shed light on what actually transpired on the night of the 10th of August, 2003.

It was further advisable for the police to have secured the medical examination of the appellant having established that the complainant had been infected with a sexually transmitted disease. If this examination was carried out, it would have confirmed or ruled out the participation of the appellant in the said defilement of the complainant.

There were many gaps in the evidence offered by the prosecution to the extent that it raised serious doubt as to the guilt of the appellant as the perpetrator of the crime.

In the circumstances of this case, the alibi defence offered by the appellant cannot be ruled out of hand. The trial magistrate erred in law and in fact in convicting the appellant on such a flimsy prosecution evidence. No evidence was adduced which placed the appellant as the scene where the complainant testifies that the defilement took place. The complainant offered contradictory evidence which ultimately established one simple fact; the allegations made by the complainant against the appellant are so improbable that it most likely did not take place. There is a possibility that the complainant named the appellant as the defiler to conceal the identity of the person whom she appears to have had a love affair with. The appellant thus became a victim of miscarriage of justice.

In the premises therefore, and for the reasons stated hereinabove, it is evident that the appeal filed by the

appellant shall be allowed. His conviction is consequently quashed and the sentence imposed set aside. The appellant is ordered set at liberty and released from prison forthwith unless otherwise lawfully held.

Dated at Kericho this 2nd day of December 2005.

L. KIMARU

JUDGE