



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT HOMA BAY
CRIMINAL APPEAL NO. 33 OF 2018

FELIX ODIWUOR ONYANGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in S.O.A case No.19 of 2018 of the Principal Magistrate's Court at Mbita by Hon. Samson Ongeru—Principal Magistrate)

JUDGMENT

1. Felix Odiwuor Onyango, the appellant herein, was convicted for the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act No.3 of 2006.
2. The particulars of the offence were that on diverse months of April 2017 and 21st January, 2018 at various locations in the Republic of Kenya, intentionally and unlawfully caused his penis to penetrate the vagina of VAO, a child aged 15 years.
3. The appellant was sentenced to serve 20 years imprisonment. He has appealed against both conviction and sentence. He was represented by the firm of G. S Okoth & Company Advocates.
4. The appellant raised grounds of appeal as follows:
 - a. The learned trial magistrate and the learned sentencing magistrate misdirected themselves on several matters of law and fact.
 - b. The learned trial magistrate erred in law of criminal procedure and practice in failing to adjourn the case on the 31st May 2018 so as to accord the accused an opportunity to peruse the witness statement of investigating officer (PW6) which was given to him on the same day thus resulting in a mistrial of the case.
 - c. The learned trial magistrate erred in law of criminal procedure and practice in causing a mistrial by flouting the provisions of Section 150 of The Criminal Procedure Code (Cap 75) by refusing to recall the investigating officer (PW6) for cross examination by the accused on the 14th June, 2018.
 - d. The learned trial magistrate erred in law of practice and procedure in plea taking in failing to read the alternative charge to the accused and /or record the accused's reply thereto.
 - e. The learned trial magistrate erred in law in failing to note that the charge as drawn is vague and equivocal in time and space and in the absence of corroboration cannot satisfactorily constitute the offence of defilement.
 - f. The learned trial magistrate erred in the law of evidence in convicting the accused on the incredible and uncorroborated evidence of the complainant who did not even state the date and time of the alleged acts of defilement and whose evidence cannot satisfy the conditions set in Section 124 of The Evidence Act.
 - g. The learned trial magistrate erred in law of evidence in deciding the case against the weight of evidence in that:
 - i. He held that the complainant was befriended by the accused whereas there was no evidence to support the allegations of the complainant who was a truant who had run away from school and formed her story on the basis of the knowledge gained through the closeness of her family and that of the accused.

ii. He failed to notice that as the prosecution did not summon the lady called Alice of Kadel Karachuonyo and Lilian Achieng of Kisian Kisumu to render credibility to the allegations there was doubt created the benefit whereof should have gone in accused's favour.

iii. The medical evidence only proved that the complainant had lost her virginity (Hymen) but would not prove when, by what or by whom considering the denial of the appellant in his evidence which was corroborated by two witnesses.

h. The learned trial magistrate (as the law now stands) erred in law in holding that she had no option but to sentence the convict for the period dictated in The Sexual Offences Act and therefore the magistrate did not exercise the liberty in sentencing provided to her by The Constitution of Kenya, 2010.

5. The appeal was opposed by the state through Mr. Ochengo, learned counsel.

6. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32**.

7. Section 8(1) of the Sexual Offences Act defines defilement in the following terms:

A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

An offence of defilement therefore, is established against an accused person when the prosecution has proved the following ingredients:

- a. That there was penetration of the complainant's genitalia;
- b. That the accused was the perpetrator; and
- c. The age of the victim must be below eighteen years.

In **Fappyton Mutuku Ngui vs. Republic [2012] eKLR** Joel Ngugi J. said:

Going by this definition of defilement, I agree with Mr. Mwenda on the issues which the court needs to determine. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant.

These are the ingredients I will endeavour to find if the prosecution proved against the appellant.

8. It was argued that learned trial magistrate (as the law now stands) erred in law in holding that she had no option but to sentence the convict for the period dictated in The Sexual Offences Act and therefore the magistrate did not exercise the liberty in sentencing provided to her by The Constitution of Kenya, 2010. This argument in my view is based on incorrect interpretation of the law. Section 8 (3) of the Sexual Offences Act provides:

A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

The learned trial magistrate therefore meted out the only legal sentence available. There was nothing unconstitutional about it. There has been an erroneously understanding of the Supreme Court's decision in the case of **Francis Karioko Muruatetu & another vs. Republic [2017] eKLR**.

9. I agree with the appellant's contention that the particulars of the offence were drawn in a way that appeared like the prosecution was not sure of its case. However, my perusal of the record indicate that the appellant was not prejudiced for the evidence named the locations and the date of the alleged offence. There was no miscarriage of justice that was occasioned. The error is therefore curable under section 382 of the Criminal Procedure Code. The section provides:

Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

10. On 31st May, 2018 the prosecutor informed the court that the appellant had declined to receive the statement of the investigating officer. The appellant did not dispute but instead informed the court that he could have them and the same were given to him. He never applied for an adjournment and he cannot be allowed to benefit on an alleged failure which he occasioned. In any case, there was nothing this officer said which was new; he recapped what other witnesses had testified to.

11. The prosecution failed to call Lilian from whose home it was alleged the complainant was found. This was a material witness to establish a link between the complainant and the appellant. The Court of Appeal in the case of **Bukenya vs. Uganda [1972] EA 549**, (Lutta Ag. Vice President) held:

The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.

12. The evidence that led the court to find that there was defilement was the averment of the complainant and the medical evidence. The medical evidence was adduced by Victor Okoth Adika (PW5). He testified that the only anomaly he noted was the missing hymen. He concluded that the girl must have been defiled due to the missing hymen. The Court of appeal in the case of **P. K.W vs. Republic [2012] eKLR** on the issue of broken hymen observed as follows:

15. In their analysis of the evidence on record, the two courts below do not seem to have directed their minds to these details. They appear to have placed a high premium on the finding that the child's hymen had been broken. Was this justified? Is hymen only ruptured by sexual intercourse?

16. Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina (sic) with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is, however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons, masturbation injury, and medical examinations can also rupture the hymen when a girl engages in vigorous physical activity like horseback riding, bicycle riding, and gymnastics, there can also be a natural tearing of the hymen. See the Canadian case of The Queen vs Manuel Vincent Quintanila [1999] AB QB 769.

13. The proviso to section 124 of the Evidence Act states:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

The learned trial magistrate was convinced that the complainant was truthful for she explained their relationship from when it started. In view of the seriousness of the offence, her assertion ought to have been tested against other material evidence on record. There is no other material evidence on record against which the veracity of the complainant can be tested.

14. I therefore find that the prosecution did not prove penetration.

15. The appellant was arrested in Kericho where he was training as a mechanic whereas the complainant was found in Kisian, Kisumu County. Without the evidence of Lilian, the prosecution failed to prove the nexus between the appellant and the complainant.

16. After a careful analysis of the evidence on record, I find that the conviction was unsafe. I quash the said conviction and set aside the sentence. The appellant is set at liberty unless if otherwise lawfully held.

DELIVERED AND SIGNED AT HOMA BAY THIS 22ND DAY OF JULY, 2021

KIARIE WAWERU KIARIE

JUDGE