



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 4 OF 2019

CALVIN ONYANGO OGOLA..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original criminal case No. 28 of 2018 Principal Magistrate's Court at Bondo on 24.1.2019 Written by Hon M. Obiero PM and Delivered by Hon E.N.Wasike, SRM)

JUDGMENT

1. The appellant **CALVIN ONYANGO OGOLA alias KEVIN** was charged with the offence of defilement contrary to Section 8(1) as read with subsection (2) of the Sexual Offences Act No. 3 of 2006. Particulars were that on the 15th day of June, 2018 at Nyabera sub-location, Rarieda sub-county within Siaya County, internationally caused his penis to penetrate the vagina of FAO [full name withheld for legal reasons] a child aged seven (7) years. In the alternative charge, the appellant faced the charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 OF 2006. Particulars were that on the 15th day of June, 2018 at about 6.30pm at Nyabera sub-location in Rarieda sub-county within Siaya County, he intentionally touched the vagina of FAO [full name withheld], a child aged seven (7) years with his penis.

2. The appellant denied the charges and the prosecution called five (5) witnesses who testified in support of their case. He gave sworn testimony denying the allegations levelled against him.

3. The trial court found the appellant guilty of the main charge and after mitigations, sentenced him to serve thirty years' imprisonment.

4. Being aggrieved by the said conviction and sentence, the appellant filed this appeal on 4th February, 2019 setting out the following grounds of appeal:

a) That, the trial court failed to appreciate that the prosecution case was marred with contradictions.

b) That, the trial court failed to consider the first report.

c) That, the trial court failed to appreciate that nothing linked me medically with the alleged offence.

d) That, the trial court failed to consider that the alleged age of the complainant was not proved beyond reasonable doubt.

e) That, I pray to be served with court proceedings and wish to attend the hearing of this appeal.

5. Tis being a first appeal, this court is expected to reassess and reevaluate the evidence adduced before the trial court and arrive at its own independent conclusion bearing in mind the fact it neither saw nor heard the witnesses as they testified.

6. Revisiting the evidence before the trial court, FAO a minor testified on oath as PW1 after voire dire examination and stated that on the material day at about 7.30pm, she was playing with her friends S, A and O and that it was not yet dark when Kevin went to where she was and told her to go tell one'mum' to go to the house which she did. That Kevin then took her to the nearby bush and told her not to tell her parents. He removed her pant and removed his trouser and pant and put his thing into her private parts and she felt pain then she started crying. She then heard her mother's voice and she continued crying then Kevin took her away to her home and enroute they met her mother near the gate of Mombasa Raha. That her mother spoke to Kevin but he did not respond and so her mother started screaming which noise attracted many people and the Assistant Chief who was in Mombasa Raha so he went and joined them and spoke to Kevin But Kevin never responded so the Assistant Chief arrested Kevin and they went to Aram Police Station where recorded her statement. She was then taken to Madiany Hospital where she was treated and examined. PW1 stated that she knew Kevin very well as they were neighbours. She identified him in court as the appellant herein.

7. **PW2, M A O** testified that the complainant herein is her daughter. She stated that on the 15th day of June, 2018 at about 6.30pm, she realized that her daughter had not gone back to the house and she went to look for her. She stated that in the process, she saw the complainant and the appellant emerging behind the house and that the appellant was holding the complainant's hand. She also stated that the complainant was crying and when PW2 asked the complainant what had happened, the complainant told her that the appellant had told her not to disclose what had happened. She stated that she threatened to beat her and the complainant opened up and explained to her. She stated that the complainant explained to her that the appellant took her to the bush and removed her pant and he also removed his pant and placed his thing into her thing. She stated that the appellant wanted to run away but she held him and people gathered. That the Assistant chief also joined them and they went to the police station where they made a report. After that, she took the complainant to Madiany hospital where she was treated and examined.

8. **PW2** further stated that the appellant was well known to her as he used to work with her husband at the same place. She stated that the complainant was seven (7) years old at the time of the incident. She identified the certificate of birth in respect of the complainant.

9. On being cross examined by the appellant, PW2 stated that she saw the appellant with the complainant at 7pm and that she saw the injuries sustained by the child in her private parts.

10. The testimony of **PW3, SAMUEL AKELO GUMO** was that on the 15th day of June, 2018 at about 7.30pm, he was from Misori beach when he received information that members of the public had surrounded a suspect on allegations that he had defiled a girl. He rushed to the scene and on arrival, he found a crowd of people surrounding a suspect, the appellant herein. When he interrogated the appellant, the appellant denied having defiled the girl. When PW3 spoke to the girl, the girl told him that the appellant took her to a nearby shamba and defiled her. PW3 arrested the appellant and took him to Misori AP Camp.

11. **Corporal ISAAC KIMURUOR** testified as PW4 and stated that he investigated the case from the 16th day of June, 2018 and at that time, the appellant had been arrested. He stated that during the investigations, he visited the scene and he also recorded statements of the witnesses. He stated that the complainant was issued with a P3 form which was subsequently filled at Madiany hospital. He further stated that he received the certificate of birth in respect of the complainant and he produced the same as exhibit 1. It was his further testimony that the P3 form confirmed that the complainant was defiled.

12. **PW5, VINCENT ONYANGO AKELLO** a Clinical Officer based at Ongiello Health Centre testified that the P3 form in respect of the complainant was filled by his colleague whose handwriting he was familiar with by the name Gilbert at Madiany hospital. He produced the P3 form dated 17/6/2018 as exhibit 2 herein. He also produced the Post Rape Care form as exhibit 3. The injuries noted on the child included laceration on the labia minora and presence of blood on the genital opening. Penetration of genitalia was confirmed. On being cross examined by the appellant, PW5 reiterated his testimony in chief.

At the close of the prosecution's case the appellant gave sworn testimony and called no witness. He testified that he was s **CALVIN ONYANGO OGOLA** and stated that on the 15th day of June, 2018 he went back home from the Lake in the company of his wife and that on reaching they found the complainant carrying their baby who was crying. He stated that his wife took the baby from the complainant. That after a short time, the complainant's mother started beating her. He stated that he went to tell the complainant's mother to stop beating her. He stated that the complainant's mother stated abusing him. He stated that after that, the complainant's mother went away and returned in the company of the Assistant Chief who arrested him and escorted him to the police station. He denied the allegations that he defiled the complainant.

SUBMISSIONS

13. In Support of this appeal, the appellant filed written submissions which he highlighted orally whereas the Respondent represented by the Prosecution Counsel made oral submissions opposing the appeal.

14. The appellant submitted consolidating his grounds of appeal and stated that the trial court erred in law by convicting him on the allegedly purported identification through recognition by the complainant who was coached and incited to do so by her resentful mother who previously swore to revenge on the same compound but that they were also intimate friends before he got married to a different girl with whom he still resided in the same compound.

15. Further, the appellant submitted that the Assistant Chief of Nyabera sub-location clearly stated that he recorded his statement at Aram Police Station on the **15th January 2018** whereas defilement allegedly occurred on the 15th June, 2018. He therefore wondered how he could not be arrested on the material date of occurrence as he was present and seen by PW2 - the mother of the Complainant?

16. The appellant further submitted that the mother alleged that, the complainant (her child) sustained injuries in her private parts and was in severe pain; but that on examination at Madiany sub-county hospital, the medical officer contradicted on the post-Rape care form parts A and B that there were injuries sustained by the complainant as alleged by her mother (PW2) see page 9 lines 10-11. Further, that the clinical officer clearly stated and the P3 form stated that there were no injuries inflicted on the complainant as recorded on pages 15, 16, 17, 18 and 19 of P3, whereas on page 13 lines 10 - 15 **Vincent Onyango Okelo** - a clinical officer at Ong'ielo Health Centre on holding brief for Gilbert Angla stated clearly on page 13 lines 10 - 17 that there was no stain or tear; that the complainant was on general fair health condition; there was normal external genitalia condition with laceration on the labia - minor and that there was also blood on the genital opening. That on laboratory technician's findings there was no report of medical importance; penetration of genitalia was confirmed.

17. According to the appellant, if at all there was genital penetration, severe/serious sexual injuries would have been inflicted thereby warranting findings and / or physical exhibitions of medical importance especially on a minor aged 7 years. He maintained that the Prosecution simply fabricated evidence as PW2 - MA (mother) incited the minor to tell lies in the court of law which should be deemed null in the court.

18. Further submission was that the Investigation officer, Aram Police Station Corporal Isaac Kimurgor stated clearly in court that defilement occurred on the 15th June, 2018 whereas in his recorded statement, he stated that defilement occurred on the 17th July, 2018.

19. The appellant further submitted that the trial court failed to take into account the appellant's defence yet the defence was capable of entitling the appellant an acquittal.

20. He further submitted that there was no tangible evidence to prove that the appellant committed the heinous crime of defiling a minor of 7 years in broad day light.

21. The appellant stated that the prosecution case against him was not proved beyond any reasonable doubt and that the basis of his conviction was more of circumstantial evidence but not a reality because, the learned magistrate failed to find out that the evidence was tainted with other several co-existing circumstances to weaken the same inference therein.[sic] . he urged this court to disregard the trial the magistrate court's findings calling it unreliable and unsatisfactory in law. He urged this court to acquit him claiming that the police had vendetta against him.

22. In his oral highlights the appellant maintained his innocence and stated that he was a former boyfriend to the complainant's mother before he got married to someone else so she was revenging by framing him with the offence of defiling her child.

23. Opposing the appeal, the Senior Principal Prosecution Counsel Mr. Okachi submitted that the prosecution proved its case against the appellant beyond reasonable doubt. That the appellant was known to the complainant who knew him well as Kevin and she saw him as he went to where she was playing with other children including 'mum,' told the other girl to enter the house and picked his victim into the bush and defiled her.

24. That the complainant vividly explained the process undertaken by the appellant before defiling her and what happened thereafter. Further, the PW4 corroborated the evidence of PW1 that the child was defiled ordered her to go with him wherein he defiled her. Counsel further submitted that the age of the complainant was proved and that the appellant was only sentenced after mitigating. He urged this court to dismiss the appeal.

DETERMINATION

25. I have carefully considered the evidence adduced before the trial court for the prosecution and for the defence. I have given equal consideration to the grounds of appeal and the oral and written submissions by the appellant and the Respondent for and against the appeal herein. In my humble view, the main issues for determination are:

a. Whether the evidence for the prosecution was marred with any contradictions as to vitiate the conviction of the appellant;

b. Whether the trial court failed to consider the first report;

c. Whether the age of the complainant was conclusively proved;

c. Whether there was sufficient evidence linking the appellant to the offence and therefore whether the conviction of the appellant was sound;

d. Whether the sentence imposed was lawful or harsh and or excessive

26. To prove the offence of defilement, there are three elements that must be established beyond reasonable doubt by the prosecution. The elements are the age of the complainant; the penetration of the complainant's genitalia and the positive identification of the perpetrator. The burden of proof always lie with the prosecution to prove its case against the accused person beyond reasonable doubt. The witnesses must be credible and consistent and there must not be material contradictions in the evidence of the prosecution witnesses although minor contradictions that do not go to the core or root of the case may be ignored in the interest of justice since no two people can state exactly the same thing even if they saw the event happening at the same time.

27. On whether the prosecution evidence was marred with material contradictions as to vitiate the conviction of the appellant, the appellant claimed in his submissions that the evidence on the injuries sustained by the complainant as adduced by her mother and the Clinical Officer was contradictory. I have reevaluated the evidence adduced by the prosecution witnesses on the injuries sustained by the complainant as stated in the P3 form and I am satisfied that there were no contradictions or at all. The P3 form clearly show the injuries to be lacerations on *labia minora* but that external genitalia was normal. Save that there was presence of blood on the genital opening. The Clinical Officer confirmed that there was evidence of penetration of genitalia of the complainant.

28. The appellant also claimed that the Assistant Chief testified that the offence occurred on 15/1/2018 and that the investigating Officer stated that the offence occurred on 15/7/2018 which contradicted the evidence of the complainant. I have reexamined the evidence adduced by all the prosecution witnesses including the investigating officer and the Assistant Chief Nyabera Sub location who testified as PW4 and PW3 respectively. The two witnesses were clear that PW3 received a report of the occurrence of the offence on 15/6/2018 and PW4 stated that he received a report on 16/6/2018 when he was at Aram Police Station to investigate the case. The dates which are mentioned by the appellant are in my view figments of his own imagination.

29. For the above reasons, I find the appellant's allegation that there were contradictions in the prosecution evidence devoid of merit and I dismiss the ground of appeal and submissions.

30. On alleged failure by the trial court to consider first report, the appellant never made any submissions to support this allegation and ground. Accordingly, the ground is found to be baseless and dismissed.

31. On whether the complainant's age was conclusively proved, PW1 in her **voire dire** examination stated that she was aged 7 years old whereas PW2 her mother testified that the minor was born on 2/12/2010 and identified her birth Certificate in court. The P3 form for the complainant states that the patient was age 7 years. The Birth Certificate No.9927805 shows that the birth of the complainant FA was registered on 22.5.2018 and a Birth Certificate issued on 10th July 2018. The Certificate shows that the complainant FA was born on 2/12/2010 to **NOOs** and **MAO (PW2)**. Accordingly, I am satisfied that the age of the complainant as at the date of alleged commission of the offence was conclusively established to be 7 years and six months old and that there was no contrary evidence as to her age. The ground of appeal therefore fails and is hereby dismissed.

32. **On whether there was sufficient evidence linking the appellant to the offence and therefore whether the conviction of the appellant was sound**, the appellant claimed and submitted that the prosecution did not adduce evidence linking him to the offence. Further, that the complainant was coached to frame the appellant with the offence because PW2 was his former girlfriend and that when they parted and the appellant married another woman, the complainant's mother vowed to revenge hence the framing of the offence against him.

33. The evidence on record was clear that the appellant knew the complainant and her mother that is why he stated that the complainant's mother found her in his home carrying his young child who was crying. The complainant was a child of tender years aged 7 years but she stated in her sworn testimony that she knew the appellant as Kevin and that he was their neighbor. She described how she was playing with other children when the appellant lured her into a nearby bush and removed her pant then he removed his trouser and his pant and inserted his thing into her private parts and that she felt pain. She cried up to and until when the appellant took her to her home where they met with her mother who was looking for her. The appellant was arrested that same evening when he was still with the complainant. This is according to the evidence of PW1,2 and 3. However in his defence, he claims that on the material day he was at the lake and when he returned he found the complainant carrying his child who was crying and that after a short while the complainant's mother arrived and started beating her and he tried to intervene but that PW2 threatened to do something that he will never forget. That she went away and returned in the company of the Assistant Chief who arrested him and escorted him to the Police station. He stated that he had an issue with the complainant's mother in that she wanted the appellant to marry her sister but the appellant refused. In his submissions, the appellant changed the story and claimed that he used to be a boyfriend to the complainant's mother and that when he left her and married another woman, the complainant's mother threatened to revenge. This evening was very contradictory. It is either it was PW2 who wanted to be married to the appellant or it was her sister whom PW2 wanted to be married to the appellant. My conclusion of the appellant's defence is that he was lying because he could not sustain his argument up to this appeal.

34. The evidence of PW4 corroborated the evidence of PW1 that she was defiled. The appellant was found to be in the company of the child that very evening and she was crying. The child's mother, PW2 was met by the appellant and the child. The child too stated that the appellant took her towards her home after defiling her and that is when they met her mother on the way. It was at that point that PW2 asked PW1 why she was crying and despite early resistance by PW1 to say because the appellant had told her not to reveal what had happened, PW1 told her mother what had happened. On hearing this, PW2 screamed attracting members of the public to gather and arrest the appellant who attempted to escape. PW2 was clear that when she went to look for the complainant, she saw the appellant and the complainant emerging behind the house and that the appellant was holding the complainant's hand. She explained that she talked to both of them and when the complainant explained to her what had happened, the appellant wanted to run away. She caught him and the commotion attracted the attention of the people who were nearby and after a short time, the Assistant Chief joined them and arrested the appellant.

35. PW3, the Assistant Chief, was at Misori beach when he received information that some people had surrounded a suspect of defilement. He rushed to the place and found the appellant, the complainant, her mother and other people. After being briefed, he arrested the appellant and escorted them to the Administration Police Camp.

36. I do not buy in the theory advanced by the appellant that he was arrested at his house after returning from the lake. He does not even state what time it was that he alleges to have returned from the lake and was arrested. Neither does this court believe the appellant's allegation that the complainant's mother coached her child to frame the case against the appellant.

37. The trial magistrate who had the advantage of hearing and seeing the complainant and her mother testify believed that they were telling the truth. He stated: ***"I am of the considered opinion that the evidence of PW1, PW2 and PW3 is well corroborated and the same clearly demonstrates that the appellant was arrested at the place they met with the complainant's mother and that he was not arrested from his house as he has alleged."***

38. The trial magistrate also critically considered both the prosecution evidence and the defence staged by the appellant and arrived at a conclusion that the prosecution witnesses were telling the truth as opposed to the defence. It is therefore not true as alleged by the appellant that the trial magistrate did not consider his defence in the judgment that convicted him.

39. The trial magistrate further observed as follows:

"I have considered the evidence of the complainant together with the defence staged by the accused person. I had the opportunity of observing the demeanour of the complainant during the testimony. I did not observe anything that would have suggested that she was not telling the truth. As such, I am of the considered opinion that it was the accused person who caused the penetration. From the foregoing, I am satisfied that the prosecution has demonstrated the essential elements of the offence of defilement."

40. I find no reason to differ with the findings and holding of the trial magistrate. I find and hold that the conviction of the appellant was sound and safe. I find that all the grounds of appeal as submitted on by the appellant are devoid of any merit. I dismiss them and uphold the conviction of the appellant by the trial magistrate.

41. On sentence, I note that although the section under which the appellant was charged provides for a maximum of life imprisonment upon conviction, the trial court in sentencing took into account the fact that the appellant was a first offender and his mitigations too were taken into account before sentencing him to serve thirty years imprisonment. That sentence is lawful and too lenient in my humble view. It requires no interference by this court. Accordingly, I decline to interfere with the sentence imposed on the appellant for defiling a 7 year old child. I uphold the sentence and dismiss the appeal against sentence.

42. On the whole, this appeal against conviction and sentence is dismissed.

Dated, Signed and Delivered at Siaya this 10th Day of February 2020

R.E. ABURILI

JUDGE

In the presence of:

Appellant in person

Mr. Okachi SPPC for the Respondent

CA: Brenda and Modestar