



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

HCCRA NO. 109 OF 2018

ERICK OMONDI OBUOGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence of the Principal Magistrate's Court at Maseno

(Hon. C. N. Oruo SRM) dated the 28th November 2018 in Maseno PMCRC No. 36 of 2018)

JUDGMENT

ERIC OMONDI OBUOGO was convicted for the offence of **Defilement** Contrary to **Section 8 (1)** as read with **Section 8 (4)** of the **Sexual Offences Act**.

1. The learned trial magistrate sentenced him to 15 years Imprisonment.
2. In his appeal, Erick Omondi Obuogo submitted that he ought not to have been convicted because the evidence of the Complainant was not corroborated at all.
3. In his view, there ought to have been some medical evidence connecting him to the offence. As no such evidence was tendered, the Appellant asked this court to quash his conviction.
4. Furthermore, the Appellant believes that the prosecution had failed to prove that there was any penetration.
5. The Appellant also submitted that the trial court failed to give consideration to his defence.
6. All the foregoing issues were embodied in the Petition of Appeal which the Appellant filed in court on 5th December 2018.
7. Thereafter, on 28th November 2019, the Appellant filed Amended Grounds of Appeal pursuant to **Section 350 (2) (v)** of the **Criminal Procedure Code**.
8. The said statutory provision provides an Appellant with an opportunity to amend his Petition of Appeal.
9. An application for leave to amend a petition of appeal may be made either at the hearing of the appeal or prior to the said hearing of the appeal.
10. When the application is made prior to the hearing of the appeal, it is to be made by way of a Motion, in open court.
11. In this case, the application was canvassed at the time of hearing the appeal.
12. Following the said application, the new grounds of appeal were set out by the Appellant, in the manner following;

“After fully been served with the trial court copy, I hereby embark in amending my earlier

lodged grounds of petition from the context or dissatisfaction and grievances to a humble mitigation (a prayer and request) prior to the sentence imposed of 15 years.

1. THAT, I pleaded not guilty due to shock and confusion.

2. THAT, I was an offender who came into conflict with the law for the first time (remorseful).

3. THAT, I was not in my right state of mind during the pleas agreement.

4. THAT, I was not aware of the dire consequences of the offence and thus under duress.

5. THAT, I am ready to adhere by any conditions set forth with thus just and fit.”

13. I have set out the amended grounds of appeal extensively because I am not at all sure whether or not the Appellant had decided to abandon his appeal against the conviction.

14. By saying that he pleaded not guilty because of shock and confusion, the Appellant might have been suggesting that he had originally intended to put in a plea of “Guilty”.

15. But when he later says that he was not in his right state of mind, I started asking myself if he was suggesting that the proceedings on the date when he took plea, were a nullity.

16. If, as the Appellant says, he was not aware of the dire consequences of the offence, I do not know whether he would have pleaded “Guilty”, if he knew the said consequences.

17. As the amended grounds of appeal appear to be somewhat jumbled-up, I will give due consideration to the substance of the submissions made.

18. I will also re-evaluate all the evidence on record and draw therefrom, my own conclusions.

19. Of course, I will bear in mind the fact that I did not have the benefit of observing the witnesses when they were giving evidence.

20. **PW1**, R, was the Complainant. She testified that the Appellant lived within the same village as her. She had known him even prior to the material day, and they used to talk.

21. **PW1** testified that the Appellant used to be helpful, as he had even treated the sister to the Complainant when she had broken her arm.

22. **PW1** described the Complainant as a person of a good character. That is why she believed that he would assist her financially, if she approached him.

23. When **PW1** asked him for some financial assistance, the Appellant said that he would give her Kshs 300/=.

24. The two of them walked along, together, heading towards the Complainant’s home.

25. However, upon reaching an area where there was sorghum farm, the Appellant stopped, and he told her to enter the farm.

26. When the Complainant refused, the Appellant held her hand, and forcibly got her into the farm.

27. It is inside the farm that the Appellant defiled her. And when the Complainant screamed for help, the Appellant held her by the neck, and also closed her mouth.

28. It was not until several hours later that the Appellant released her. And when she got home, the Complainant immediately informed her mother about what had transpired.

29. **PW2** is the Complainant’s mother. She arrived at their home at about 6pm, and found that the Complainant was not there.

30. Both **PW1** and **PW2** testified that the Complainant returned home at about 12.00 midnight.

31. Immediately, after the Complainant informed her mother about what had transpired, the mother escorted her to the hospital. They went to hospital using a motorcycle.

32. At the hospital, the Complainant was examined by a Senior Clinical Officer, Samuel Otieno Ongwech (**PW4**).

33. He found that the Complainant’s neck had mild swelling, which was consistent with strangulation.

34. In my considered opinion, that finding corroborated the testimony of the Complainant, when she had said that the Appellant held her by the neck when she had screamed for help.

35. PW4 testified that the Complainant's labia were massively swollen, reddish and very painful. Her right labia was bruised.

36. And inside her vagina, there was some discharge, consistent with semen.

37. In conclusion, the Clinical Officer testified that the;

“..... Inflammation, bruises, tenderness of the genitalia – forceful vaginal penetration, consistent with defilement.”

38. When the Appellant was put to his defence, he denied having committed the offence.

39. He said that the Complainant was forced by Aboy Okin, to press charges.

40. Having re-evaluated all the evidence, I find that the prosecution proved all the ingredients of the offence of defilement.

41. The age of the Complainant was proved through a Birth Certificate.

42. Penetration was proved through the P3 Form, the Post Rape Care Form and the Treatment Notes from the Kombewa County Hospital.

43. And the identity of the person who committed the offence was proved through recognition. Not only did the Complainant know the Appellant well, prior to the material day; she trusted him sufficiently that she sought financial assistance from him.

44. All this happened in broad daylight, when the Complainant walked together with the Appellant, in the belief that the Appellant was leading her to the place where he would give her the sum of Kshs 300/= which he had promised.

45. The Appellant submitted that there was no premeditation on his part. He said that there was no;

“..... substantial, orchestrated or intricate planning for the offence. In this case there was no such evidence. It appears, from the facts (that) I was under influence of either alcohol or some other drugs.”

46. However, the Appellant never raised any such defence during the trial. Bearing that fact in mind, the Appellant graciously stated thus;

“Even though this was not offered as a defence and it would not have risen to the level of diminishing my criminal culpability, it is a relevant factor to consider in sentencing, since it lowered the degree of blame.”

47. I find that the learned trial magistrate cannot be faulted for not taking into consideration a factor which was never drawn to his attention at the time of the trial.

48. If the Appellant deemed any such factor as relevant, it was his responsibility to bring it to the court's attention.

49. In any event, unless an accused person demonstrates that at the time he committed the offence he was so much under the influence of alcohol or drugs, that he did not understand the nature of his actions or that he did not know what he was doing, the defence of intoxication would not be available to him.

50. Furthermore, the defence of intoxication could only be available in limited circumstances, such as when one was charged with an offence in which one of the ingredients is the intention to commit the crime.

51. That therefore means that the defence of intoxication is available only in a very small category of cases, such as Murder, where mens rea is an ingredient.

52. There is also the need for an accused who put forward such a defence, to demonstrate that the intoxication was not voluntary.

53. It is difficult to visualize how a person who has committed a criminal offence can expect to be excused simply because he did so when he was intoxicated, yet it was evident that he had deliberately set out to get intoxicated either to get “Dutch courage” or to find an excuse for having committed the offence.

54. In this case, I find that the defence of intoxication was not available to the Appellant.

55. The Appellant invited this court to take into account the circumstances in which the offence was committed, and to reduce the sentence so that the same is proportionate to or commensurate with the nature and gravity of the offence, as well as the manner in which the offence was committed.

56. In principle, the courts ought to take into account factors such as those outlined above.

57. However, the starting point in the determination of the sentence most proportionate to the offence for which an accused has been convicted, is the statute.

58. The law makers have the mandate to determine what acts or omissions constitute a criminal offence; and they also determine the appropriate sentence for each crime.

59. Whilst the court may have the discretion in sentencing, such discretion can only be exercised within the confines of the law as laid down by the legislature.

60. In this case, I note that the Appellant betrayed the trust which the Complainant had in him. He took advantage of a young girl who believed that he would assist her.

61. To my mind, that is one of the relevant factors to be taken into account when handing down an appropriate sentence: and rather than being a factor in the reduction of the sentence, it could actually be the basis for a more severe sentence.

62. But I am also alive to the relatively small gap in the ages of the Appellant and the Complainant. He was 20 whilst she was 16.

63. I think that when the difference between the ages of the perpetrator and of the victim is relatively small, and if the offence was committed in circumstances in which it was consensual, although it should not excuse the offence of defilement, the court may take that factor into consideration during sentencing.

64. In this case, the learned trial magistrate did not give an elaborate explanation for the sentence, I note that he handed down the lowest sentence stipulated under **Section 8 (1) (4)** of the **Sexual Offences Act**.

65. I find no reason, in law, to reduce or to review the said sentence. I also find no reason, in fact, that would justify an interference with the discretion as was applied by the trial court.

66. In the result, the appeal is dismissed.

DATED, SIGNED and DELIVERED at KISUMU

This 5th day of **February** 2020

FRED A. OCHIENG

JUDGE