



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL APPEAL NO. 91 OF 2017

FREDRICK ONYANGO OUMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the judgment, conviction and sentence delivered in Siaya Principal Magistrate's Court Criminal (SO) case No 915 of 2016 by Hon. T. M. Olando, Senior Resident Magistrate on 26th September, 2017)

JUDGMENT VIA SKYPE

1. The appellant herein **Fredrick Ouma Onyango** was convicted of the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006. It was alleged that on the 24th day of September, 2016 at Asayi Sub location in Gem Sub County within Siaya County, he intentionally caused his penis to penetrate the vagina of VAO [full name withheld] a child aged 12 years. The appellant had been charged with the alternative charge of committing an indecent act with the same child for intentionally touching her vagina. He was however convicted on the main charge.
2. Upon conviction, the appellant was sentenced to serve 20 years which is the minimum under section 8(3) of the Sexual Offences Act.
3. Aggrieved by the said conviction and sentence, the appellant filed this appeal on 28th September 2017 acting pro se. later the appellant instructed counsel to represent him in this appeal and leave was granted by this court to file an amended appeal dated 9th January 2020.
4. In the initial appeal, the appellant claimed primarily that the trial court failed to find that Article 50(2) (j) of the Constitution was not complied during the trial.
5. In the amended appeal, counsel for the appellant set out the following grounds of appeal:
 1. The trial magistrate erred in law and fact by failing to ensure that the provisions of Article 50(2) (c) and (j) were complied with during the trial, a failure which rendered the judgment, conviction and sentence invalid, null and void because
 - i. The trial court did not inform the appellant of his right to be represented by an advocate and failed to ensure that the appellant was represented during the trial since he faced a serious charge attracting a minimum sentence of 20 years imprisonment upon conviction.
 - ii. The trial court failed to ensure that the appellant was supplied with, in advance the evidence that the prosecution intended to be relied on at the trial.
 2. The trial magistrate erred in law and fact when he convicted the appellant in the absence of any evidence direct or circumstantial, connecting the appellant with the alleged offence of defilement
 3. The trial magistrate erred in law or fact in convicting the appellant in the absence of any evidence of identification, considering the circumstances of the case, especially the time and manner of the appellant's arrest vis a vis the date the offence was allegedly committed
 4. The trial magistrate erred in law or fact in convicting the appellant when there was no sufficient evidence on record to support such conviction

5. The trial magistrate erred in law or fact in shifting the burden of proof to the appellant

6. The trial magistrate erred in law or fact in imposing upon the appellant a harsh and excessive sentence of 20 years.

6. This being a first appellate court, I must re assess and reevaluate the evidence adduced before the trial court and arrive at my own independent conclusion bearing in mind the fact that I neither saw nor heard the witnesses as they testified. See **Okeno v Republic [1972] E.A. 32.**

7. Revisiting the trial court record, PW1 testified on oath that on 24th September 2016, she had gone to attend a funeral at her maternal home so she left the complainant PW2 with other children at her matrimonial home. When she returned, she noticed the complainant bleeding and thought that the girl was in her menses. The following day, one Pamela went to the home of PW1 and told her to establish from the complainant what had happened to her. They called the complainant and on asking her of what had happened to her, the girl narrated that she had gone to the posho mill and on returning she met the appellant who accosted her and took her to the bush, removed her pant and defiled her. They escorted the complainant to hospital and reported the matter to the police. That the complainant described the appellant and the witnesses who saw her being defiled and one of them was Caren

8. PW1 stated that the complainant was born in 2004 hence she was 12 years old. She identified the P3 form and Laboratory tests report. She stated that she did not know the accused before that day and when they went to arrest him he was found at his home. She stated that the complainant had a problem talking and was not school going.

9. In cross examination the witness stated that there were children who witnessed the defilement and that they even chased the accused away.

10. PW2 Evaline Odhumo a Clinical Officer at Yala Sub County Hospital testified on oath and recalled that on 25/9/2016 she received the complainant who was in pain and limping with a history of being defiled and strangled and threatened not to disclose the ordeal to anyone. Her neck was swollen and her genitalia were painful on touch. Her genitals were hyperemic and that she had bruises and reddening on the labia. There were also bruises along the vaginal bonfil. There was also hymenal tag which was fresh as the hymen had just been broken. There was creamish whitish discharge on the genitalia which was foul smelling. The complainant had a black pant which had blood stains. Lab tests showed blood and epithelial cells and bruises on the vaginal wall. High vaginal swab revealed pus an indication of infection. HIV and pregnancy tests were negative. The clinical officer concluded that the complainant had been defiled in a period of less than 24 hours. Later on 28th September 2016 the Appellant herein was taken to the same hospital for examination. HIV and syphilis tests were negative he had normal external genitalia. The witness produced both the P3 form for the appellant and complainant as exhibits. She also produced the laboratory tests results for the complainant whom she stated had a downs syndrome.

11. The complainant gave evidence as PW3 without being sworn, after voire dire examination by the trial court. She stated that on 24/9/2016 she went to the posho mill at Jimba and on her way back she was accosted by the appellant who carried her like a child and took her to the bush then he removed her pant and tore it. He also removed his trouser and did something to her. She felt pain on her leg and hand and he touched her vagina. That she made noise then Glen went to where she was and chased the appellant and that the appellant ran away. She went and told F her sister as to what had happened as her mother was not at home. She was taken to hospital and to the police. She stated that she knew the appellant but not by name.

12. On being cross examined by the appellant, the complainant stated that the appellant had sex with her in the bush and that Glen went and chased the appellant. She stated that her mother had gone to a funeral.

13. PW4 No 50358 PC Wilson Kipyegon from Sirembe Police Station testified that on 25/9/2017 at about 10.00am he was at the office when he was called by an unidentified person saying that a suspect was being assaulted by members of the public. In company of CPL Wanjala the witness proceeded to the scene where he found the complainant and confirmed the report. They arrested the suspect and took the complainant to Yala Sub county Hospital, the complainant was issued with a P3 and the witness went back to the scene and established from witnesses that the appellant had defiled the complainant so he charged him with the offence. PW4 produced a Birth Certificate for the complainant as an exhibit.

14. In cross examination, PW4 stated that there was someone who found the appellant in the act and that the person had testified. He denied being bribed.

15. On being placed on his defence, the appellant stated that he wished not to give any evidence and the handwritten proceedings show that he also stated that he had no witness to call.

14. The appeal was canvassed by way of written submissions with Mr. Amuga Advocate appearing for the appellant whereas Mr. Okachi Senior Principal Prosecution Counsel represented the Respondent State.

17. According to Mr. Amuga, there was no sufficient evidence to link the appellant with the alleged defilement. He added that the Appellant was not arrested at the scene of alleged offence and the arresting officer stated that he was alerted about a person who was being mobbed on 25/9/2017. That the offence is alleged to have taken place on 24/9/2017. That although the complainant testified that she knew the appellant, she did not tell anybody as to who had defiled her. She only revealed the following day. She never described to her mother or the police the identity of her defiler.

18. Counsel submitted that the complainant suffers from downs syndrome which congers intellectual disability and cognitive deficit accordingly, he was of the view that the appellant should have been subjected to an identification parade to determine whether he could be identified by the complainant and the person who had as the person who defiled the complainant. It was submitted that the appellant was only identified in court and that Medical evidence did not connect the appellant with the offence.

19. The appellant's counsel further submitted that the person who allegedly chased the appellant from the scene of crime was never called to corroborate her evidence. He contended that in the absence of proper identification of the appellant, the conviction was completely unsafe.

20. On shifting of the burden of proof to the appellant it was submitted that the Trial Magistrate shifted the burden of proof when he stated that the appellant did not challenge the evidence of the prosecution. He relied on **Elkana Nderitu Maina v R [2018]e KLR** and urged the court to allow the appeal.

21. On ground No. 1 of failure to ensure that the appellant's right under **Article 50** was complied with, counsel submitted that Defilement is a serious offence. As such, the trial court should have notified him of his right to legal representation if he could afford or be afforded by the state. He cited the authorities filed and maintained that failure to comply with **Article 50** vitiates the trial.

22. On sentence, the appellant's counsel submitted that the trial magistrate did not seek for social inquiry report before imposing minimum sentence to a first offender. Counsel for the appellant urged the court to interfere with sentence should the other grounds of appeal fail.

23. In opposing the appeal, Mr. Okachi for the state submitted that the prosecution proved its case beyond reasonable doubt. On alleged violation of the appellant's right to a fair trial, it was submitted that the appellant did not raise any issue of legal representation.

24. That there is evidence that the offence took place against the victim who was able to describe to her mother and neighbor the appearance of the attacker, the day after the incident after her mother found her bleeding. That the victim had Down's syndrome but she described her attacker and how the incident took place and who did it leading to the neighbours looking for him and arresting him. That PW2 the Clinical officer also corroborated the victim's evidence.

25. Counsel submitted that this is a case where the appellant took advantage of the downs syndrome of the victim and defiled her assuming she would not say it. He urged the court to take into account the fact that the mental capacity of the victim could act against her unless the court is careful not to disadvantage her as she was defiled and deserves protection by the court being careful in evaluating evidence on record.

26. On social inquiry report, it was contended in submission that the court imposed sentence based on the fact that the appellant was a first offender. The court was urged to uphold the conviction and sentence.

27. In a brief rejoinder, Mr. Amuga submitted that the right to be informed of the right to legal representation is absolute. That the accused is a lay person so he need not have asked for it.

28. On medical evidence it was submitted that the Medical evidence says the victim was defiled but the only issue is whether the appellant is the defiler, as the victim never described the defiler to anyone. That the victim had no mental capacity to describe events and the appellant who was not arrested in the act or nearby should have been subjected to an identification parade and not a dock identification which is very dangerous.

DETERMINATION

29. I have considered the appeal herein, the evidence adduced before the trial court, the submissions by the parties counsel and authorities cited. In my humble view, the main issues for determination are:

1. Whether the appellant was positively identified as the perpetrator of the heinous act of defiling the complainant and Whether the prosecution proved its case against the appellant beyond reasonable doubt

2. Whether the appellant's rights under Article 50(2) (c) and (j) of the Constitution were violated

3. What orders should the court make

30. The undisputed facts as supported by the evidence on record are that the complainant was no doubt defiled on 24/9/2016 and that evidence of defilement was corroborated by the testimony of PW2 the Clinical Officer who examined the complainant on 25/9/2016 and confirmed that she had been defiled. She produced the P3 form, Laboratory and Tests report confirming the defilement of the complainant. The complainant's mother, PW1 also testified of how she had gone to a funeral and upon return she found the complainant bleeding and was told by Pamela to find out what had happened to the complainant. When the complainant was asked she stated that she had been defiled by the appellant herein.

31. The defence counsel does not dispute that fact and neither does any of the grounds of appeal challenge that fact of defilement. In addition, it is not in dispute that the complainant was aged 12 years as her birth certificate produced in evidence as exhibit confirm that she was born on 20th May 2004 and PW1 is shown as her mother.

32. The only issue is whether the appellant was the person who defiled the complainant. It was stated by PW2 that on 24th September 2016 she had gone for a funeral at her home and left the complainant behind with other children and that upon her return she learnt that the complainant had been accosted by the appellant on her way from the posho mill and defiled, and that the complainant who was her daughter had difficulties in speaking. Pw2 The Clinical Officer stated that the complainant had downs syndrome.

33. PW3 the complainant gave unsworn evidence after voire dire examination and stated that on 24th September 2016 she had gone to the posho mill and when she was returning the appellant whom she identified in court carried her as a child, took her to the bush and removed

her pant, tore it and removed his trouser and put his penis in her vagina and she felt pain and he also used his hand to and she screamed and Glen came. The appellant made noise Glen chased the appellant. That the complainant went and told her sister F of what had happened her, as their mother was away attending a funeral.

34. PW1 stated that Pamela told her to ask the complainant about what had happened to her. Pamela was never called as a witness on what she knew about the defilement and how she learnt about it. In addition, PW3 stated that the appellant was found in the act of defiling her by GLEN who chased the appellant. GLEN was never called as a witness to testify on what he saw.

35. The time of defilement was never stated by any of the four prosecution witnesses. Albeit section 143 of the Evidence Act does not oblige that the prosecution must call all witnesses who have information on the offence, and whereas in sexual offences, corroboration is not mandatory, however, in this case, it was clear that the complainant had a downs syndrome and difficulties in speaking. She also stated that she knew the appellant but not by name. PW1 the complainant's mother stated that she had never known the appellant before and that there were children who saw him defile the complainant. The investigating officer stated that there was an eyewitness who saw the appellant defile the complainant. In the absence of those witnesses who allegedly saw the appellant defile the complainant, and in the absence of evidence of whether the defilement took place during daytime or at night, it is difficult to reach a finding that the appellant herein was positively identified as the complainant's defiler.

36. I am in agreement with Mr. Amuga in his submissions that it was necessary to have a parade identification parade to determine whether the complainant who has a disability and who is said to have described the appellant leading to his arrest could identify her assailant. In the absence of an identification parade, the prosecution should have called GLEN who was mentioned by the complainant as the person who found the appellant defiling her and chased the appellant. There is no indication as to whether GLEN was a child or an adult and what time it was that he found the complainant being defiled. Further, there is no explanation why PAMELA, who told the complainant's mother that the complainant had a problem was not called to testify. The prosecution also failed to call F the sister to the complainant whom the complainant claims she told after being defiled. The prosecution did not endeavor to disclose the age of the said F and why she could not be called to testify. That failure by the prosecution to call those witnesses in my humble view, weakened the prosecutions' case. There are many loose ends in the evidence of the prosecution creating sufficient doubt on the identity of the defiler and it was not upon the appellant to fill those gaps as the burden of proof always lie with the prosecution to prove its case against an accused person beyond reasonable doubt.

37. On that ground alone I find and hold that the conviction of the appellant was unsafe and unsound.

38. On whether the appellant's right to legal representation was violated and whether his right to the statements of witnesses and documents intended to be used at the trial against him was violated, the trial record does not show that the appellant was supplied with witness statements or documents intended to be used at the trial by the prosecution. In addition, there is no evidence that he was asked to indicate whether he could afford an advocate for legal representation and in default then the court was bound to appoint a pauper brief advocate for the appellant. This is so because the appellant faced a serious offence whose minimum sentence upon conviction is 20 years imprisonment. Failure to accord the appellant legal representation violated his right to a fair trial. However, as I have already found that there was no watertight evidence that the appellant was positively identified as the person who defiled the complainant, I need not make a finding on whether the appellant should be retried or not.

39. I find this appeal merited on all fours. I allow it, quash the conviction of the appellant and set aside the 20 years imprisonment imposed on him.

40. Unless otherwise lawfully held, the appellant **FREDRICK ONYANGO OUMA** is hereby set at liberty forthwith.

41. Orders accordingly.

Dated, Signed and Delivered at Siaya this 5th Day of May, 2020 via skype due to the Covid 19 situation

R.E. ABURILI

JUDGE