



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CRIMINAL APPEAL NO. 105 OF 2015**

**(From Original Conviction and Sentence in Criminal Case No. 429 of 2014 by the Senior Principal Magistrate's Court at Mumias)**

**PATRICK NGOLO OKORO.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**JUDGEMENT**

1. The appellant was convicted by Hon SK Ng'etich, Senior Resident Magistrate, of attempted defilement contrary to Section 9(1) of the Sexual Offences Act No. 3 of 2006, and was accordingly sentenced to fifteen (15) years imprisonment. The particulars of the charge against the appellant were that on the night of 4<sup>th</sup> day of May 2014 at 4.00 pm at [particulars withheld] Village, Eshikalame Location, South Wanga Division, Mumias District of Kakamega Central District within Kakamega County he intentionally attempted to cause his penis to penetrate the vagina of FW, a child aged 3 years.

2. He had also faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006. The particulars of the alternative charge were that on the same date and at the same place stated in the main count, he had intentionally caused his penis to come into contact with the vagina of the subject child.

3. The appellant pleaded not guilty to the charges before the trial court, and the primary court conducted a full trial. The prosecution called five (5) witnesses.

4. CNO, the mother of the complainant, testified as PW1. She explained how the complainant reported to her about having been defiled by the complainant and the steps she took thereafter, until she took the child to the police and to hospital. The complainant testified as PW2, and gave an unsworn statement. She identified the appellant as the person who did bad things to her. Administration Police Officer Simon Tabu Abiyo (PW3) and Corporal Morris Otieno, were the police officers who handled the matter, took the complainant to hospital, and later apprehended the appellant. Albert Dome (PW4) was the clinical officer who attended to the complainant and prepared the Police Form 3 which was put in evidence. He stated that she was brought in sick looking and walking with difficulty. She had a creamy white discharge around her vulva area. There was tenderness on her external genitalia. She had no bruises and her hymen was intact but there was a foul smell from her external genitalia. She had bacterial infection. He had also examined the appellant, and found that he too had a bacterial infection.

5. The appellant was put on his defence. He gave a sworn statement and called on witness, Martin Sakani (DW2). He denied the offence. He explained how he had spent his time on the material day, which testimony was supported by DW2, who stated that he spent the whole day with him.

6. After reviewing the evidence, the trial court convicted him of the main charge, and sentenced him to fifteen (15) years imprisonment.

7. Being dissatisfied with the conviction and sentence the appellant appealed to this court and raised several grounds of appeal. He averred that the evidence was not corroborated, the evidence of the doctor was not in tandem with that of the arresting officer, no tests were done to identify the person whose sperms were found on the underwear placed before the court, the court did not consider whether or not the alleged sperm marks were real, the court shifted the burden of proof to him and did not consider his defence, and that the sentence imposed was harsh.

8. Being the first appellate court, I have re-evaluated all the evidence on record. I have drawn my own conclusions, whilst bearing in mind the fact that I did not have the benefit of observing the witnesses as they testified. The Court of Appeal's decision in the case of ***Okeno vs. Republic (1972) EA 32*** has consistently been cited on this issue. In its pertinent part, the decision is to the effect that:-

*“An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own*

*conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."*

9. The appeal was canvassed on 11<sup>th</sup> October, 2018. The appellant relied on written submissions that he placed before me, while Mr. Juma, Prosecution Counsel, informed the court that he was relying on the evidence on record to oppose the appeal.

10. The appellant's submissions did not revolve around the issues raised in his grounds of appeal, but I shall consider all the issues raised in both the petition of appeal and in the submissions.

11. The first issue raised in the petition is that the evidence was not corroborated and therefore it was of no probative value. It is not clear to me which evidence is said to be uncorroborated. However, the law requires that evidence of a sexual offence victim be corroborated. The complainant, PW2, a child of about three years, talked of how the appellant did bad manners to her. PW1, her mother, noted that she was walking with difficulty, she examined her and found her vagina opening reddish in colour and with whitish substance around her vulva and then she took her to the police and to hospital. The police officers (PW3 and PW5) did not examine PW2 nor interview her, but received the report from PW1, and their narration of what she told them was consistent with what PW1 told the court. They also narrated about the findings of the clinical officer (PW4). Again, their testimonies on the findings and conclusions of PW4 were consistent with the testimony of PW4. I have carefully perused through the testimony of PW4 and I find that it is consistent what that of PW1. I do not find any merit in the submission by the appellant that the evidence of PW2 had not been corroborated and was lacking in probative value. I am satisfied that the testimony of the complainant had been corroborated by the other witnesses.

12. On the under wear put in evidence, alleged to be that of the appellant, I find that the trial court did not place any reliance on the said underwear and the sperms alleged to be on them. Nothing therefore turns on this ground.

13. The appellant alleges that the trial court shifted the burden of proof on him, yet he has not in any way demonstrated in what respects the trial court did that. He submits that his sworn defence was not considered. Looking at the judgment, I note that the trial court did consider the defence but concluded that the same had been displaced by the prosecution evidence. On the severity of sentence, I note that section 9(2) of the Sexual Offence Act provides for a minimum sentence of ten (10) years. The court considered the circumstances, and in particular the fact that the victim was an infant of three years to impose the sentence. The trial court cannot be faulted in that score.

14. In the written submissions, the appellant raises the issue of fair trial principles. He argues that he not was subjected to a fair trial in that he was not afforded adequate time and facilities to prepare his defence and he was not informed in advance of the evidence the prosecution was to rely on and was not allowed reasonable access to it. He has not pointed to any requests that he made to the trial court with regard to the two items and the court turned him down. He did not raise those issues at trial, and there is nothing on record that the court denied him time and facilities to prepare his defence, neither did the trial court decline to have him given access to the prosecution evidence. The record reflects that on 1<sup>st</sup> July 2014 the matter was adjourned because he had not received copies of the statements, but when the hearing resumed on 13<sup>th</sup> August 2014 he indicated that he was ready. That would suggest that the prosecution had availed the statements that had occasioned the prior adjournment. I do not think that anything turns on this ground.

15. On what he submits to be doubtful evidence, I wish to reiterate that the evidence of PW1 and PW4 was consistent. None of them testified that the child had lost her virginity during the ordeal. PW1 only talked of observing reddishness around her vaginal opening. The reference to *dudu* by PW2 should be understood in the context of children of PW2's age. She was obviously not talking about insects, but both her genitalia and that of the appellant.

16. Having considered all the issues raised in the appeal, I am of the considered view that the conviction of the appellant in Kakamega CMCCRC No. 429 of 2014 was safe. I shall accordingly disallow the appeal, uphold the said conviction and confirm the sentence imposed.

**PREPARED, DATED AND SIGNED AT KAKAMEGA THIS 31<sup>ST</sup> DAY OF JANUARY, 2019**

**W. MUSYOKA**

**JUDGE**

**DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 7<sup>TH</sup> DAY OF FEBRUARY, 2019**

**J. NJAGI**

**JUDGE**