



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. 45 OF 2018

BETWEEN

NOAH OKOTH ODHIAMBO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence in Criminal Case Number 548 of 2015 in the Chief Magistrate's Court at Kisumu by Hon. M.Agutu (RM) on 17.4.18)

JUDGMENT

Background

1.The Appellant herein **NOAH OKOTH ODHIAMBO** has filed this appeal against conviction and sentence on a charge of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006 (hereinafter referred to as **the Act**). The particulars of the main count are that

On 5th September, 2015 at Nyamasaria Area in Kisumu East within Kisumu County unlawfully and intentionally caused his genital organ namely penis to penetrate the genital organ namely vagina of A.A.O a girl aged 8 (eight) years

The appellant was also charged with an alternative count of indecent act with a child contrary to section 11 (1) of **the Act**.

Prosecution case

2. The prosecution called a total of seven (7) witnesses in support of its case. PW1, the complainant, recalled that on the material date, she and her brother JO boarded the Appellant's motor cycle. She stated that J alighted at some junction and she and the Appellant went to watch video, later went to Appellant's house where they had a meal after which the Appellant took her to a bush defiled her, and abandoned her there. PW2 J O, the complainant's brother aged 6 years told court that he and complainant boarded the Appellant's motor cycle but the Appellant dropped him on the way and went away with the complainant. PW3 MA, the complainant's mother testified that he allowed the Appellant to take complainant and PW2 home on his motor cycle but that she later arrived home to find PW2 who told her that the Appellant had gone away with the complainant. It was her testimony that the following day, she found the complainant admitted at Jaramogi Oginga Odinga Hospital (Russia) where she had been taken by a police officer that rescued her from a bush. PW4 H O O the complainant's father told court that complainant was born in January 2007 and PW2 in September, 2009. He also recalled that he found his daughter admitted in hospital on 6.9.18 and learnt that she had been defiled. PW5 Morris Ojwang Nyanga, assistant chief Kanyakwar town location arrested the Appellant on 14.9.18 after he was identified by PW2 as the one that defiled the complainant. PW6 Dr. Brenda Omondi, examined complainant on 15.9.18 and found her with a perineum tear that was healing and inflamed labia and fluid on the labia. She also had injuries to the neck and chest. She formed an opinion that the child had been defiled. She produced complainant's and Appellant's P3 forms as PEXH. 2 (a) and (b); Post Rape Care Report as PEXH. 3 and theatre notes as PEXH. 4. PW7 Senior Sergeant Simon Cheruiyot, the investigating officer stated that the Appellant was arrested on 15.9.18 and was charged with defilement. He produced the complainant's immunization card which shows she was born on 1.1.07 as PEXH. 1.

3. At the close of the prosecution case, the appellant was ruled to have a case to answer and was placed on his defence. The Appellant stated he was a bodaboda rider. He stated that he was arrested by PW5 on 4.9.18 at a garage where he had taken his motor cycle for repairs and was taken to the police station and charged with offences that he denied committing.

4. *In a judgment dated 17.4.18, Appellant was convicted and sentenced to life imprisonment.*

The appeal

5. Aggrieved by this decision, the appellant lodged the instant appeal on 3rd May, 2018. From the 4 grounds in the amended petition of appeal and written submissions both filed on 28th February, 2019, the appellant's raises the following issues for determination.

1) Charge sheet was defective

2) Breach of his right under Article 49(1)(f) of the Constitution

3) Violation of Section 19 of the Oaths and Statutory Declarations Act

4) Contradictions in the prosecution case

6. When the appeal came up for hearing on 28th February, 2019, appellant chose to wholly rely on the amended grounds of appeal and also on his written submissions in which he reiterated the grounds of appeal.

7. Ms. Gathu, Learned Counsel opposed the appeal on the ground that the prosecution had tendered evidence that appellant had defiled the complainant who was 8 years old. It was argued that Appellant was with complainant for a considerable length of time and there was no possibility of mistaken identity. The state also urged the court to find that the evidence by PW2 and PW3 corroborated the complainant's evidence that Appellant carried her on a motor cycle and later defiled her. The court was also urged to find that the charge sheet was not defective, that there were no contradictions in the prosecution case and that penetration was proved by way of a P3 form.

Analysis and Determination

8. In a more recent case of *Collins Akoyo Okemba & 2 Others vs Republic [2014] eKLR*, the Court of Appeal stated as follows on the duty of the first appellate court:

"It is a duty to re-evaluate, re-analyze and re-consider the whole evidence in a fresh and exhaustive way before arriving at its own independent decision."

9. I have considered the appeal in the light of the evidence on record, the amended grounds of appeal and submissions by the appellant and for the state. In dealing with this appeal, I will separately deal with the grounds of appeal stated herein above *vis a vis* the evidence on record.

Was Charge sheet was defective

10. The Appellant argues that the charge sheets states that he was arrested on 15.9.18 whereas the P3 forms shows that's he was arrested on 6.9.18.

11. A dispute arises between the evidence by PW5 Morris Ojwang Nyanga who stated that he arrested the Appellant on 14.9.18 whereas Appellant stated that he was arrested on 4.9.18 and was in custody on 5.9.18 when the offence was committed. The investigating officer stated that the Appellant was arrested on 15.9.18 as shown on the charge sheet.

12. The prosecution case that the Appellant was not in custody when the offence was committed is corroborated by PW5 and the investigating officer. The date appearing on the P3 form as 6.9.18 is the date the offence was reported to the police and not the date of arrest.

Was Article 49(1)(f) of the Constitution breached

13. Article 49 (1) provides that ***an arrested person has the right***

(f) to be brought before a court as soon as reasonably possible, but not later than—

(i) twenty-four hours after being arrested; or

(ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day

14. There is evidence that appellant was arrested either on 14.9.18 which was a Friday or 15.9.18 which was a Saturday. The Appellant was arraigned in court on Monday 17.9.18. There was no delay in arraigning Appellant before the court and Article 49(1) (f) of the Constitution was not breached.

Was Section 19 of the Oaths and Statutory Declarations Act complied with

15. Section 19 of the Oaths and Statutory Declarations Act Cap 15 of the Laws of Kenya provides that:

19(1) Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an

oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section.

16. Under section 19 of Cap 15 of the Laws of Kenya, the trial court must be severally satisfied **1) whether the child understands the nature of an oath; or 2) if the child, in the opinion of the court does not understand the nature of an oath, whether the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.** The inquiry should graduate to the second level if the child does not understand the nature of the oath; then the trial court should determine if he possesses sufficient intelligence to justify the reception of the evidence, and he understands the duty of telling the truth. It is only after the said inquiry has been conducted that the testimony of a child of tender age is received in evidence either under oath or as unsworn statement. In both instances, the child is liable to cross-examination.

17. I must discern from the record whether the trial magistrate complied with section 19 of Cap 15 of the Laws of Kenya. The reason why this question is of preliminary importance is because courts have emphasized that non-compliance with the requirements of section 19 of Cap 15 of the Laws of Kenya will result into quashing of a conviction unless there is other evidence before the court which is sufficient on its own to sustain a conviction. (See the case of **Nyasan S/O Bichana v Republic [1958] EA 190**).

18. In the instant case, two children complainant (PW1) and PW2 were called as witnesses by the prosecution. The court conducted *voire dire* of PW1 as follows:

“I am A.A. I live in [particulars withheld], I live with my parents. My mother is called M A and my father H O. I am 7 years old. I do not go to school. I know it is evil to tell lies. I will state the truth.

19. The record of the trial court shows that the magistrate clearly recorded the *voire dire* examination of the complainant. The information given by the child is in the nature of answers which I presume were elicited by question asked by the magistrate. The trial magistrate then recorded, in no uncertain terms, that she was satisfied the child was intelligent enough to testify but she would give unsworn statement. Although the trial magistrate did not specifically record a finding that the child understood the duty of speaking the truth, the record is clear on that matter, as it is borne out from what the child stated that: **“... I know it is evil to tell lies. I will state the truth”**.

20. From the foregoing, I am satisfied that the trial magistrate fully complied with the requirements of section 19 of Cap 15 of the laws of Kenya by making a specific finding on the matter before receiving the evidence of the complainant. The argument by the Appellant, therefore, fails.

21. No *voire dire* was conducted before the evidence of PW2 was taken. Although the evidence by PW2 is of no probative value, complainant’s evidence that she and PW2 boarded Appellant’s motor cycle on the material date is corroborated by their mother PW3.

Were there contradictions in the prosecution case

22. The appellant argues that the complainant was taken to hospital nine days after the alleged offence was committed.

23. I have considered the evidence on record. Post Rape Care Report as PEXH. 3 was filled on 5.9.18. The theatre notes PEXH. 4 show that the complainant underwent corrective surgery on 6.9.18. Although complainant’s P3 form PEXH. 2(a) was filled on 15.9.18, there is evidence that she went to hospital long before then. The Appellant’s argument that complainant was taken to hospital 9 days after the offence was committed therefore fails.

Disposition

24. *Having considered the evidence in its totality*, I am satisfied that the appellant was convicted on sound evidence. Accordingly and for the reasons set out hereinabove, this appeal is dismissed and the conviction and sentence imposed on the appellant upheld. It is so ordered.

DELIVERED AND SIGNED AT KISUMU THIS 7th DAY OF March 2019

T. W. CHERERE

JUDGE

In the presence of-

Court Assistant - Felix

Appellant - Present in person

For the State - Ms Gatho