



REPUBLIC OF KENYA

CORAM: R.E. OUGO J

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 22 OF 2018

RICHARD ODHIAMBO OCHWEDA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence from Kilgoris Senior Resident Magistrate's Court in Criminal Case No. 245 of 2015 delivered by Hon. D.K. Matutu SRM dated 26th March 2018)

JUDGMENT

1. The appellant **Richard Odhiambo Ochweda** was charged with the offence of defilement contrary to **Section 8(1)** as read with **Section (3)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of the charge were that on 1st March, 2015 in Transmara West District within Narok County he intentionally caused his penis to penetrate the vagina of SN a girl aged 14 years. In the alternative, the appellant was charged with committing an indecent act with a child contrary to **section 11 (1)** of the **Sexual Offences Act**. It was alleged that on 1st March, 2015 in Transmara West District within Narok County he intentionally touched the vagina of SN a child aged 14 years with his penis.

2. The appellant was convicted on the main count and sentenced to serve 20 years' imprisonment. He has now preferred this appeal against the decision of the trial court. He filed his written submissions condensing his petition of appeal into the following grounds:

- a. The learned trial magistrate erred in law and in fact by failing to appreciate that the evidence on record was not watertight enough to warrant a conviction ;
- b. The learned trial magistrate erred in law and in fact by convicting the appellant without sufficient evidence on record;
- c. The learned trial magistrate erred in law and in fact by relying on evidence which was not corroborated and lacked probative value and therefore unsafe for a conviction ;
- d. The learned trial magistrate erred in law and in fact by failing to appreciate that in the case of indecent act, the complainant must demonstrate the accused's act; and
- e. The learned trial magistrate erred in law by relying on the evidence partly recorded by another magistrate in convicting the appellant without adhering to the provisions of section 200 of the Criminal Procedure Code thereby causing prejudice to the appellant.

3. In response, Counsel for the state submitted that the complainant, who was aged 14 years at the material time, had identified the appellant as the teacher who had taken her to a secluded area of the school and defiled her. PW 2 had seen PW1 after she had been with the appellant and PW 6 had given medical evidence confirming that the complainant had been defiled. He opposed the appeal stating that the appellant had been correctly convicted for the offence of defilement and urged the court to affirm the sentence.

4. This is a first appeal and therefore this court has the duty to re-evaluate all the evidence given at trial and come to its own independent conclusions being aware that it never saw nor heard the witnesses testify and therefore, it must make due allowance for that. (See **Okeno v R [1972] EA 32**).

5. The prosecution called 8 witnesses in support of its case whereas the appellant gave sworn testimony in his defence. The complainant (PW1) testified that she was in school and was going for supper on that Sunday evening when at about 7:00 p.m. the appellant sent PW 6 to call her and asked her to meet him near the dining hall which she did. Later when she returned to check the timetable, the appellant asked her to go with him to the garden. He told her that he loved her and forcefully kissed and touched both of her breasts. He then asked her to lie

down. She removed her pants and the appellant lay on her and in PW 1's words the appellant "did sex" to her. She testified that she was lying down facing up with her legs apart, while the appellant was facing down. She told the court that the appellant had sex with her for about four minutes. She asked him to let her leave as she had had enough. She testified that she met PW 2 on her way back and was later called by PW 3 who asked her where she had been. She told PW 3 that she had been in the garden with the appellant. The next day, the police and chief arrived at her school. She was taken to Kilgoris police station to write her statement and was later taken to Transmara district hospital for examination. She testified that it was her first time to having sex with the appellant but on cross examination, stated that she had told PW 5 that she had sex with the appellant on 25th February, 2015 when her class had gone for a tour in Nairobi.

6. PW 2 testified that on 1st March 2015, he went to take a roll call at about 7:30 p.m. and noted that the complainant was not in class. He questioned PW5 and another classmate about her whereabouts. They were reluctant at first but then wrote on a piece of paper that the complainant was in the company of the appellant in the garden within the school compound. He headed towards that direction and met the complainant coming back. He stated that he had proceeded to report the matter to PW 3 which was taken up by the administration.

7. PW3, the deputy head teacher, recalled receiving information that the complainant was missing from class. After preps, she called the complainant and interrogated her. She testified that the complainant told her that the appellant had asked her to go with him to the school garden and had wanted to have sex with her. PW3 informed the head teacher about the incident and the following morning, they took the complainant to hospital and reported the matter to the police station. She stated that the appellant had been working at the school for less than a year and denied having any grudge with him.

8. PW4 testified that the complainant who was her desk mate had asked her to lend her with her torch on the night in question but did not tell her where she was headed. Their class teacher PW 2 asked them to search for the complainant but they did not find her.

9. On her part, PW 5 told the court that on 28th February, 2015 the complainant confided in her that the appellant asked her to meet him after lessons and that he had wanted to kiss the complainant but she refused. On the night in question, PW 5 testified that the complainant went missing at about 8:00 p.m. She and PW 4 looked for the complainant but did not find her. She testified that they reported the matter to PW 2 who also went in search of the complainant. When the complainant came back to class they were both summoned by PW 3 and questioned. The complainant confessed that she had been with the appellant at the school farm.

10. The investigating officer, PW 7, stated that he recorded the complainant's statement and escorted her to the hospital for examination. He obtained the complainant's birth certificate which he produced as evidence. He then visited the school, recorded the statements of all witnesses and had the appellant charged with the offence.

11. The clinical officer, PW 8, testified on behalf of his colleague Festus Kurgat whom he had worked with for 5 years. He stated that on examination, the complainant's genitalia were reddish and hypermic with a whitish discharge. A few pus cells were seen on conducting a high vaginal swab. The pregnancy test and HIV test came up negative. It was concluded that the complainant had been defiled.

12. In his defence, the accused stated that he was summoned by the head-teacher in the middle of his lesson and informed that the school was overstaffed and his services discontinued. He stated that he asked for his salary but was informed that there was no money to clear it. He was adamant that he be paid upon which the director of the school called the area chief and two administration police officers who hand cuffed him without a word. The appellant maintained that he was innocent of the charges he faced.

13. From the memorandum of appeal, the record of appeal and the parties' submissions, the issues arising for determination are:

- a. Whether the prosecution proved the case against the appellant beyond reasonable doubt;
- b. Whether the trial magistrate paid due consideration to the appellant's defence; and
- c. Whether the provisions of section 200 of CPC were adhered to.

14. On the first issue, the appellant argued that the evidence on record was contradictory and was not adequately corroborated for a safe conviction. The appellant contended that the complainant did not describe the act of penetration and had not checked her vaginal area after the incident. She had also not testified that she had difficulty in walking and told PW 4 that the appellant had "wanted" to have sex with her. The appellant also pointed out that the complainant had initially stated that she was a virgin but on cross examination by the appellant she admitted that a week prior to the incident, she had had sex with the appellant. He questioned the reliability of the evidence given by the complainant who had been described by her friend PW 5 as cheeky. The appellant contended that the trial court in a bid to clarify PW 1's testimony had asked her questions and had not accorded the appellant an opportunity to cross examine the witness on those issues.

15. The appellant further submitted that the medical evidence did not confirm penetration. He argued that the pus and epithelial cells that had been observed suggested a urinary tract infection and that it was not possible for them to have developed at such a short time. The appellant contended that this being her first time having sex, it was expected that the complainant would have experienced tenderness, lacerations, a broken hymen and the presence of blood. These had not been proved hence there was no proof of penetration.

16. The appellant was charged with the offence of defilement contrary to **section 8(1)** as read with **section 8(3)** of the **Sexual Offences Act** which provide:

8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement;

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years;

17. The prosecution was required to prove the age of the child, the identity of the perpetrator and the fact of penetration of the child by the perpetrator. The age of the child was not in dispute, what is strongly contested is whether the appellant defiled the complainant.

18. The prosecution's case against the appellant is that the appellant, who worked as a teacher in the boarding school where the complainant studied, sent PW 6 to call the complainant that evening. PW 2 noticed her absence as he was taking a roll call of the students at about 7:30 p.m. and inquired about her from her classmates. He sent PW 4 and PW 5 to look for her. PW 4 testified that the complainant had asked her for her torch but did not divulge where she was headed. As for PW 5, she testified that the complainant had confided in her that the appellant had once before met her at night and had told her that he loved her. She also confirmed that on the material night, the appellant had gone missing from 8:00 p.m. to about 9:00 p.m. and that she and PW 4 had unsuccessfully tried to locate her. PW 2 stated that on the suggestion of the complainant's classmates, he had proceeded to the garden and had met the complainant returning from that direction. He did not see the appellant who was not on duty that evening but testified that the appellant lived within the school compound.

19. The complainant told the court that the appellant had called her and defiled her in the school garden. She described how the appellant had lain on her and had sex with her. When cross examined by the court, the complainant stated as follows:

"He did sex to me. His stomach touched my stomach. His penis touched my vagina. I felt the penis on my vagina. I could not feel it in me. That is all."

20. PW 8, the clinical officer, produced the P3 form which had been prepared by his colleague in accordance with **section 77** of the **Evidence Act**. The conclusion of the medical officer was that there was proof of penetration having observed that the labia were reddish and hyperemic with whitish discharge. A high vaginal swab also revealed a few pus cells.

21. In this case, the prosecution relied on circumstantial evidence and medical evidence to corroborate the testimony of the complainant. PW 2 testified that the appellant lived within the school compound. The testimony of PW 6 placed the appellant in the school environs at the time the crime was committed. His testimony that the appellant sent him to call the complainant buttressed the complainant's claim that she had been with the appellant at the material time.

22. The medical evidence presented by PW 8 further confirmed the complainant's testimony that she had sexual relations with the appellant. The Act defines penetration to mean *the partial or complete insertion of the genital organs of a person into the genital organs of another person*. It was not necessary to show that the complainant was bruised or had lacerations or had a freshly broken hymen as even the slightest penetration of the genitalia, which was proved by medical evidence in this case, could suffice. (See ***Erick Onyango Ondeng V. Republic Criminal Appeal No. 5 of 2013 [2014]***)

23. The appellant challenged the examination of the complainant by the court stating that the appellant was not given the opportunity to cross examine the complainant on those facts. **Section 150** of the **Criminal Procedure Act** gives the court wide discretion to examine any person in attendance. It provides:

150. A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:

Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness.

24. In my view the appellant was accorded sufficient opportunity to cross examine the complainant and was not prejudiced by the court's exercise of its discretion to examine her and seek better particulars. I therefore find no reason to interfere with the court's discretion.

25. As for the complainant's evidence, it is not in doubt that she initially stated that she had not had any sexual relations with the appellant and that the appellant had not pursued her prior to that incident. It however emerged from her cross examination and from the testimony of PW 2, PW 5 and PW 7 that there was a possibility she could have had prior sexual relations with the appellant. It is trite that a witness upon whose evidence it is proposed to rely upon should not create an impression in the court's mind that the person is not a straight forward person. (See ***Ndungu Kimani vs. Republic (1979) KLR 282***). The court must also consider whether the discrepancies in the witness' evidence were so fundamental as to cause prejudice to the appellant or whether they were inconsequential to the conviction and sentence of the appellant. (See ***Joseph Maina Mwangi –Vs- Republic Criminal Appeal No. 73 of 1992***)

26. In this case, I find that though there were contradictions in the complainant's evidence, it did not diminish her case against the appellant which was adequately corroborated. The courts have held that a case of defilement can be proved by way of circumstantial evidence, oral evidence, or medical evidence and therefore there was sufficient. (See ***Fappyton Mutuku Ngui v Republic Criminal Appeal No. 32 of 2013 [2014] eKLR***; and ***Kassim Ali v Republic Criminal Appeal 84 of 2005 [2006] eKLR***)

27. The chain of events in the evidence presented by the prosecution was strong to rebut the defence of innocence raised by the appellant. It was proved beyond reasonable doubt that on that fateful evening the complainant was not in class as she should have been having been summoned by the appellant who lived within the school's compound. Medical evidence also supported the complainant's testimony that she had been defiled by the appellant.

28. On the second issue, the appellant argued that his defence that he had been falsely implicated for the offence due to his refusal to accept retrenchment without payment of his salary had not been exhaustively analysed by the trial court. The appellant challenged the prosecution's failure to call the chief to testify. He submitted that the fact that he was arrested from school showed that he had no reason to run away.

29. In rejecting the appellant's defence, the trial court weighed it against the prosecution's case and found that the defence could not rebut the prosecution's case. The trial court found that the case could not have been fabricated by the school administration to get away without paying a month and a half's salary if at all it was owed to the appellant. There was therefore no basis for the contention that his defence was not considered. It was also upon the prosecution to call the number witnesses it believed would prove the facts of its case. The chief's evidence would not have advanced the prosecution's case as he would merely have reiterated what the rest of the prosecution witnesses had told him.

30. The appellant also contended that the trial magistrate had not adhered to section 200 of CPC of the Criminal Procedure Code occasioning the appellant prejudice. He argued that the magistrate who had written the judgment did not observe the demeanour of the witnesses and if he had done so, he would probably have reached the conclusion that the prosecution had not proved its case beyond reasonable doubt.

31. An analysis of the record shows that the matter was heard by Hon. A.K. Mokeross S.R.M. before it was taken over by Hon. D.K. Matutu SRM. The proceedings show that the appellant's right to have the matter start de novo were explained to him, upon which he elected to have the matter proceed from where it had reached. I therefore reject the appellant's argument that section 200 was not adhered to untenable. The trial court performed its duty to inform the appellant of his rights to have the matter start de novo. The court was not obliged to start the matter afresh especially after the appellant had chosen to proceed from where the matter had reached. (See *Abdi Adan Mohamed V Republic Criminal Appeal No. 1 of 2017 [2017] eKLR* and *Ndegwa -Vs Republic (1985) eKLR 534*)

32. I am satisfied that the appellant was properly convicted of the offence of defilement contrary to **section 8(1) as read with section 8(3)** of the **Sexual Offences Act**. The sentence of 20 years' imprisonment is upheld as it is the minimum prescribed by law for defilement of a child aged 14 years. The appeal is accordingly dismissed.

Dated, signed and delivered at Kisii on the 3rd day of **April 2019**.

R.E.OUGO

JUDGE

In the presence of;

Appellant In person

Mr. Otieno Senior Prosecution Counsel Office of the DDP

Rael Court clerk