



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. 66 OF 2018

BETWEEN

ENOCH OCHANGO MUNGAO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against judgment, conviction and sentence dated 07.06.18 imposed by Hon. R.S.Kipngeno (SRM) in Maseno Criminal Case Number 445 OF 2013)

JUDGMENT

Background

1. The Appellant herein **ENOCH OCHANGO MUNGAO** 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**) which was allegedly committed on 15th May, 2013 against SE a girl aged 11 (Eleven) years The appellant was also charged with an alternative count of indecent act with the same complainant contrary to section 11 (1) of **the Act**.

2. *In a judgment dated 07.06.18, the Appellant was convicted for the offence of indecent act with a child and was sentenced to 10 years imprisonment.*

3. Aggrieved by this decision, the appellant lodged the instant appeal on 20th December, 2018. From the 4 grounds in the amended petition of appeal and written submissions both filed on 1st April, 2019, the appellant's raises the two main issues for determination.

1) Whether prosecution case was proved

2) Whether the defence was considered

4. At the hearing, Mr. Nyanga for the Appellant relied on the written submissions. It was submitted that the evidence in the medical report that the complainant's hymen was missing was not conclusive evidence that she was defiled. It was contended that the complaint was reported 10 days and that there was inconsistency regarding the time of the offence and that this raised a doubt as to whether complainant was defiled. The state was faulted for not calling as a witness a teacher to whom the complaint was first made whereas the court was faulted for allegedly not considering the Appellant's alibi.

5. Mr. Muia, Learned Counsel for the State opposed the appeal on the ground it was proved that the Appellant who was known to the complainant had indecently assaulted her and further that her age was proved by the evidence of her mother.

Analysis and Determination

6. 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.”

Prosecution case

7. **PW1, SE** the complainant, aged 11 recalled that on 15th May, 2013, she and J.I were going to school through a route that passes near the Appellant's house when he called them and asked them to collect firewood for him. It was her evidence that when they took the firewood inside, Appellant called her to his bedroom and JI went away and it was then that the Appellant defiled her after which he gave her 8/- and let her go. It was her evidence that she reported the matter to her teacher the following day and she in turn informed her mother who escorted her to the police station and also to hospital.

8. **PW2, JI** aged 12 similarly told court that the Appellant asked her and the complainant to collect firewood for him and that when they took it inside, the Appellant asked her to leave and he was left with the complainant.

9. **PW3 John Shigali**, a clinical officer filled complainant's P3 form dated 22.5.13 on the basis of treatment notes dated 21.5.13 which show her hymen was missing. He produced complainant's treatment notes and P3 forms as PEXH. 1 and 2 respectively.

10. **PW4 MH**, the complainant's mother testified that complainant was born on 24.2.02 as shown on the immunization card PEXH. 3 and baptism card PEXH. 4. She testified that upon receiving a report from complainant's teacher that complainant had been defiled, she interrogated complainant who informed her that the Appellant had asked her and another girl to collect firewood for him and that complainant was defiled when she took the firewood inside the house. It was her evidence that she escorted the complainant to hospital on 21.5.14 and later reported the matter to the police.

11. **PW5 SGT LYDIA MIGOVI**, the investigating officer received complaint from PW4 that complainant had ben defiled, arrested the Appellant and charged him with defilement.

12. 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 denied the offence and stated he was at home with one Wycliffe Muyela who was cutting firewood for him on the material day. Wycliffe Muyela said he was cutting firewood at the Appellant's home on that day and did not see complainant go to the Appellant's house. Simon Omutoko only stated that the Appellant was known to him.

13. I have considered the appeal in the light of the evidence on record, the grounds of appeal and submissions by the appellant and for the State.

14. There is no dispute that complainant was defiled. The treatment notes show that complainant's hymen was missing when she was examined on 21.5.13 which was 6 days from the date of the alleged offence.

15. Concerning the identity of the Appellant as the person that defiled complainant, complainant told court that she was alone with the Appellant in his house when he defiled her. With regard to the issues of corroboration, the record shows that PW2 who allegedly left complainant in the Appellant's house where she was defiled was not cross-examined thereby denying the Appellant the opportunity to test the veracity of her evidence. On that ground, I find that evidence by PW2 is of no probative value, thus leaving the prosecution with the evidence of only the complainant.

16. The foregoing notwithstanding, **Section 124 of the Evidence Act** is clear that the court may convict on the evidence of the alleged victim alone provided that the court is satisfied that the alleged victim was truthful. Complainant testified that she was called by Appellant to collect firewood for him and when she took the firewood inside, he defiled her. The Appellant and his first witness on the other hand stated they were together at home on the material date and that complainant did not go there.

17. I have considered the judgment of the trial court and other than replicate what each witness stated, the judgment does not comply with accepted practices that require the court to conduct a thorough analysis of the evidence presented in light of the applicable law and properly articulate the reasoning behind the final judgement. It is evident that the trial court did not express the basis for the reasoning behind its acceptance of the prosecution case and rejection of the defence case which was corroborated.

18. *Having considered the evidence in its totality*, I find that the defence cast a reasonable doubt on the prosecution case and the Appellant ought to have been given the benefit of doubt. Accordingly, and for the reasons set out hereinabove, this appeal succeeds. The conviction is quashed and the sentence set aside. Unless otherwise lawfully held, it is ordered that the Appellant be set at liberty. It is so ordered.

DELIVERED AND SIGNED AT KISUMU THIS 9th .DAY OF May, 2019

T. W. CHERERE

JUDGE

In the presence of-

Court Assistant - Felix

Appellant - Present

For the Appellant - Ms. Omoro

