



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**(CORAM: CHERERE-J)**

**CRIMINAL APPEAL NO. 66 OF 2019**

**BETWEEN**

**WALTER ACHUMBO OYOO.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**(Appeal against conviction and sentence in Criminal Case Number 686 of 2016 in the**

**Senior Principal Magistrate's Court at Maseno by Hon. C.N.Oruo (RM) on 26<sup>th</sup> March, 2018)**

**JUDGMENT**

**Background**

1. This appeal was brought by way of **Misc. Application No. 58 of 2018**. This did not come to the court's attention until the hearing of the appeal and while the matter was pending judgment. After considering that **Article 159(2) (d)** of the **Constitution** places heavy premium on substantive justice as opposed to undue regard to procedural technicalities, I directed that the matter be allocated an appeal number and it was allocated **Criminal Appeal No. 66 of 2019**.
2. The Appellant herein **WALTER ACHUMBO OYOO** has filed this appeal against conviction and sentence on a charge of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006 (***the Act***). The offence was allegedly committed against VAO a girl aged 15 years on 14<sup>th</sup> May, 2016.
3. The prosecution called 7 witnesses in support of the charges. **PW1** the complainant herein stated she was born on 23.12.01 and was in form 3 at [particulars withheld] Mixed Secondary School. She recalled that on 14.0.16 at about 02.00 pm, she was going from school and when it started raining she shielded herself at a certain kiosk. It was her evidence that she was pulled her into the said kiosk and defiled. She stated that she reported the matter to a neighbour who called her mother and her uncle escorted her to hospital and was later called to an identification parade where she identified the Appellant as the one that defiled her.
4. **PW2 JO** the complainant's father and **PW3 Florence Atieno** a teacher at [particulars withheld] Mixed Secondary School received complainant's report after the event.
5. **PW5 George Ochieng** stated that she interviewed the complainant on 14.05.16 and she said that she could only identify her assailant by the clothes he was wearing and his complexion. He stated that he reported to the OCS that he had a suspect in mind and Appellant was subsequently arrested and charged.
6. **PW6 Obino Tai**, a clinical officer examined complainant on 14.05.16 and found she had lacerations on labia majora and minora and bleeding from the vagina. He produced complainant's treatment notes and P3 form as **PEXH. 1** and **PEXH. 3** respectively. He concluded that there was evidence of penetration.
7. **PW7 CI Edward Kisanga** conducted an identification parade on 03.06.16 in which the appellant was identified by the complainant as the person that defiled her. He produced the identification parade as **PEXH. 7**.

8. **PW8 PC Joseph Kiptum**, the investigating officer produced complainant's certificate of birth which showed she was born on 23.12.01 as **PEXH. 4**.

9. In his sworn defence, the Appellant denied the offence and stated that he was framed.

10. In a judgment dated 26<sup>th</sup> March, 2018, *the* Appellant was convicted and sentenced to 20 years' imprisonment.

### **Appeal**

11. Being dissatisfied with the conviction and sentence, the Appellant lodged the instant Appeal on 08.11.18. *From the 5 grounds of Appeal and submissions, I have deduced the following issues for determination: -*

#### **1) Identification was not credible**

#### **2) That the defence was not given due consideration**

12. When the appeal came up for hearing on 24.07.19, Appellant stated that he was wholly relying on the grounds of appeal and written submissions filed on 03.10.19. The state through Ms. Gathu, Senior Prosecution Counsel opposed the appeal and relied on written submission filed on 03.10.19.

### **Analysis and Determination**

13. The duty of the 1st appellate court was explained by the Court of Appeal in the case of **Kariuki Karanja Vs Republic [1986] KLR 190** that:

**"On first appeal from a conviction by a judge or magistrate, the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. The court has a duty to rehear the case and reconsider the material before the judge or magistrate with such materials as it may have decided to admit."**

14. In order to consider this appeal, it is important to remind myself of the key ingredients necessary to establish a sexual offence under *the Act*. These are the age of the victim, penetration and identity of the offender.

15. In the case of **Alfayo Gombe Okello v Republic [2010] eKLR**, the Court of Appeal stated that:

**In its wisdom, Parliament chose to categorise the gravity of that offence (defilement) on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8 (1).**

16. It is therefore important for the prosecution to prove the age of a victim since age determines the sentence to be meted out on the offender. Complainant's certificate of birth **PEXH. 4** show she was born on 23.12.01 was therefore 15 years old when the offence was allegedly committed.

### **Penetration**

17. Section 2 of *the Act* defines penetration to entail: -

**"partial or complete insertion of a genital organ of a person into the genital organ of another person."**

18. The lacerations on labia majora and minora and bleeding from the vagina as evidenced by complainant's treatment notes and P3 form produced as **PEXH. 1** and **PEXH. 3** respectively proved without a doubt that there was evidence of penetration.

### **Identity of the offender**

19. The trial court ruled that the incident happened in broad day light and that the complainant had identified the Appellant and as the one that defiled her. While it is indeed true that the offence was committed around 02.00pm, the Appellant was a stranger to the Appellant and it is not unusual for many witnesses not to properly identify another person even in daylight. In the case of **Maitanyi vs Republic (1986) KLR 198**, *the Court of Appeal* held: -

**".....That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight....."**

20. From the foregoing, I find that the trial court's finding that complainant identified her assailant is not supported by the evidence on record. That the complainant did not identify her assailant was reinforced by the evidence by **PW5 George Ochieng** who stated that she interviewed the complainant on 14.05.16 which was the same date that the offence was committed and she said that she could only identify her assailant by the clothes he was wearing and his complexion. He stated that he reported to the OCS that he had a suspect in mind and Appellant was subsequently arrested and charged.

21. Of interest to note however is that the complainant neither described the clothes nor the complexion of the person that allegedly defiled her. In fact, the Appellant was arrested at the instance of PW5 who in his own words stated that;

*‘I went to the OCS and we agreed to arrest the suspect I had in mind and an identification parade was done at the station’.*

22. I have also considered whether dock identification of the Appellant by complainant suffices. In the case of **GABRIEL KAMAU NJOROGE VS. REPUBLIC (1982 -88) 1 KAR PAGE 1134**, the Court of Appeal held:

**“Dock identification is worthless the court should not rely on a dock identification unless this has been preceded by a properly conducted identification parade. A witness should be asked to give description of the accused and the prosecution should then arrange a fair identification parade.”**

23. With respect, the Appellant was arrested at the instance of PW5 and not of the complainant. The conduct of identification parades in the absence of prior description of the Appellant by the complainant was an exercise in futility and of no probative value.

24. 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.

**DELIVERED AND SIGNED IN KISUMU THIS 21ST DAY OF NOVEMBER 2019**

**T. W. CHERERE**

**JUDGE**

In the presence of-

**Court Assistant - Amondi**

**Appellant - Present in person**

**For the State - Ms. Gathu**