



REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL APPEAL NO. 95 OF 2016

BETWEEN

KENNEDY OTIENO ODUOR.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. H Wandere, PM dated 25th August 2016 at the Principal Magistrate's Court at Siaya in Criminal Case 603 of 2012)

JUDGMENT

1. The appellant, **KENNEDY OTIENO ODUOR**, was charged with the offence of defilement contrary to **section 8(1)** as read with **section 8(3)** of the *Sexual Offences Act*. The particulars of the offence were that on 22nd July 2012 in Siaya County, the appellant intentionally caused his penis to penetrate the vagina of **SAO**, a child aged 15 ½ years. Based on the same facts, he was alternatively charged with committing an indecent act with a child contrary to **section 11(1)** of the same *Act*. The appellant denied the charges and after a full trial, he was convicted on the principal count and sentenced to serve 20 years' imprisonment. The appellant was aggrieved by his conviction and sentence and has filed an appeal to this court.

2. The facts of the case before the trial court are that PW 1 went to borrow some examination past papers from the appellant. While at the appellant's home it began raining and PW 1 remained there. Due to the change in weather, she began feeling cold and the appellant lent her his sweater. PW 1 testified that she lost consciousness and when she recovered, she found herself lying on the appellant's bed with the appellant on top of her. PW 1 stated that the appellant undressed her and proceeded to sexually assault her. Later that evening, PW 1's sister, PW 3 came looking for her but she left her behind as she was unable to walk. PW 1 recalled that at around 10.00pm she requested the appellant to take her to her PW 2's house where she intended to spend the night as she was unwell.

3. PW 2 was in her house when the appellant brought PW 1 to her house on motorcycle. She testified that the appellant informed her that she found PW 1 at Uhuru shopping centre. When she asked PW 1 about what happened PW 1 informed her that she had been taken ill and said nothing about the alleged defilement. PW 2 recalled that later that night PW 1's mother came to her house accompanied by local youths, PW 3 and the appellant. She later heard that the appellant had defiled PW 1.

4. PW 4, a clinical officer based at Siaya District Hospital, produced a P3 form and medical examination notes for PW 1. The P3 form indicated that although there was evidence of vaginal infection there was no conclusive evidence of defilement. PW 5 was assigned to investigate the case. She interviewed the

witnesses, recorded their statements and formed the opinion that a case of defilement had been made. She charged the appellant with the offence.

5. When the appellant was put on his defence, he denied committing the offence. He testified that on the day in question PW 1 went to their home looking for examination past papers and found the appellant doing some construction work. She decided to wait for him to finish his work. When it started raining, she decided to wait in the appellant's house. The appellant testified that when PW 1 started feeling sick, he gave her a sweater and she decided to rest. PW 3 came looking for her but they did not go home together as PW 1. The appellant recalled that he decided to take PW 1 to hospital but PW 1 insisted on going to PW 2's home. Later PW 1's mother came to his home looking for PW 1 in the company of some youths while accusing him of defiling PW 1 and demanded that he pay Kshs. 20,000/- whereupon he was escorted to the police station.

6. This being a first appeal, it is the duty of this court to subject the evidence adduced before the trial court to a fresh scrutiny and evaluation before reaching its own independent determination whether or not to uphold the conviction. In doing so, this court is required to bear in mind the fact that it neither saw nor heard the witnesses as they testified and therefore give due regard in that respect (see ***Njoroge v Republic [1987] KLR 19***).

7. The issue for determination by this court is whether the prosecution proved that the appellant defiled the complainant beyond reasonable doubt. Upon re-evaluation of the facts of the case and the submission made by the parties to this appeal, I am of the firm view that the prosecution failed to prove its case to the required standard.

8. PW 1 was the key witness. When her initial testimony contradicted her earlier statement to the police, the prosecutor applied to have her declared a hostile witness. The court declared her a hostile witness and directed that she be remanded in custody for a period of 7 days. When she returned, she proceeded to testify implicating the appellant.

9. **Section 152** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*** sets out who a refractory witness is and provides how such a witness should be dealt with. It states:

152 (1) Whenever a person, appearing either in obedience to a summons or by virtue of a warrant, or being present in court and being verbally required by the court to give evidence

(a) refuses to be sworn;

(b) Having been sworn, refuses to answer any question put to him; or

(c) Refuses or neglects to produce any document or thing which he is required to produce; or

(d) refuses to sign his deposition, without offering sufficient excuse for his refusal or neglect, the court may adjourn the case for any period not exceeding eight days, and may in the meantime commit that person to prison, unless he sooner consents to do what is required of him.

(2) If the person, upon being brought before the court at or before the adjourned hearing, again refuses to do what is required of him, the court may again adjourn the case and commit him for the same period, and so again from time to time until the person consents to do what is so required of him.

(3) Nothing contained in this section shall affect the liability of any such person to any other punishment or proceeding for refusing or neglecting to do what is so required of him, or shall prevent the court from disposing of the case in the meantime according to any other sufficient evidence taken before it.

10. From the record, it is apparent that the trial magistrate erred in the manner it treated PW 1 as she was not a refractory witness. She was able to answer the questions put to her. The complaint by the prosecutor was that she was retracting the statement she had made to the police. Since she contradicted her earlier statement to the police, she was a hostile witness and although the line between a refractory and hostile witness is thin, the trial magistrate erred in remanding her in custody. Once the witness was declared hostile, the prosecutor was entitled to cross-examine the witness by putting to her the previous statement she recorded with the police in accordance with **sections 153, 154, 161 and 163** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*.

11. The law on hostile witnesses is now clear that the probative value of such evidence is negligible and it may only be relied upon in clear cases to support the prosecution or the defence case. The court in *Abel Monari Nyanamba & 4 Others v Republic NRB CA Criminal Appeal No. 86 of 1994 [1996] eKLR* noted that;

[T]he evidence of a hostile witness is indeed evidence though generally of little value obviously, no court found a conviction solely on the evidence of a hostile witness because his unreliability must itself introduce an element of reasonable doubt

12. To support a conviction, the evidence of a hostile witness must be corroborated in material particulars by other evidence. In this case, only the medical evidence was supportive of PW 1's testimony, yet it was weak and inconclusive. There was also evidence that pressure was mounted on PW 1 to testify against the appellant because when PW 1 was taken to PW 2's house, she said nothing of the alleged defilement. It is PW 1's mother who raised the issue that PW 1 had been defiled. This clearly undermines the prosecution case.

13. For the reasons I have highlighted, the prosecution cause was fraught with doubt. The conviction is unsafe. Consequently, the appeal is allowed and the conviction and sentence quashed. The appellant is set free unless otherwise lawfully held.

DATED and DELIVERED at SIAYA this 2nd day of February 2018.

D. S. MAJANJA

JUDGE

Appellant in person.

Mr Odumbe, Prosecution Counsel, instructed by the Office of Director of Public Prosecutions for the respondent.

Court Assistants: L. Odhiambo and L. Atika