



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CRIMINAL APPEAL NO.6 OF 2018**

**JOSEPH OCHIENG OCHOLA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(An appeal from the conviction and sentence in Criminal Case Number 13 of 2017 in the Senior Resident Magistrate's Court at Tamu delivered by Hon. P. K. Rugut (SRM) on 6th September, 2017)***

**JUDGMENT**

**The Trial**

1. The Appellant herein **JOSEPH OCHIENG OCHOLA** has filed this appeal against sentence and conviction 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. The particulars of the charge are that

***On 10th June, 2017 within Kisumu County unlawfully and intentionally caused your genital organ namely penis to penetrate the genital organ namely vagina of D.A a girl aged 13 years***

**Prosecution case**

2. The prosecution called a total of five (5) witnesses in support of its case. Complainant stated that she was 13 years old and in class 4. She recalled on 10.6.17, she was going to the toilet at 8.00 pm when she met appellant who dragged her to his house where he defiled her. That she returned to their house and did not report the matter to anyone. That the following day, she reported the matter to her uncle and identified appellant's house to him. That later that night, appellant was arrested. She said there was electric lighting at the scene where she met appellant and was able to identify him.

3. PW2, C A, the complainant's mother told court that complainant was born on 20.11.14 as shown on her baptism card PEXH. 2. She stated that she did not know about the incident until 11.6.17 when it was reported to her brother.

4. PW3, B O O, complainant's uncle told court that on 11.6.17, complainant told her that she had been defiled the previous night by one Joseph. That he later went to the house of appellant's house; arrested him and handed him over to the police.

5. PW4, SGT Dan Omachonde, the investigating officer received complainant's report on 13.6.17 and escorted her to hospital. That appellant was later arrested and charged.

6. PW5, Jared Okoth, a clinical officer examined complainant on 13.6.17 and found her with no evidence of defilement. He produced complainant's P3 form as PEXH. 1.

7. At the close of the prosecution case, the appellant was ruled to have a case to answer and was placed on his defence. He gave an unsworn defence in which he denied the charges. He stated that he slept in his friend's house on the material night and it was from there that he was arrested and charged.

8. *In a judgment delivered on 6th September, 2017*, appellant was convicted and sentenced to serve 20 years imprisonment.

**The appeal**

9. Aggrieved by this decision, the appellant lodged the instant appeal on 14th February, 2018, appellant set out 5 grounds to wit:-

1. *That he pleaded not guilty to the charge*
2. *That the trial court erred in relying on the evidence of blood relatives to convict him*
3. *The doctor's report exonerated him*
4. *The prosecution witnesses gave contradictory and uncorroborated evidence*
5. *That his defence was not given due consideration*

10. When the appeal came up for hearing on 15.5.18, appellant chose to wholly rely on the grounds of appeal and also on his submission filed on 15.5.18 in which he reiterated the grounds of appeal. Ms. Wafula, Learned Counsel for the state conceded to the appeal on the following 3 grounds. One that appellant was not properly identified; secondly that there was no evidence on defilement and thirdly that appellant's alibi had not been controverted.

11. This being a court of first appeal, I am guided by the ruling of the Court of Appeal in the case of **OKENO VS. REPUBLIC [1972] E. A. 32**, where it held that:-

***“It is the duty of a first appellant court to consider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld”***

12. The trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and this court is in dealing with this appeal obligated to give allowance for that.

#### **Analysis and determination**

13. The clinical officer stated that there was no evidence of defilement. There is therefore no doubt that the medical evidence undoubtedly exonerated appellant from blame and on that ground alone, the trial court ought to have found appellant not guilty.

14. The foregoing notwithstanding, I have taken time to consider if the appeal would have succeeded had the clinical officer confirmed that appellant had been defiled. The alleged offence was committed at night. Complainant told court that there was electric lighting at the scene and that she identified appellant who was their neighbor.

15. In the case of **R v Turnbull, (1976) 3 All ER 551** Lord Widgery CJ observed as follows on identification:-

***“the quality of identification evidence is critical; if the quality is good and remains good at the close of the defence case, the danger of mistaken identification is lessened, but the poorer the quality, the greater the danger”.***

16. In the recent case of **John Muriithi Nyagah v Republic [2014] eKLR**, the Court of Appeal held:-

***“in testing the reliability of the evidence of identification at night, it is essential to make an inquiry of the relevant circumstances such as the nature of the light, the strength of the light, its size, its position relative to the suspects etc.”***

17. The evidence on record shows that the court did not make an inquiry of the relevant circumstances such as the nature of the light, the strength of the light, its size and its position relative to the appellant. Even if there was evidence that complainant had been defiled, the circumstances pertaining to the identification of appellant at night are missing and the charge would still not have been proved beyond reasonable doubt.

18. Appellant raised an alibi and stated that he was not at the scene of crime. The Court of Appeal in the case of **Kiarie v Republic [1984] KLR** held as follows:-

***“An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.”***

19. The prosecution in the case before me did not apply to the court to obtain evidence for the purpose of rebutting the alibi of the appellant. This puts the case of the prosecution in doubt considering that the evidence tendered against the appellant cannot be said to be overwhelming.

#### **Decision**

20. I have considered the evidence on record and I am in agreement with the state that the trial court would have arrived at a different decision had it considered that medical evidence exonerated the appellant and that appellant's alibi was not challenged.

21. I thus find and hold that the conviction and sentence were unsafe. Accordingly, the conviction is quashed and sentence set aside. Unless otherwise lawfully held, it is hereby ordered that appellant shall be set at liberty forthwith.

DATED AND SIGNED THIS *17th* DAY OF *May* 2018

T. W. CHERERE

JUDGE

In the presence of-

Court Assistant - Felix

Appellant - In person

For the State - Ms. Wafula