



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NO. 124 OF 2016.

SALIM OLEBERA MAKOKHA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(from the original Conviction and Sentence by T.A. Odera – SPM in Mumias

SPMC CR. Case No. 681 of 2015 dated 2nd December, 2016.)

JUDGMENT

1. The appellant herein was convicted in court 1 for the offence of gang rape contrary to section 10 of the Sexual Offences Act, Act No. 3 of 2006, and in count 2 of an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the said Act. In count 1 he was sentenced to serve 15 years imprisonment while in the alternative charge to count 2 to serve 10 years imprisonment. The appellant was aggrieved by the convictions and the sentences and hence filed this appeal.

2. The grounds of appeal are in summary that:-

- (1) The trial court convicted the appellant on evidence that was uncorroborated, fabricated, malicious and lacked probative value,
- (2) The key witnesses never stated that the appellant defiled or had the intention to defile the complainant.
- (3) The trial court failed to consider that the charge was defective;
- (4) There was no evidence to sustain the charges;
- (5) The trial court failed to consider his alibi;
- (6) The ages of the complainants were not ascertained; and that
- (7) The sentence meted out was harsh.

3. The particulars of the offence in count 1 were that on the 1st September, 2015 at about 5 P.M. in Matungu sub-county in Kakamega County in association with another before court intentionally and unlawfully caused his penis to penetrate the vagina of SAO (herein referred to as the 1st complainant/complainant in count 1) a child aged 14 years.

4. The particulars of the offence in the alternative to count 2 were that on the 1st September, 2015 at 5 p.m. in Matungu sub-county in association with another not before court intentionally caused his penis to come into contact with the vagina of D.S.C. (herein referred to as the 2nd complainant/complainant in count 2) a child aged 13 years.

Prosecution Case

5. The prosecution case was that the two complainants were school going pupils at [particulars withheld] primary School. The first complainant was in the year 2015 aged 14 years while the 2nd complainant was aged 12 years. The 1st complainant was living with her parents at [particulars withheld] village while the 2nd complainant was living with her aunt.

That on the material day at 10 a.m., the two girls were going to fetch firewood in a forest at a nearby river when they passed outside the shamba of the appellant. They saw the appellant and his wife planting maize in their shamba. The couple requested them to go to their home after they finished what they were doing. The girls went and fetched firewood. They passed on the same route on their way back. The appellant reminded them of what they had told them. The girls took the firewood home.

7. That at 3 p.m. the girls went to the home of the appellant. They found the appellant at the home together with his wife. The two welcomed them into their house. In the house they found a young man called Wilberforce. The wife to the appellant gave them Sukuma wiki and asked them to cut them for her. The appellant's wife then excused herself and said that she was leaving briefly. The girls started to prepare the Sukuma wiki. A nephew to the appellant called Julius (who was the 1st accused in the case) arrived. The appellant then called the two young men outside three times and talked to them. After the third occasion, the appellant pulled the 1st complainant into the bedroom. He removed the 2nd complainant out of the house and took her to the kitchen. Wilberforce went with them to the kitchen. The first complainant was left in the house with Julius. The appellant locked the door of the main house from outside. Julius followed the 1st complainant into the bedroom. He pulled down the 1st complainant's skirt and panties. He tripped her with his legs and dropped her on a mat on the floor. He laid on her and inserted his fingers into her vagina. He opened her vagina with his fingers. She started to bleed from the vagina. He tried to insert his penis into her vagina but the penis slipped away due to the bleeding. He started to look for a condom. The 1st complainant got up. She then saw the 2nd complainant and Wilberforce returning to the sitting room. She put on her clothes and went out.

8. Meanwhile after Wilberforce and the 2nd complainant went to the kitchen, Wilberforce forcibly pulled down her skirt. He tore her panties and pulled her down. He removed his trousers and underwear. He lay on top of her and inserted his penis into her vagina. He defiled her for about 10 minutes. Later he let her go. She put on her clothes. Some minutes to 7 p.m., the appellant went there and opened the door. The 2nd complainant came out. She joined her colleague. The appellant then warned them that he would strangle them if they revealed to anybody as to what had happened.

The girls went home. They did not report to anybody. On the following day they were interrogated by the area chairman of *nyumba kumi* initiative Patrick Mutini PW4 as to what had taken place at the home of the appellant. PW4 stated that he had seen the girls coming out of the home of the appellant. The girls revealed what had happened. PW4 called the village headman who took the girls to Koyonzo police post. They were taken to Matungu Hospital but the laboratory was not working. On the following day, 3rd September, 2015, they were taken to Mumias Police Station. PC Kanalio PW6 issued P3 forms to them. They were taken to St. Mary's Hospital, Mumias. On the 4th September, 2015 the P3 forms were completed by a clinical officer PW5 of Matungu sub-county hospital. The clinical officer found the 1st complainant with bruises on the vagina with rugged hymen. The cervix was closed. The clinical officer formed the opinion that the girl had been penetrated.

10. The 2nd complainant told the clinical officer that nothing had been done to her on being locked in the house. The clinical officer examined her and did not find anything negative. The hymen was intact.

11. PC Kanalio PW6 investigated the case. The appellant and his co-accused (Julius) had been arrested on 2nd September, 2015. They were charged with the offences. They denied the charges. They were tried and convicted of the charges as indicated above. The third suspect, Wilberforce, went underground and was not before court during the trial.

Defence Case

12. When placed to his defence, the appellant gave sworn evidence and stated that he had gone to Webuye town on 28th August, 2015 to visit a patient. He returned home on the 2nd September, 2015 when he was arrested and taken to the local AP camp. He was detained for a week. The investigating officer demanded for Ksh. 20,000/=. He did not have the money. He was then charged.

Findings of the trial court.

13. The trial magistrate found that the first complainant (PW1) was aged 14 years while the 2nd complainant (PW3) was aged 12 years. The magistrate found that the two complainants knew the appellant before the date of the incident and there was therefore no mistaken identify on the appellant. The magistrate was impressed by the credibility of the two complainants and believed that they were telling the truth on the identity of the appellant. The court found that PW1 was penetrated into her vagina by Julius by use of fingers as evidenced by tears on the vagina. The magistrate found no evidence that the 2nd complainant (PW3) was defiled as the clinical officer who examined the girl PW5 found the hymen intact. However that Wilberforce touched her vagina indecently. That the appellant acted in association with Julius and Wilberforce with a common intention to defile the two girls. That the first accused (Julius) succeeded in committing the offence of defilement on PW1. That though the appellant did not penetrate the vaginas of the girls, he was part of the gang which planned and abetted the defilement on PW1 and indecent act on PW2. The magistrate dismissed the alibi of the appellant and said that the appellant orchestrated a scheme to avail the two minors to be sexually abused by Julius and Wilberforce.

Submission.

14. The appellant filed written submission. The state did not make any submissions but opposed the appeal and relied on the record of the lower court.

15. The appellant submitted that the evidence adduced by the prosecution had inconsistencies and contradictions. That the complainants stated in their evidence that they did not meet with anybody when they left the home of the appellant. However that Patrick Manyeni PW4 testified that he met the girls leaving the home of the appellant. That he greeted them but they did not respond but only cried. That on the following day PW4 locked the girls in a room and forced them to confess. That in an attempt to explain their whereabouts on the previous

day the girls under duress fabricated the story about the defilement.

16. Further that PW1 told the clinical officer PW5 that she was found having been locked in a house with a man known to her who had attempted to defile her. That there was no mention of other men but only a man. There was no mention of defilement. That the conviction of the offence of defilement was therefore unsafe.

17. That there was no evidence to prove the charge of gang defilement. The evidence of PW1 only disclosed the offence of attempted defilement as there was no evidence of full or partial penetration. Moreover, PW1 told the clinical officer PW5 that a man had attempted to defile her. That it was therefore a misdirection on the part of the trial court to convict him of the offence of gang defilement.

18. That the trial against the appellant was unfair in that it did not comply with the provisions and article 50 (2) (g), (h) and (j) of the Constitution because there is no indication in the court record that the appellant was informed of the evidence that the prosecution intended to rely on in the case.

Duty of a first appellate court

19. This is a first appeal. It is the duty of a first appellate court to analyse and examine the adduced evidence in the lower court and draw its own conclusions while bearing in mind that the trial court had the advantage of seeing and hearing the witnesses testify – see **Okeno –Vs- Republic** 1972 EA 32

Analysis and determination

20. The appellant stated in his petition of appeal that the ages of the complainants were not ascertained. PW2 stated in her evidence that she was at the time aged 14 years. Her mother PW2 testified to the same effect. An age assessment was conducted on her by a clinical officer PW7 who estimated her age at 14 years. PW7 produced the report as exhibit – PEx. 8.

21. PW3 in her evidence stated that she was at the time aged 13 years. She produced a birth certificate Pexh 9 that indicated that she was born in the year 2004. The offence was said to have been committed in the year 2015. That would then put her age at 11 years. The clinical officer PW5 stated that the history that he was given was that PW1 was aged 14 years while PW3 was aged 11 years.

22. The age of a person may be proved by both documentary evidence and oral evidence of parents or guardian – see the decision of the Court of Appeal in **Mwolongo Chichoro Mwanjembe vs. Republic**, Mombasa Criminal Appeal No. 24 of 2015 cited in **Edwin Nyambaso Onsongo vs. Republic** (2016) eKLR. From the above evidence there was no doubt that the two girls were aged 14 and 11 years respectively. The age assessment report on PW1 corroborated her evidence and that of her mother that she was aged 14 years. The birth certificate was sufficient evidence that PW3 was aged 11 years. The ages of the two complainants were therefore ascertained at 14 and 11 years respectively. There is no substance in the contention that the ages of the complainants were not ascertained.

23. PW1 in her evidence stated that they were passing by the appellant's shamba when the appellant's wife called her to where she was. That she went there alone and the appellant's wife told her to visit her house with PW3 after doing their family chores. They went and fetched firewood. On their way back the appellant reminded her of what his wife had told her.

24. PW3 on her part stated that it is the appellant himself who called PW1 to where the appellant and others were planting in the shamba. That PW1 went to him. She came back and told her that the appellant had requested that the two of them go to his home in the afternoon. That on the way back from fetching firewood the appellant reminded PW1 of what he had told her earlier.

25. PW1 says that it is the appellant's wife who invited them to her home while PW3 says that it is the appellant himself who did so. Who then between these two was telling the truth as to who invited them to the home of the appellant?

26. While Patrick Mutini PW4 stated that he met with the two girls coming out of the home of the appellant and that he talked to them but that they only cried, the two complainants never in their evidence mentioned that they met with PW4. PW1 in cross-examination only mentioned a person called Hamida whom she said saw them coming out of the appellant's home. She further said that the mother to Hamida gave the information to her uncle Silas who then locked them up in a room and threatened to beat them up if they did not reveal what had taken place at the home of the appellant. She further stated that a person called Kalily saw them entering into the home of the appellant. PW3 however stated that nobody saw them going into the home of the appellant.

27. If then PW1 mentioned Hamida as the person who saw them leaving the home of the appellant, why didn't she mention Patrick Mutini PW4 if indeed PW4 had even talked to them outside the home of the appellant? Why would PW1 state that the person who informed Silas of the incident was the mother Haminda and not PW4? Why would PW3 state that she does not know who informed Silas of the incident if indeed PW4 had confronted them upon them leaving the home of the appellant? Why was Hamida not called as a witness in the case if she saw them leaving the home of the appellant? These inconsistencies in the evidence create doubt as to whether the complainants went to the home of the appellant. The fact that the complainants were not categorical as to who between the appellant and his wife invited them to their home confounds the issue.

28. PW3 stated that Wilberforce penetrated her vagina by use of his penis for about 10 minutes. However when she was examined by the clinical officer PW5, there was no evidence of defilement as the hymen was intact. PW3 in fact told the clinical officer that the person who locked her in the house did not do anything else to her upon locking her in the house. The findings of the clinical officer supported what PW3 told the clinical officer. Why did PW3 thereafter change her evidence in court and state that Wilberforce penetrated her vagina? This is a manifestation that she was not a credible witness.

29. The burden of proving falsify of an accused's defence of alibi lies on the prosecution – See **Karanja vs. Republic (1983) KRL 501**. The appellant herein alleged that he was in Webuye on the day that he is accused of having abetted the defilement on the complainants. The above mentioned inconsistencies in the prosecution evidence left room for the possibility that the alibi could be true. The inconsistencies went to the substance of the charges against the appellant. The prosecution witnesses did not explain the inconsistencies. In the absence of any explanation, there was doubt as to whether the prosecution witnesses were telling the truth as to whether they went to the home of the appellant and if they did so, what took place there.

30. The complainants stated that the person who interrogated them on the incident was called Silas. It was not explained whether the said Silas was the same person as PW4. The witnesses did not say that it is PW4 who interrogated them. If Silas was a different person, why didn't the said Silas testify in the case?

31. The complainants were threatened to reveal what happened at the home of the applicant. The fact that PW3 lied that she had been defiled at the home of the appellant when this never happened is a pointer that even the rest of the evidence on defilement on PW1 might be false. The appellant was in the circumstances entitled to the benefit of doubt as the credibility of the complainants was put into question.

32. The appellant did not defile the complainants. The evidence was that he abetted the commission of the offences on the complainants and conspired with Julius and Wilberforce to commit the offences. There were no defects on the charges.

33. Upon keenly evaluating the evidence that was placed before the lower court, it is my finding that there was insufficient evidence to sustain the charges against the appellant. The convictions were not supported by credible evidence. The convictions are quashed and the sentences imposed upon the appellant set aside. The appellant is set at liberty forthwith unless lawfully held.

Delivered, dated and signed in open court at Kakamega this 18th day of September, 2018.

J. NJAGI.

JUDGE.

In the presence of:-

Appellant.....appearing in person.

.....for the state.

.....court Assistant.

14 days Right of Appeal