



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

HCCRA NO. 53 OF 2017

JOB OTIENO OTINDO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal against the conviction and sentence of the Senior Principal

Magistrate's Court at Maseno (Hon. R.S. Kipng'eno SRM) dated the 26th

September 2017 in Maseno SPMCRC No. 728 of 2015]

JUDGMENT

1. The Appellant, **JOB OTIENO OTINDO**, was convicted on two counts of Defilement.
2. On Count 1 the Complainant was 9 years and 11 months old. In respect to that count, the Appellant was sentenced to Life Imprisonment.
3. On Count 2 the Complainant was 12 years old, and the Appellant was sentenced to 20 Years Imprisonment.
4. Being dissatisfied with both the conviction and the sentence, the Appellant lodged an appeal to the High Court.
5. The first issue which he raised was in relation to the alleged **DELAY** in taking him to court. He said that he had been held in custody for four (4) days before being taken to court.
6. Pursuant to the provisions of **Article 49(1)(f)** of the **Constitution of the Republic of Kenya**, an arrested person has the right to be brought before a court as soon as reasonably possible, but not later than 24 hours after being arrested.
7. If the Appellant was held in custody for 4 days, before he was first taken to court, it would, prima facie, appear that his constitutional rights had been violated.
8. When any person alleges the violation of his constitutional rights, it is incumbent upon him to raise the issue at the earliest opportunity, and the court would have the obligation to address the issue promptly.
9. Whether or not an arrested person was taken to court late, is a matter of evidence.
10. And even when it would appear that there was some delay in taking the person to court, the state may or may not be able to demonstrate that it had brought the person to court "*as soon as was reasonably possible*", in the circumstances.
11. By raising the issue for the first time, before an appellate court, the Appellant has deprived the court of an opportunity to delve into the factual circumstances, which may have informed the matter about which he was now complaining.
12. An appellate court is ordinarily enjoined to make determinations on issues which were being raised to challenge the decision or the process of the trial court.
13. When an issue is raised for the first time, at the appellate stage, the determination on that issue cannot be said to be one that was made in

an appeal.

14. However, even assuming that the Appellant was taken to court after 24 hours from the time of his arrest, that alone cannot be a basis for quashing the conviction.

15. If there was sufficient evidence to sustain conviction, the trial court would have been right to convict the Appellant. However, the conviction, even if it were deserved cannot deprive the Appellant of his constitutional rights. In effect, notwithstanding conviction, an Appellant may yet pursue justice in relation to the violation of his constitutional rights.

16. The second issue raised by the Appellant was that he was not informed of the evidence, in advance. The said complaint arose from the fact that the trial commenced immediately.

17. Pursuant to **Article 50(2)(j)** of the **Constitution**, every accused person has the right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.

18. In this case, the Appellant was taken to court on 11th May 2015. On that day, the Appellant expressly told the trial court that he was ready to proceed with the trial.

19. In the circumstances, the court could not have been expected to know whether or not, the prosecution had informed the Appellant, in advance about the evidence which the prosecution intended to rely upon.

20. When the Appellant informed the court that he was ready to proceed with the trial, on the first day that he appeared before the trial court, he cannot now fault the said court for proceeding with the case, for allegedly compelling him to proceed with the case.

Crucial Witnesses

The Appellant submitted that the trial court had erred by convicting him without noting that some very essential witnesses did not testify at the trial.

21. He said that the lady who was said to be the owner of the house in which the 3 Complainants were defiled, ought to have been arrested and charged with the offence of "**Permitting Defilement of a Child.**"

22. **Section 149** of the **Penal Code** stipulates as follows:-

"Any person who, being the owner or occupier of a premises or having or acting or assisting in the management or control thereof, induces or knowingly suffers any boy or girl under the age of sixteen years to resort to or be upon those premises for the purpose of having unlawful sexual connection with any person, whether the sexual connection is intended to be with any particular person or generally, is guilty of a felony and is liable to imprisonment for life."

23. There is no material before me, that would enable me ascertain whether or not the lady, (or any other person), who was the owner of the premises at which the offence was committed, had induced or knowingly suffered the Complainants to be present at her house, for purposes of unlawful sexual connection.

24. Secondly, pursuant to **Article 157** of the **Constitution**, it is the Director of Public Prosecutions who has been given the mandate to institute and undertake criminal proceedings against any person.

25. In the exercise of the powers and functions vested in him, the Director of Public Prosecution shall not be under the direction or control of any person or authority.

26. Therefore, the Appellant had neither the legal obligation nor authority to tell the Director of Public Prosecution, to commence criminal proceedings against the owner of the house where the girls were defiled.

27. The decision on whether or not to charge the lady with any criminal offence was absolutely in the discretion of the Director of Public

Prosecution.

28. The fact that no charges were preferred against the lady cannot advance nor prejudice the Appellant's case.

29. In any event, I fail to appreciate how the lady was being considered as a vital witness. Neither the Appellant nor the Complainants said that the lady was at the scene of crime at the material time.

30. The second person whom the Appellant deemed to have been a crucial witness was the Chief who first interrogated the Complainants.

31. From my re-evaluation of the evidence on record, I find that the Chief was not at the scene of crime. His role was limited to talking to the Complainants, a feat which had eluded the Complainants' mothers.

32. The Appellant has suggested that the Chief was coaching the Complainants. But the Appellant did not give any indication at all, why the Chief would have wanted to coach the Complainants.

33. I have found no basis upon which the Chief can be described as having been a critical witness.

34. The third person whom the Appellant said was a critical witness is the Head Teacher at the school where all the three Complainants were studying.

35. The Appellant believes that the Head Teacher must have been hiding some information because she did not testify, yet her statement had been recorded.

36. The fact that the police record statements from a person, during the process of investigations, does not render all such persons critical witnesses.

37. A witness is critical if his evidence would have an impact on the case. In effect, the testimony of such a witness would be necessary in making the case complete.

38. The absence of the testimony of an essential or a critical witness would leave a gap or gaps in the case.

39. In this case, the Appellant has not demonstrated to the court what gap would have been filled up only with the evidence of the persons he has described as critical witnesses.

40. I find that the Head Teacher was not a critical witness.

Coaching of Witnesses

As the Complainants talked to the Chief and to the Head Teacher before the Appellant was arrested, the Appellant expressed the view that the Complainants must have been coached.

41. The Appellant also said that the only reason why the Complainants remained at the police station, was that they were being coached by interested parties.

42. The Appellant did not give the identities of the alleged "*Interested Parties*", or the basis of their interest in his case.

43. To my mind, the allegation of coaching of the Complainants was nothing more than idle speculation on the part of the Appellant.

44. If the Appellant had any grounds for believing that the Complainants were coached, drilled or trained about what evidence they should tender, he had every opportunity to cross-examine them in that regard.

45. A re-evaluation of the evidence tendered does not reveal any signs of the alleged coaching, training or drilling of the Complainants.

Contradictions

The Appellant submitted that the Complainants gave contradictory testimonies. In particular, he pointed out that the Complainants did not cite the same sequence in which each of them entered into the house in which they were defiled.

46. He also pointed out that the door to that house was said to have been wooden, but one witness said it was made of metal.

47. Thirdly, whilst two Complainants said that they waited outside the door after being defiled, one witness said that when she left the house, she found that the other Complainants had left for their respective houses.

48. The fourth issue raised by the Appellant was that it was not clear whether the incident took place on 7th May 2015 or on 4th April 2015.

49. The fifth aspect of the alleged contradictions was said to be in relation to the medical facility at which Mercy was examined. In his

submission, the Appellant said that the prosecution witnesses talked about Emuhaya Hospital and Sagam Hospital, respectively.

50. He also added that the date of the alleged examination was unclear; was it 7th or 11th May 2015?

Proof of Age

The Appellant submitted that there was insufficient proof of the ages of the Complainants.

51. In his view, the age of a child cannot be presumed, based upon the class which the child was in.

52. Furthermore, the pieces of evidence tendered by the prosecution did not speak the same language; they appeared to assign different ages to the same Complainants.

Defence

According to the Appellant, his Defence was very cogent. Therefore, he ought not to have been convicted.

53. He said that 4th April 2015 was “*Good Friday*”, and that therefore schools cannot have been open for learning.

Other Issues

The Appellant wondered why PW6 would have been so keen as to find out why PW1 was not wearing her panties.

54. In the Appellant’s view, the alleged conduct of PW6 was unusual.

55. The Appellant also asked why the alleged victims decided to go to the headmaster, instead of going to the police.

56. In answer to the appeal, Mr. Muya, Learned State Counsel, submitted that the evidence adduced by the prosecution was overwhelming.

57. The Respondent said that the Appellant was identified positively. It was easy for the Complainants to identify him because he was a teacher at the same school where the girls were students.

58. On the issue of the ages of the Complainants, the Respondent pointed out that Baptism Cards and a Notification of Birth were sufficient proof of the ages of the Complainants.

59. And in respect to the ingredients of the offence of defilement, the Respondent submitted that the prosecution had proved penetration.

60. Being the first appellate court, I am obliged to re-evaluate all the evidence on record, and to draw my own conclusions. It is in that process that I will also discuss and determine issues such as those of identification; proof of age; contradictions; and the Appellant’s defence.

61. PW1 testified that she was 12 years old. She did not know the name of her teacher.

62. The Appellant said that PW1 cannot be a credible witness if she did not know the name of her own Class 3 teacher, yet she purported to know the Appellant’s name.

63. I note that PW1 made it clear that she was new to the [particulars withheld] Primary School. That may well explain why PW1 did not know the name of her class teacher.

64. But would PW1 know the Appellant’s name, considering that PW1 was in Class 3, whilst the Appellant only taught pupils in Class 5 and above?

65. The answer is closely intertwined with the incidents giving rise to this case.

66. The Appellant is said to have given money to PW1, through PW3. I would therefore understand why PW1 would have taken a keen interest in getting to know the benefactor.

67. After being generous to the 3 young girls, the benefactor invited them to his house. He gave them instructions leading to his house; and when the Complainants reached the house, it is the Appellant who opened the door.

68. As there was no other occupant of the house, and considering that the Appellant had invited the Complainants to get to know where he lived, it is clear why the Complainants believed that the house where they were defiled was the Appellant’s house.

69. The fact that it later turned out that the house did not belong to the Appellant, did not render weak, the evidence that the prosecution had adduced.

70. Each of the 3 Complainants described in detail what the Appellant did to them.
71. The actions were taking place in broad daylight. The person molesting them was not hiding his face. He was talking to them, as he encouraged them, that they had no reason to have fear.
72. In effect the prevailing circumstances were optimal for positive identification. That is not just because the incidents took place in broad daylight, but also because the Appellant walked with the girls from their school, until the house where the incident took place.
73. The Appellant was giving them directions; and that meant that they were in visual contact for a considerable length of time.
74. Even though the Appellant was not a teacher in the classes attended by the Complainants, the girls were able to identify him positively.
75. On the issue concerning the sequence in which the girls entered into the house where they were defiled, PW1 said that she was first; M was second and M was third.
76. Meanwhile, M\ testified that PW1 was first, M\ was second and she (M\) was third.
77. On her part, M\ (PW3) said that PW1 (M\) was first, M\ was second and she (M\) was third.
78. Clearly, the evidence of PW3 was not consistent with the evidence of the other two Complainants.
79. I do share the view expressed by the learned trial magistrate, that the inconsistency was not material.
80. There are a couple of other inconsistencies in the evidence tendered, including;
- a) The material from which the door to the house was made – It is not clear if it was metallic or wooden.*
- b) Did the Complainants wait for one another, outside the house, after being defiled, or did the first two Complainants go home before the other Complainant came from the house.*
- c) If M\ was attended to at Sagam Hospital, how come the Medical Report was issued from Emuhaya Sub-District Hospital?*
81. When each of the above cited inconsistent pieces of evidence are considered separately, they would not constitute material inconsistencies.
82. However, when the said pieces of evidence were considered together, I find that they lead me to the conclusion that there exists some lingering doubts. Of course, it is well settled that it is acceptable to have some inconsistencies in the evidence tendered, because human memory is not akin to a properly functional computer, which would replicate such information as it is fed with.
83. Indeed, when several witnesses give precisely the same details about each aspect of the case, that may lead to the impression that the evidence was rehearsed.
84. I must not, however, be understood to mean that two or more witnesses cannot give evidence which was similar in most material aspects. It is entirely possible that witnesses can give the exact same evidence, if they testified about that which they saw.
85. But it is equally possible that two or more witnesses could be telling the truth about what they saw, but their evidence may have some dissimilarities, depending on all manner of factors. The witnesses could have seen the incident from different angles, or from varying distances in relation to the subject matter.
86. In the instant case, I find myself unable to share the view expressed by the learned trial magistrate, that the contradictions merely concerned minor details, which may therefore be disregarded.

87. In the result I hold that the Appellant ought to have been accorded the benefit of doubt, albeit reluctantly.

88. Accordingly, the appeal is allowed; the conviction is quashed on both counts; and the sentences are set aside.

89. Unless the Appellant is being held in custody for any other lawful cause, I direct that he be set at liberty.

DATED, SIGNED AND DELIVERED AT KISUMU

THIS 1ST DAY OF OCTOBER 2018

FRED A. OCHIENG

JUDGE