



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT SIAYA
HIGH COURT CRIMINAL APPEAL NO. 94 OF 2016
(CORAM: J. A. MAKAU – J)
KENNEDY ONGOWO ODALO.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

*“(Being an appeal against both the conviction and sentence dated 7.8.2015,
in Criminal Case No. 694 of 2013 in Bondo Law Court
before Hon. M. Obiero – PM)*

JUDGEMENT

1. The Appellant **KENNEDY ONGOWO ODALO** was charged with an offence of **Defilement contrary to section 8(1) (4) of the Sexual offences Act No. 3 of 2006**. The particulars of the charge are that on the 17th day of August 2013 at around 02.00 hours at [particulars withheld] village, [particulars withheld] sub-location, in Bondo District within Siaya County, intentionally caused his male genital organ (penis) to penetrate the female genital organ (vagina) of RAA, a child aged 16 years. The Appellant faced an alternative charge of **Committing an indecent act with a child contrary to section 11(1) of the Sexual Offences No. 3 of 2006**. The particulars of the offence are that on the same day, same time, same place the Appellant intentionally touched the vagina of RAA a child aged 16 years with his penis.

2. After trial the Appellant was convicted, on the main count and sentenced to serve 15 years imprisonment .

3. The Appellant aggrieved by the conviction and sentence preferred this appeal and relied on the supplementary grounds of appeal filed on 22.11.2016 being as follows:-

1. That the prosecution failed to exercise due diligence in coming up with an expertise approach to determine the age of the complainant.

2. That the whole prosecution evidence adduced wasn't in itself conclusive to lead the court to positive ends of justice.

3. That Several Learned trial magistrates handled the case without fully complying with Section 200 of the CPC.

4. That he Appellant wasn't furnished with certified copies of witnesses' statements, charge sheet and other relevant documents during trial.

5. That the Honourable Court be pleased and uphold Article 49(f) (i) of the constitution.

6. That the learned trial Magistrate erred in law and fact by issuing a conviction without proving the ingredients of defilement beyond any reasonable doubts.

4. I am the first appellate court and as expected of me have to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I neither saw nor heard any of the witnesses and have to give due allowance. I am guided by the Court of Appeal case which sets out the principles that apply on a first appeal. These are set out in the case of **ISSAC NG'ANGA ALIAS PETER NG'ANG'A KAHIGA V REPUBLIC CRIMINAL APPEAL NO. 272 OF 2005** as follows:-

“in the same way, a court hearing a first appeal (i.e. a first appellate court) also has duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same. There are now a myriad of case law on this but the well-known case of OKENO -VS- REPUBLIC (1972) EA 32 will suffice. In this case, the predecessor of this court stated:-

The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses (See Peters Vs. Sunday Post, (1958) EA 424)'

5. The Appellant at the hearing of the appeal appeared in person whereas M/s. M. Odumba appeared for the State.

6. The Appellant relied on his written submissions and added that the prosecution did not call all the witnesses as indicated in the charge sheet, that the Appellant was not furnished with copy of the charge sheet and witnesses statements, that the age of the complainant was not proved as no Birth Certificate was produced, that the Appellant thought the complainant was 19 years old and that **Section 200 Criminal Procedure code** was not complied with.

7. M/s. Odumba, Learned State Counsel, submitted that **Section 200 of the Criminal Procedure Code** was not fully complied with, that she is conceding the appeal and do not root for a retrial, that the Birth Certificate was not produced to prove the age of the complainant, that the investigating officer did not collect the Birth Certificate in cause of his investigation. The Learned Counsel urged that a retrial if ordered would not secure conviction and as such she did not root for the same.

8. The facts of the Prosecution case form part of the record of Appeal and I need not reproduce the evidence, however, I will summarize the prosecution's case and the defence.

9. The Prosecution's case is that:- PW1 a class 8 pupil who was born on 18.6.1997, on 16.8.2013 at 11.00 p.m. she left for Kennedy's house, the Appellant, but did not find him but as the house was not locked but shut, she entered the house. The Appellant came at 11.30 p.m. and at around 2.00 a.m. the Appellant asked the complainant to remove her underpant as the Appellant removed his. The Appellant took

condom and the two had sex three times during the night. The following day the complainant left for her home but on the way she met her father, that on arrival at home her father inquired where she was and she told him and lead him to the home of the Appellant, as her mother went to Ndori Boda Boda stage to look for the Appellant. The complainant's mother found the Appellant, took him to the home, called his parents after which the matter was reported to police from where the two were taken to Bondo District Hospital. The complainant was treated and issued with P3 form. The Appellant was subsequently charged with this offence.

10. The Appellant denied the offence and stated that on 17.8.2013, he was at a disco and in the morning he went home and proceeded to his work. That while at his work a lady by the name V called the Appellant asking him to go and repair her generator at her home. On arrival she asked the Appellant to remove the generator from her kitchen, on entering the kitchen, the Appellant found the husband to the lady who enquired where he was with his daughter. He stated he was not with their daughter and the two started beating the appellant injuring him and forcing him to run away, forcing them to shout 'thief' and the Appellant decided to stop. He called his friend and on returning home he found the complainant and her father. That as the Appellant was recording his statement he was put into cells and at 3.00 p.m. he was taken to Lwala Police Station and found the complainant there. That the two were escorted to Bondo Hospital and were examined. That on 19.8.2013 he was charged with this offence. He denied having defiled the complainant.

11. Whether the prosecution proved the ingredients of the offence of defilement? The essential ingredients of an offence of defilement are: Penetration, Recognition/identification and age of the victim. In the instant case that only evidence is evidence of a single minor witness PW1. PW1 testified that on 16.8.2013 at 11.00 p.m. she took herself to the Appellant's home but she did not find him but as the house was not locked but shut she entered the house and waited for the Appellant who came at 11.30 p.m. That during the night they had sex three times. PW4, a Clinical Officer, testified that when he examined PW1 who claimed to have been defiled on 17.8.2013 at 2.00 a.m. he found the hymen was perforated with milky substance. He produced P3 form as P Exhibit 2 and chit as P Exhibit 3. I have examined P exhibit 1, in which PW2 indicated old/fresh abrasion on the labia majora, perforated hymen and milky discharge. He concluded defilement was confirmed. On Recognition PW1 stated she knew the Appellant as a neighbor and her boyfriend and even by name. This fact is not denied by the Appellant as he knew the complainant very well. On issue of age PW1 stated she was born on 18.6.1997. PW2 father to the complainant testified PW1 was born on 18.6.1997 and gave Birth certificate serial No. [...] and offered to produced it as exhibit, however the prosecution offered to produce the same but never produced it. PW3, the investigating officer did not obtain any birth certificate of the minor, PW3 stated the minor was 17 years. He denied having seen a copy of the birth certificate.

12. In the instant case the prosecution did not produce the complainant's birth certificate or any document to confirm the age of the complainant was below 18 years. The Appellant in this Appeal urged the complainant was his girlfriend and was aged 19 years old. It is difficulty for the court to determine the age of the victim without Birth Certificate or age assessment Report or any document indicating the complainant's age. The prosecution is under duty to establish the age of a victim in defilement cases but not to leave the matter to speculation as sentencing under sexual offences Act is pegged on the age of the victim. In this case I find the prosecution was not diligent enough to produce the Birth Certificate and in absence of proof of the age of the victim and where the Appellant's contention is that the victim was aged 19 years, the benefit of doubt should go to the accused. In the case of **Daniel Mugambi V R CRA 37 of 2014 [2016] eKLR the Court of Appeal** stated as follows:-

"It is our view that in the absence of a birth certificate in circumstances where no explanation was given as to its unavailability, the appellant's complaint that the complainant may very well have been sixteen (16) years as at the time of the commission of the alleged offence was sound and it should not have been brushed aside."

13. In the instant case no Birth Certificate nor any documentary evidence was availed as regards the age of the victim and no explanation was given for failure to avail the Birth Certificate which PW2 had stated was in his possession and was readily available. The Appellant's complaint is that the victim who is his

girlfriend was 19 years which complaint may very well be correct or not, however the accused person has no duty to prove the victim was a minor. I therefore find the prosecution did not prove the age of the victim. PW2 stated the victim was 16 years whereas PW3 stated she was 17 years. It is possible the victim was not a minor as alleged by the Appellant.

14. Section 124 of the Evidence Act Provides:-

“124. Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

In the instant case the only evidence is that of PW1. The same was corroborated by evidence of PW4, the clinical officer as regards penetration.

15. On the issue of whether PW1 was defiled by the appellant? PW1 explained how she went to the appellant's home and how they had sex. The appellant in his defence did not make reference to the victim's evidence nor did he during cross-examination of PW1 raise the issue of their having sex. The trial was done by different magistrates but the trial magistrate who made the judgment after evaluation of the evidence found that there was sufficient evidence that the appellant was the person who caused the penetration. I have evaluated and analyzed the evidence and I am satisfied the prosecution proved that the complainant and the Appellant were friends, neighbours and well close to each other and it is the Appellant who had sex with complainant on thereafter on 17.8.2013.

16. Whether the appellant was furnished with charge sheet and witnesses statements and whether failure to do so resulted in appellant not having a fair trial? The court record reveal that on 19.8.2013 the court ordered the appellant to be supplied with witnesses statement at his own costs. The court record do not show whether the appellant was able to be supplied with any court records. In the case of **Habel Omondo Onyango V. R. HCCRA 58 of 2015**. I stated as follows:-

“There is imposed upon the prosecution the duty of disclosing to the defence all the evidence to be used against them, whether asked for or not, to enable the court to arrive to a fair conclusion of the case, being a right flowing from the accused constitutional right to a fair trial.” The judges further noted that the trial in a criminal proceeding is in the nature of a contest and when one of the contestants fails to disclose the evidence to be used before hand, the contest can neither be equal nor fair.”

17. Article 50 (2) (j) of the Constitution of Kenya 2010 provides:

“Section 50 (2) (j) of the Constitution of Kenya 2010 provides:-

(2) Every accused person has the right to a fair trial, which includes the right—

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

In the instant case the prosecution did not furnish the Appellant with the witnesses statement as required and as the Court ordered him to be supplied with witnesses statement at his own costs. The failure to furnish the Appellant with witnesses statements amounted to unfair trial. The Appellant was denied his constitutional right to a fair trial and was prejudiced. I therefore find the proceedings were

unconstitutional and declare them dull and void.

18. Whether the trial Court heard case without complying with Section 200(3) of the Criminal Procedure Code?

Section 200 (3) of Criminal Procedure Code provides:-

“(1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may—

(a) deliver a judgment that has been written and signed but not delivered by his predecessor; or

(b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or re-summon the witnesses and recommence the trial.

(2) Where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercises that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment.

(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.

(4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial.”

In this case the proceedings commenced before **Hon B.R. Kipyegon (RM)** who took evidence from three witnesses before transfer. On 7.5.2014 **Hon. C.A. Kutwa (Ag. PM)** took over the matter and the Appellant told the court as follows:-

“I wish to proceed from where we had reached.”

As per the Court record **Section 200(3) of CPC** was complied with. That Hon C.A. Kutwa (Ag. P.M.) heard only one witness and was transferred. Then Hon. M. Obiero (PM) took over on 8.6.2015 and informed the Appellant of his rights under **Section 200 (3)** where the Appellant is recorded to have stated:-

“This matter should proceed from where it had reached.”

19. The Court then recorded that the case was to proceed from where the case had reached. The purpose of complying with **Section 200 (3) of CPC** is to inform the accused of his right to have any witness recalled for cross-examination or to testify again and failure to comply with the Section renders the subsequent proceedings a nullity. This section in essence entrenches the accused rights to a fair trial as constituted under **Article 50 of the Constitution**. I have perused the trial courts proceedings and I am satisfied **Section 200 (3) of CPC** was complied with. The Appellant was informed of his rights and opted to have the case proceedings from where it had reached. I find that the Appellant’s constitutional rights were not violated in anyway.

20. Having come to the conclusion that I have, I find that State Counsel correctly conceded the appeal as the age of the complainant was not proved that she was below 18 years. I also find that

proceedings were null and void for breach of the constitutional rights of the Appellant. This appeal is therefore allowed. The conviction is quashed and sentence set aside. Appellant is released forthwith unless otherwise lawfully held.

DATED AT SIAYA THIS 25TH DAY OF JANUARY, 2017.

J.A. MAKAU

JUDGE

DELIVERED IN OPEN COURT

IN THE PRESENCE OF:

APPELLANT IN PERSON PRESENT

M/S M. ODUMBA FOR THE STATE

C.A.

- 1. PATIENCE BERYL OCHIENG**
- 2. LEONIDA ATIKA**
- 3. SARAH OORO**

J. A. MAKAU

JUDGE