



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MIGORI
CRIMINAL APPEAL NO. 20 OF 2015
KENNEDY OCHIENG AOKO.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT
(Being an appeal arising from the conviction and sentence by Hon. J. Mitey
(Mrs.), Resident Magistrate in Rongo Senior Resident Magistrate's
Criminal Case No. 359 of 2013 delivered on 27/03/2015)

JUDGMENT

1. **KENNEDY OCHIENG AOKO**, the Appellant herein, was arrested over allegations of sexually assaulting C.A.O. a minor aged 11 years old. He was subsequently arraigned before the trial court at Rongo on 22/08/2013 and charged with defilement of the said minor contrary to **Section 8(1)(2)** of the **Sexual Offences Act** No. 3 of 2006. He also faced an alternative charge of committing an indecent act with a child contrary to **Section 11(1)** of the Sexual Offences Act No. 3 of 2006. He denied both counts.

2. The appellant was subsequently tried and convicted of the alternative offence of committing an indecent act with a child and was sentenced accordingly. The particulars of the alternative charge of committing an indecent act with a child were as follows:

“On the night of 17th and 18th day of August 2013 at [particulars withheld] within Migori County in the Republic of Kenya intentionally and unlawfull touched the buttocks/breasts/vagina of C.A.O. a child aged 11 years.”

3. A total of four witnesses testified. They were the complainant, C.A.O. who after a *voir dire* examination gave a sworn testimony as **PW1**. Dr. Marita Durglas, a Medical Officer of Health from Rongo District Hospital gave evidence as **PW2**. The complainant's father testified as **PW3** whereas the Investigating officer testified as **PW4**. It emerged in evidence that the appellant was an uncle to the complainant (being a brother to PW3) and they both lived in the same homestead.

4. The prosecution's case was that in the night of 17th and 18th August 2013 the complainant had been left at their home as her parents went for a funeral and were to spend there. The complainant went to sleep in her parents' house at around 08:00pm together with other three children being **M.J.A**, **B**. and **H**. Later that night, the complainant was awoken by someone who called her name and when she responded, that person approached her, touched her, held her hand, lifted her leg and had sex with her. As she felt pain,

the person removed his male organ and left. According to the complainant the person had a torch which he illuminated her and only wore a short. It was the complainant's evidence that she managed to recognize the person who had sexual intercourse with her as the accused person, who is his uncle and they used to stay within the same homestead, by the aid of his voice when he called her as well as the torch when he shone it on her. The complainant then slept until the following morning when she informed the wife of her other uncle of what the appellant had done to her who later informed her husband and eventually her parents came to know of the matter.

5. PW3 then accompanied the complainant to Rongo District Hospital on 18/08/2013. According to the hospital notes, the complainant was examined at around 01:20pm. A further laboratory examination by way of a high vaginal swab was also conducted which revealed the presence of some sperm cells. PW3 then reported the matter to Kamagambo Police Station where PW4 took over the conduct of the investigations. On 21/08/2013 PW4 accompanied the complainant back to the hospital where she was again examined and a P3 Form filled by PW2 who also relied on the earlier medical notes and examination results. The sum medical evidence by PW2 was that the complainant's hymen was not intact but there was no evidence of any tears on the vagina, the external genitalia was normal as well as the *labia majora* and *minora*. He however noticed the normal whitish vaginal discharge as well as the presence of the sperm cells. PW2 also remarked that although the hymen was broken there were no recent tears a pointer that the hymen was not recently broken and according to him there could not have been any penetration especially by an adult without such a serious damage. To him, the way the complainant's vagina was could only admit a small finger. PW2 produced the treatment notes and the P3 Form as exhibits. PW4 confirmed that the complainant was a minor and produced Child Health Care Card that the complainant was born on 27/07/2001 and she later preferred the charges against the appellant.

6. At the close of the prosecution's case the appellant was placed on his defence and gave sworn defence and called a witness one **ENOS OBUYA ACHAR**, who testified as **DW2**. The appellant raised an alibi defence that he had accompanied DW2 to work on DW2's farm at Migori and that they had left on 16/08/2013 and returned at around 05:00pm on 18/08/2013. DW2 corroborated that evidence.

7. At the close of the defence case the trial court rendered a judgment where it found the appellant guilty and convicted him of the alternative offence and he was sentenced to the minimal 10 years in prison.

8. As the appellant was dissatisfied with the conviction and sentence, he initially lodged an appeal in person. The appellant filed a Petition of Appeal on 09/04/2015 where he raised 8 grounds as follows:

1. THAT the learned trial magistrate grossly erred both in law and fact in convicting and sentencing the appellant without considering that I plead not guilty to the charge.

2. THAT the learned trial magistrate grossly erred both in law and fact in misapprehended the tenor extend and nature of the offence charged had not incorporate with the evidence on record consequently the judgment of the trial magistrate is calloused with errors of omission and commission thus rendering same manifestly unsafe.

3. THAT the learned trial magistrate further grossly erred both in law and fact in finding that the respondent had proved the offence charge beyond reasonable doubt without considering that the respondent case had not been established.

4. THAT the learned trial magistrate grossly erred both in law and fact convicting I the appellant without considering that the complainant was a daughter to my brother and we had a land dispute with his father that could lead to miscarriage of justice.

5. THAT there was no sufficient evidence to establish the case, no eye witness or sound witness to the act of proof of the said was recorded.

6. THAT the trial magistrate erred both in law and fact by convicting I the appellant after I brought my defence witness and corroborate my evidence before court, consequently the

judgment of the trial magistrate was illegally unattainable.

7. THAT the trial magistrate erred both in law and fact in convicting and sentencing I the appellant without considering that the I. O. never did any dusting to the clothes of the minor to prove the alternative charge of indecent act against the appellant .

8. THAT the learned magistrate erred both in law and fact in convicting and sentencing I the appellant on the uncorroboration evidence when the necessary caution and /or circumspection contrary to establish the charge of uncorroboration evidence of the respondent witness in the evidence on record, consequently the judgment of the magistrate is illegally unattainable.

9. At the hearing of the appeal the appellant had acquired a Counsel who had filed the Record of Appeal on 01/12/2016 and the appeal was heard by way of oral submissions. Counsel for the appellant, **Mr. Agure Odera** argued all the 8 grounds together where he challenged the prosecution's case on account of failure to prove the case as required in law, failure of crucial witnesses to testify, unreconciled contradictions and the severity of the sentence. The State, through Mr. Okaka, Learned State Counsel opposed the appeal and submitted that none of the 8 grounds raised by the appellant would stand as the evidence was cogent and left no room to speculation. He further argued that the sentence was the minimum provided in law and that if there were any contradictions then they were all reconciled by the trial court. He relied on the case of **Ganzi & 2 others vs. R (2005)1 KLR 53** on the issue of the appellant's alibi defence and urged this Court to dismiss the appeal. This judgment is therefore the outcome of the appeal.

10. As this is the Appellant's first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013)eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

11. Since the State did not lodge any appeal against the judgment on the principal charge of defilement and in line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the offence of committing an indecent act with a child were proved and as so required in law; beyond any reasonable doubt.

12. **Section 11(1)** of the Sexual Offences Act states that:

'11(1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term not less than ten years.'

Section 2(1) of the said Act defines an indecent act as follows:

'Indecent act' means an unlawful intentional act which causes:-

a. Any contact between any part of the body of a person with the genital organ, breast or buttocks of another, but does not include an act that causes penetration;

b. exposure or display of any pornographic material to any person against his or her will;

13. I will therefore endeavor to first determine whether it was the appellant who indeed entered into the house where the complainant was sleeping with the other children and had an encounter with her. That issue revolves around the identification of the appellant.

14. There is no doubt that the alleged incident took place at night and inside a house. In that house, the

complainant was sleeping with 3 other children; herself being the eldest. The complainant was woken up by a voice calling her name. From the record it is not clear how many times the voice called the complainant's name. I will therefore take it that she was only called once. My attention is then drawn to the possibility of some error in the voice recognition given that the complainant had just woken from her sleep and the call was only once. Further, how loud was the voice? Could it have been heard by the other children in the house? And the questions so continue.

15. The person who called the complainant also had a torch which he shone towards the complainant. The attacker then went ahead to touch the complainant. As the record is again silent, this Court will take notice that when some light is shone upon someone who is asleep and who then suddenly wakes up; it may not be possible for such a person to really identify the holder of the light unless there is evidence that at some point the light from the torch shone upon the holder or other light aided in the recognition. In this case, the record is again silent as to whether there was at some point where the light from the torch shone upon the holder or other light came into play.

16. There is also the issue of the possible time taken by the assailant in the act. According to the complainant, the assailant touched her, grabbed her hand, lifted her leg and had sex with her, but when she felt pain the assailant left her and went away. The possible time taken was not brought out as well as how the assailant knew that the complainant was feeling pain until he left her. Could it be that the complainant cried? If so, was the cry overheard by the other children in the house?

17. There is however some startling evidence by the complainant which it would be worth to look at. She stated in evidence that as she was in the house she clearly saw the assailant remove some door panes and open the door thereby gaining access into the house. The complainant however did not elaborate the conditions which prevailed inside the house that made her to clearly see the assailant given that she was asleep and it was her testimony that the only light came from the torch the assailant had.

18. This Court is well alive to the provisions of **Section 124** of the **Evidence Act**, Chapter 80 of the Laws of Kenya which requires no corroboration in sexual offences and that the evidence of the victim, however sole, is capable of admission and sustaining a conviction. That being so when an issue as to the identity of the assailant comes into play a Court is called to satisfy itself that there is no error in the identity of such a person.

19. To that end a Court is called upon to exercise serious caution especially if the conditions then prevailing could reasonably hamper the identification of an assailant and moreso at night. The guidance thereto has been given in settled and binding case law. The Court of Appeal in the case of **Wamunga Vs Republic (1989) KLR 426** stated as under;-

“It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.”

It was also held in **Nzaro vs Republic (1991) KAR 212** and **Kiarie vs Republic (1984) KLR 739** by the Court of Appeal that evidence of identification/recognition at night must be absolutely watertight to justify conviction.

20. In **R –vs- Turnbull & Others (1973) 3 ALL ER 549**, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said:

“... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original

observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?.... Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

21. The above does not mean that there cannot be safe identification or recognition even at night. The Court of Appeal in **Douglas Muthanwa Ntoribi vs Republic (2014) eKLR** in upholding the evidence of recognition at night held as follows:-

“On the issue of recognition, the learned Judge evaluated the evidence on record and emphasized that PW1 testified:-

“I flashed my torch and I saw the accused he was 2 meters away from me. That the appellant was not only seen, but was positively and correctly identified or recognized by PW1, the complainant.”

The Learned Judge further noted that the complainant testified he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error...”

Again the Court of Appeal in **Criminal Appeal No. 274 and 275 of 2009 at Eldoret in Peter Okee Omukaga & Another vs R (unreported)** had this to say on the evidence of recognition at night:-

“We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that F, J and R were familiar with the appellants; that F and J had known them by appearance as ‘neighbours from the village’, that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non-recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen items did not in any way point to the innocence of the appellants.”

22. From the analysis of the evidence in this case and on the guidance of the various judicial decisions, this Court is unable to confirm that the identification of the appellant herein was safe and free from error. I hence respectfully disagree with the learned Magistrate’s finding that the appellant herein was properly and safely identified as the perpetrator of the alleged offences.

23. Having so found, any further analysis of the other ingredients of the offence at hand and the grounds as argued before me would only be for academic purposes. That being so, today I choose to end this discourse here. The upshot being that due to the deficiency of the evidence on record, the appellant cannot be said to have been the perpetrator of any of the offences he was charged with. The appeal is hereby allowed and the conviction on the alternative offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act is hereby quashed and the sentence of 10 years imprisonment set-aside. The appellant is hereby set at liberty unless otherwise lawfully held.

24. Those are the orders of this Court.

DELIVERED, DATED and SIGNED at MIGORI this 23rd day of January 2017.

A. C. MRIMA

JUDGE