



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA
CRIMINAL APPEAL CASE NO. 101 OF 2015
(CORAM: JUSTICE J.A. MAKAU – J.)

ALPHONCE ODHIAMBO OLWA APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal against both the conviction and the sentence dated 16.11.2015 in Criminal Case No. 409 of 2012 in Bondo Law Court before Hon. M.M. Nafula-SRM)

JUDGMENT

1. The Appellant **Alphonce Odhiambo Olwa** 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 diverse dates between the month of April 2012 and May 2012 at [particulars withheld] in Bondo District within Siaya county, intentionally caused his penis to penetrate the vagina of SAO a child aged 17 years. The Appellant also faced an alternative charge of committing an indecent act with a child contrary to **Section II(I) of the Sexual offence Act No. 3 of 2006**. The particulars of the alternative charge are that between the same time, same place, the appellant touched the vagina of SAO a child aged 17 years using his penis.

2. After full trial the court convicted the appellant on the main count and sentenced him to serve 15 years imprisonment.

3. Aggrieved by the conviction and sentence the Appellant preferred this appeal through the firm of M/s. Ken Omollo & Co. Advocates setting out 15 grounds of appeal which can be summed up as follows:-

(i) The Prosecution failed to prove their cases against the appellant beyond reasonable doubt.

(ii) That the trial magistrate erred in law failing to comply with Section 200 of Criminal Procedure Code.

(iii) That trial court erred in law and fact by convicting the appellant on charges which were not read to him and pleaded to as required.

(iv) The learned trial magistrate erred in law and fact by convicting the appellant on a defective charge sheet.

(v) The learned trial magistrate erred in law and fact by failing to consider the DNA results

which exonerated the appellant from being the father of the child that was born out of the alleged sexual intercourse the Appellant had with the complainant herein.

(vi) The learned trial magistrate erred in law and fact by failing to indicate or make a finding which charge he had convicted the Appellant on.

4. Before the hearing of the appeal by notice filed on 13th June 2015, the appellant withdrew services of his advocates and opted to handle the appeal in person.

5. At the hearing of the appeal the appellant appeared in person whereas M/s. M. Odumba, Learned State Counsel, appeared for the State. The Appellant stated he was relying on the supplementary grounds of appeal in his written submissions being as follows:-

(i) That his rights before trial court was breached contrary to Article 50 (2) (i) (b) and Article 49 (i) (f) (i) (ii) of the Constitution of Kenya 2010.

(ii) The Prosecution did not satisfy the ingredients of an offence of defilement as the perpetrator was not known to the victim.

(iii) The DNA results were not availed to connect the Appellant with the offence

6. The facts of the prosecution's case are that:- on various dates between April and May 2012 the Appellant, defiled the complainant PW1 who was a student and aged 17 years. That one day PW1 collected her personal belongings and left her mother's home. A neighbor called PW1's mother who came home around 7.00 pm and found PW1 had taken all her clothes and left. PW3 reported the matter to police at Bondo. The following day PW3 went to Children's Office to report and on the way she met another girl who told her PW1 was at the house of Mohamed, a neighbour. PW3 went and informed Children's Officers and Police, who proceeded to Mohammed's house wherein PW1 was found with a brother of Mohammed, both were arrested together with wife of Mohammed. PW1 told police she had been with Odhiambo, who was subsequently arrested. PW1 told police she had been with Odhiambo who had defiled her. PW1 was taken to hospital for examination and found to be pregnant. The appellant was subsequently charged with this offence.

7. The appellant in his unsworn statement, stated that he knows the charge. He stated on 4.6.2012, he was at his garage when two people approached him and asked him to accompany them to police station so that he could know the charges against him. That on the way he was found with a lady and both of them were led to police station. He later saw Joyce Agola Adero (PW3) came to police cells and told him he thought he was clever and that he was going to see consequences. That after 4 days he was taken to court where charges were read to him which he denied. The appellant stated that the girl's mother caused his arrest and that of his two wives claiming the Appellant had hidden PW1 yet he knew nothing about it. The Appellant stated he had grudge with mother to the complainant. He attributed the grudge to a TV he had given PW3 and took it back and for refusing to be a friend to her.

8. I am the first appellate court and as such I have subjected the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I had no opportunity to see and hear the witnesses and so I cannot comment on their demeanour. I have drawn my conclusions after due allowance. I am guided by the **Court of Appeal case Okeno V. R. (1972) E.A. 32** where the Court set out the duties of a first appellate court thus:-

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vs. Republic (1957) E.A. . (336) and the appellate court's own decision on the evidence. 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 V. Sunday Post, (1958) E.A. 434”

9. The Appellant in support of his appeal produced written submissions. He indicated that he had withdrawn the grounds drawn by his former Counsel on 21.6.2016. He urged the DNA results were not produced to confirm the paternity of the child, he urged the complainant stated she had not known the appellant, that the complainant did not present out who defiled her, that there was no evidence connecting him with defilement of the complainant, and that the complainant never went to his place as they had no relationship.

10. M/s. Odumba, Learned State Counsel, opposed the appeal urging the Prosecution proved the necessary ingredients of the offence of defilement, thus penetration, identification and age of the victim. She urged DNA is not an ingredient of an offence of defilement and failure to produce DNA test did not prejudice the appellant.

11. Whether the prosecution proved the necessary ingredients of defilement? On penetration, the prosecution produced P3 form through PW2 who gave evidence on behalf of Dr. Collins Otieno Oginga. Dr. Collins Otieno Oginga noted that the patient concealed a lot of information and an approximate age of injury was uncertain and probable type of weapon was penile penetration. On genitalia examination, he found she had torn hymen. The report was signed on 7.6.2012. The P3 form exhibit 2 was produced on behalf of Dr. Collins Otieno Oginga. I have perused the P3 form dated 6th June 2012 in which date and time of the offence is indicated diverse date, without indicating any dates, any month and any year. The P3 form lacks vital information simply because the victim as noted by the doctor, much of the history of the offence was not forthcoming and she appeared to conceal much of the information, however, on the examination it revealed that the hymen was torn. I find that there was therefore penetration.

12. Whether the complainant recognized and/or identified her assailant? Identification or recognition of a perpetrator in a defilement case is very important ingredient. In this case, the matter started before Hon. D. Wangeci (Ag. SRM) who partly heard PW1 and before whom the prosecution applied the complainant to be stood down faulting the outcome of her evidence so far adduced then, with an intention to prefer to discontinue the charge under **Section 40 of the Sexual Offences Act** which provides:-

“(40). The decision as to whether the prosecution or investigation by any police officer of a complaint that a sexual offence has been committed should be discontinued shall rest with the Attorney General. “

In this case, the victim had been remanded at KJRH pending the hearing of this case and criminal case Nos. 796 of 2012 and 807 of 2012. She was then remanded at Kisumu G.K. Prison. The prosecution on 10.1.2013 informed the court they had considered the idea to withdraw the charges but the OCPD Bondo directed the case proceed to hearing. On the first appearance the victim PW1 on oath told the court as follows:-

“I used to live with my mother, her name is Joyce Agolla. The accused is not known to me, I am seeing him for the first time today.”

13. That when B.R. Kipyegon (RM) took over the matter, the accused elected to have the matter proceed from where it had reached. I find the matter proceeded from where it had reached. That when PW1 was recalled on 11.6.2013 to continue with her evidence she took 360° degrees turn in her evidence and stated as follows:-

“I can see one in the dock called Alphonse Odhiambo Olwa who was my neighbor. Alphonse asked me to be his friend but I refused. I joined [particulars withheld] Secondary in 2012, form one. In April 2012, there is nothing that happened. I never accepted to be friends with Alphonse but he forced me to be his friend. He said if I refused he would beat me up. He also told me if I report him to my mother he would beat me. There was a time he had sex with me in

June 2012.”

14. The evidence of PW1 is contradictory and riddled with the inconsistencies as regards whether she knew the appellant before her first appearance before court on 19.12.2012 or not. She was categorical on 19.12.2012 that she did not know the appellant then, however, after being charged and held at Kisumu Main Prison, she came back and purported to have known the appellant as her neighbor. The prosecution did not bother to put forward any evidence as to why the victim stated she did not know the appellant before and why there was now a change of her evidence. There are fundamental inconsistencies and contradictions in her evidence. I find the inconsistencies and contradictions in PW1's evidence were not considered. I have examined PW1's testimony and I am satisfied that there are fundamental inconsistencies that dent the prosecution's case. The appellant has succinctly identified the alleged inconsistencies and pointed out how they dent the prosecution's case. In view of the above contradictions and inconsistencies the trial court should have treated PW1's evidence with a lot of caution and should have looked for a corroborating evidence. **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 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.”

The trial court in its judgment stated the complainant was telling the truth but it did not record reasons in the proceedings why the court believed the complainant was telling the truth. The evidence of PW1, a minor needed therefore corroboration. The medical report, P3 form exhibit 2 do not corroborate the evidence of PW1, as the date and time of the said offence is recorded as “diverse dates”, in which the year and month is undisclosed. The doctor indicated the complainant appeared to conceal a lot of information. PW1 did not even tell the doctor when she was defiled. That though the hymen was torn the doctor indicated in his report the age of injury were uncertain.

15. I find that there is doubt as to whether the victim here was defiled by the appellant. There is doubt whether the victim was telling the Court the truth in view of fear of the consequences that may befall her on the pending case. Secondly, **Section 40 of the Sexual Offences Act** as to whether to continue with the sexual offence already filed lies with the Attorney General and not the OCPD. I have no doubt from the evidence that the victim was defiled but her evidence casts doubt as to whether the perpetrator was the appellant or someone else.

16. I have further perused the particulars of the charge sheet. The offence is alleged to have been committed between April and May 2012, however, PW1 in her evidence stated nothing happened during such period but states there was a time the appellant had sex with the victim in June 2012. PW2, the Doctor who examined the complainant in exhibit 2, noted PW1 appears to conceal a lot of information. The P3 form indicated the date of alleged offence to be “diverse dates.” The period of commission of the offence is not disclosed. The time when the hymen was torn is not determined. I find that the investigation in this matter to have been shoddy and casual in the way the police carried it out. This failure affects the credibility of the investigation.

17. **I now turn to the next ingredient of age of the victim.** PW1 stated that she was born on 14.12.1992 and identified Birth Certificate MFI P1. PW3, mother to the victim stated she was born on 14.12.1994. PW5 produced PW1's birth certificate as exhibit 1. I have perused the Birth Certificate of PW1 registered on 1.3.2011 but the date of issuance written as 24th day of Bondo, 2011. P3 form exhibit 2 show the victim was 15 years as of 6.6.2012 but as per Birth Certificate though with an error on the date of issuance, being an official document and not challenged by the appellant, it should be taken as the one with the current age of the victim. The victim was then 17 years and 6 months and a minor. I therefore find that the prosecution did not prove all the three ingredients of an offence of defilement and more

specifically that it was the appellant who defiled the complainant. In view of the contradictions and inconsistencies in the Prosecution's evidence and failure of the prosecution to give an explanation of the cause for contradictions and the circumstances under which the victim was remanded in custody and recalled to give evidence; I find the prosecution's evidence not credible as it is difficult to blow and swallow at the same time. It is hard to believe a witness who states on oath that she does not know the accused and was seeing him for the first time in court and on being remanded in custody and charged with an offence turns around and states she had known the accused as a neighbor. I doubt a court directing its mind properly will treat such a witness as credible and rely on her evidence to convict. I find that PW1 herein should not have been treated as a credible witness and her evidence should not have been believed.

18. Whether the appellant had a fair trial? The Lower Court record clearly shows that the charge was read and explained to the appellant in the language which he understood "Dholuo" contrary to his assertion that the charge was not read and explained to him. The appellant urges **Article 50(2) (h) of the Constitution of Kenya 2010** was violated. He has not explained in what manner his constitutional rights were violated nor did he state he applied for an advocate to represent him nor did he submit failure to appoint an advocate to represent him occasioned him substantial injustice in this case. On **Article 49 (1) (f) (i) (ii) of the Constitution of Kenya 2010**, the Appellant urges that he was arrested on 6.6.2012 and taken to court on 19.12.2012 instead of being taken to court within 24 hours. I have perused the court proceedings which show that the appellant was taken to court on 8.6.2012 and not on 19.12.2012 as indicated in the charge sheet. The appellant had been arrested on 6.6.2012 and taken to court on 8.6.2012. Whether 24 hours had lapsed by the time the appellant was taken to court depends on what day of the week it was when he was arrested. On 6.6.2012, that aside if the appellant's constitutional rights were violated, he can raise the issue before a constitutional court on violation of his constitutional rights. In view of the above, I find in this criminal case whether the appellants constitutional rights were violated or not the trial court properly proceeded to hear and determine the matter. I therefore find no merits in this ground of appeal.

19. The upshot is that I find the evidence of PW1 doubtful as to who defiled her due to the glaring contradictions and inconsistencies in her evidence and the fact that she had to be forced to give evidence in this case against the appellant. I give the appellant the benefit of doubt and find that though the complainant was defiled, it has not been proved beyond reasonable doubt that it was the appellant who did it. I shall give the appellant the benefit of doubt.

20. On the issue of DNA test, the Appellant and PW1 and the child were subjected to DNA tests but the results were not availed. The DNA taken in this case was to determine the issue of paternity of the PW1's child and whether the appellant was the father. The results by Henry Kiptoo Sang of Government Chemist, Nairobi, would have enabled court determine the father of the child and if positive would have strengthened the prosecution's case on defilement though in defilement cases, there is no requirement for DNA to prove defilement where there is other sufficient evidence but where DNA evidence is available either from discharge, semen or sperms or blood of either the victims or the perpetrator, it is important to be produced as it would corroborate the victim's evidence, places perpetrator at the scene and crime and can be used as a basis for conviction. DNA can be obtained from either the victim or the perpetrator in a criminal case. In this case, I once again blame the prosecution for failing to avail DNA test in spite of having been given sufficient opportunities to do so. Had such evidence been availed it would either have strengthened the prosecution's case or weakened the prosecution's case, but whatever the case might have been, the prosecution are to blame for failing to avail such vital evidence in this case, in view of the contradicting and inconsistent evidence of PW1.

21. The upshot is that the appellant's appeal succeeds. I allow the appeal. The conviction is quashed and sentence set aside. The appellant is set at liberty forthwith unless otherwise lawfully held.

DATED AT SIAYA THE 16TH DAY OF FEBRUARY, 2017.

J.A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF:

APELLANT – PRESENT IN PERSON

M/S. ODUMBA FOR STATE

C.A.

1. GEORGE NGAYO

2. PATIENCE OCHIENG

3. SARAH OORO

J.A. MAKAU

JUDGE