



THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 65 OF 2016

(CORAM: J.A. MAKAU – J.)

MICHAEL OCHALO OTEKE.....APPELLANT

VS

REPUBLIC.....RESPONDENT

(Being an Appeal against both the conviction and the sentence dated 6.6.2016 in Criminal Case No. 834 of 2014 in Bondo Law Court before Hon. M.Obiero-PM)

JUDGMENT

1. The appellant **MICHAEL OCHALO OTEKE** was charged with the offence of defilement contrary to **Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006**. The particulars of the charge are that on the **20th Day of August 2014** at [particulars withheld], in Bondo Sub-County within Siaya County intentionally caused his penis to penetrate the vagina of one MA, a girl aged 8 years. The Appellant 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**. The particulars of the charge are that on the same day, same place, the Appellant willfully and intentionally touched the vagina of MA, a child aged 8 years.

2. After full trial, the Appellant was found guilty of the alternative charge, convicted and sentenced to serve ten (10) years imprisonment.

3. The conviction and sentence provoked the Appellant to prefer the appeal setting out four grounds of appeal in the petition of appeal. Subsequently, M/S Dola, Magani & Co. Advocates filed what they referred to as “Memorandum of Appeal” dated 13/7/2016 setting out three grounds of appeal. That before the appeal could be heard, the appellant informed the court he was now acting in person and was relying on his supplementary grounds of appeal which he handed over to the court setting out the following grounds of appeal: -

a) That: the Learned Trial Magistrate erred in law and fact in convicting the Appellant when the evidence on record was manifestly insufficient, inconsistent and had glaring gaps hence incapable of sustaining a conviction.

b) That: the Learned Trial Magistrate erred in law and fact in convicting the Appellant against the weight of evidence on record.

c) That: the Trial court failed to consider that the right of the Appellant enshrined in Article 49(1)(f) of the Constitution of Kenya was not adhered to.

d) That: the evidence of PW1 strongly needed a corroboration to ascertain the charges leveled against the Appellant who was against the trial initiated by the Trial court.

4. At the hearing of the appeal, the Appellant appeared in person and relied on his supplementary grounds of appeal and attached written submission therein dated 26/9/2016. He added that he was framed because he had a grudge with the mother of the victim who he knew as A. He urged that though the victim said she knew the perpetrator and the offence took place at 4.00pm, her evidence was riddled with inconsistencies.

5. M/S M. Odumba, Learned State Counsel, opposed the appeal, urging that the conviction and sentence was proper on the alternative charge. She urged that the ingredients of the alternative charge were proved and that the complainant's evidence was corroborated by the medical report and even the trial court correctly relied on **Section 124 of the Evidence Act**. On issue of the grudge, she urged that the issue was not raised at the trial court though the Appellant had a counsel nor was it mentioned by the Appellant's witness. On defence of alibi, she urged it was not raised early enough for the Prosecution to check it out and disapprove it, urging it was an afterthought. She prayed that this appeal be dismissed.

6. I am first appellate court and 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 case of **Kiilu and Another V. R (2005) 1 KLR 174** where the court of Appeal held thus:-

“an Appellant in a 1st appeal is entitled to expect the whole evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision in the evidence. The 1st appellate Court must itself weigh conflicting evidence and draw its own conclusions.”

It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; only then can it decide whether the magistrates finding 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.”

7. The facts of the Prosecution's case are contained in the record of appeal and I need not reproduce the same save to summarize the Prosecution's case and the defence.

8. The Prosecution's case is that; MA, a child aged eight (8) years then in class four at St. [particulars withheld] who was living with her grandparent was on 20/8/2014 at around 4.00pm on her way home alone, when the Appellant passed her with his two dogs and who the complainant knew as Mukua. The Appellant then caught the complainant by the neck and forced her to the ground in a sisal plantation near the road; tore her pant, pulled her skirt down and did what the complainant called “tabia mbaya” between her thighs. The complainant felt pain and at some time, she was unable to scream as the appellant was holding her by her neck. That after the Appellant was through, he went away. The complainant went to her aunt's home and later to her grandmother's home but she did not tell them what had happened to her as she feared that she would be beaten. The complainant later explained to her grandmother, after she asked her why she was walking slowly. The victim was subsequently taken to the hospital, treated and later to Bondo Police Station. The Appellant was subsequently arrested and charged with the offence.

9. The Appellant denied the commission of the offence giving a defence of alibi, the Appellant denied knowing the complainant and urged that on 20/8/2014, he was at his home with his wife and children and did not go anywhere. That he was arrested on 28/8/2014 and on 1/9/2014, he was charged with this offence.

10. The Appellant in this appeal contends that the Learned Trial Magistrate erred in law and fact in convicting the Appellant when the evidence on record was manifesting, insufficient, inconsistent, with glaring gap hence incapable of sustaining a conviction. The Appellant urges that the evidence of PW1 was weak urging further the complainant's evidence was contradicted by the P3 form in that the hymen

was intact and as such no sexual offence was committed and further urged had the trial court considered the evidence of PW2 and PW3, it would not have invoked **Section 124 of the Evidence Act**.

11. The Appellant was convicted of the alternative charge of committing an indecent act with a child contrary to **Section 11(1) of the Sexual Offences Act**. **Section 2(1) of the Sexual Offences Act** defines “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 organs, breasts 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.”

12. PW1, MA, the complainant testified that on 20/9/2014 at 4.00pm, she met the Appellant on her way home, the Appellant passed her and held her by her neck and forced her to the ground. She had known him and gave his name as Mukua. She saw him tore her pant and pulled down her skirt and did what she referred to as “tabia mabaya” which means in English “bad manners” or “indecent act” between her thighs and she felt pain. The complainant stated she bled during the incident. The complainant identified the accused in court and gave his name as Mukua. The trial court in its judgment stated as follows: -

“when the complainant talked about the accused person’s “thing”, she was pointing at the genital region and when she talked about between her thighs, she was also pointing at her genital region. As such, I was convinced that she was talking about the genital organs when she talked about between her thighs and the accused person’s “thing”.

PW2, the grandmother to the complainant testified PW1 told her she had been defiled by someone known to her. She checked on PW1’s private parts and realized it had reddened. She also noted PW1’s clothes had been torn. PW4, a Clinical Officer who examined the complainant on 27/8/2014 noted that her hymen was intact and no bruises nor discharged and concluded there was no defilement. PW5 presented torn red pant exhibit 1, red stripped skirt exhibit 9, purple skirt exhibit 2, P3 form in respect of the complainant exhibit 4, P3 form in respect of the Appellant exhibit 7 and original birth certificate of the complainant exhibit 5 indicating the complainant was born on 15/11/2005. PW5 stated considering the OB the complainant knew the Appellant and she identified him. DW2, S A O, wife to the Appellant stated in cross-examination.

“my husband is also called Mukua”

13. In the instant case, I find that the Prosecution satisfied all the necessary essentials of an offence of indecent act with a child. The Prosecution proved the aged of the victim through production of birth certificate confirming the victim was born on 5/11/2015 and during the time of the commission of the offence, she was 8 years old, that PW1 recognized the assailant as the Appellant who she saw clearly, and who she knew as a neighbour and by his name “**Mukua**” which DW2 confirmed was the name of the Appellant. From the evidence of PW1 of which trial court found needed no corroboration, there is sufficient evidence that the Appellant’s genitalia had contact with the genital organs of the complainant. The trial court correctly stated the provisions of **Section 124 of the Evidence Act** and applied the same correctly, when it stated as follows in its judgment.

“During the trial, the complainant who was the alleged victim was sworn. She testified and was subjected to cross-examination. She was firm and consistent and I was convinced that she was talking the truth. As such, I am of the humble opinion that her evidence did not require any corroboration. I have also noted that the Learned Counsel did not actually state the exact piece of her evidence which required corroboration. With due respect, it also appears that the Learned Counsel is not aware of the provisions of the Section 124 of the Evidence Act.”

14. In view of the above, I find the Prosecution's evidence was sufficient, consistent and had no glaring gaps which would have dented the Prosecution case and the conviction against the Appellant is proper. The above findings disposed of the grounds numbers 2 and 4 of the appeal and I need not consider the same further.

15. The Appellant under ground number 3 contends that the trial court failed to consider that the right of the Appellant as enshrined in **Article 49(1)(f) of the Constitution of Kenya 2010** had not been adhered to. The Appellant in his written submissions did not submit on this ground. The charge sheet shows that the Appellant was arrested on 28/8/2014 and arraigned before court on 1/9/2014. He did not complain to the trial court that his constitutional rights had been violated or that **Article 49(1)(f) of the Constitution of Kenya 2010** had been violated in anyway. As this ground had not been convassed by the Appellant and the state, I see no need of making any finding other than to take it as having been abandoned and dismiss the same.

16. **I now turn to consider whether the Appellant's defence of alibi was considered?** The Appellant's defence is of alibi. He denied having left his home the whole day of 20/9/2014. On the Appellant's defence of alibi, the trial court did not consider the same, however, that failure would not prejudice the Appellant as I shall as First Appellate court consider the same and come to my own conclusion as required of the first Appellate Court. In cases where a defence of alibi is raised, the accused person does not assume the burden of proving the defence of alibi. In criminal cases, the burden lies squarely on the Prosecution, except in those cases where the section creating the offence specifically places some evidential burden on the accused to establish a fact or rebut a presumption or prove a defence of a particular kind. It is the duty of the Prosecution to disapprove of any alibi defence an accused puts forward unless it appears to the court that the alibi cannot be sustained or was raised at a time which did not give room for the Prosecution to check it out and disapprove it. **(See Njuki & Four Others V Republic (2002)1 KLR 771.**

17. I have very carefully evaluated the Appellant's defence of alibi and the first thing I have noted is that though the Appellant was all along represented by a counsel, he did through cross-examination of the Prosecution witness raise his defence of alibi at all. The Appellant's defence of alibi was for the first time raised in his defence at a time which did not give the Prosecution room for Prosecution to check it out and disapprove of it. That notwithstanding, I find the defence of alibi can't be sustained because the Prosecution through the evidence of PW1 placed the Appellant at the scene of crime. He was properly identified by PW1 as the offence took place during broad daylight and it took time as Appellant committed the offence of indecent act; PW1 saw him clearly and gave the name of the Assailant in her evidence as "Mukua" thus the other name of the Appellant as confirmed by his wife who gave evidence as DW2. I therefore, find the Appellant's defence of alibi to be without merits and an afterthought which in my view cannot be sustained.

18. **The upshot is that the Appellant's appeal is without merits and is dismissed. The conviction is upheld and sentence confirmed.**

DATED AT SIAYA THIS 16TH DAY OF FEBRUARY 2017.

J.A. MAKAU

JUDGE

DELIVERED IN OPEN COURT THIS 16TH DAY OF FEBRUARY 2017.

In the presence of:

Appellant: Present

M/S Odumba: for State

Court Assistants:

1. George Nganyo
2. Patience B. Ochieng
3. Sarah Ooro

J.A. MAKAU

JUDGE