REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 103 OF 2015

(CORAM: J.A. MAKAU – J.)

WALTER OTIENO OKUMU ……..…… APPELLANT

VERSUS

REPUBLIC ……...…….. RESPONDENT

(Being an appeal against both the conviction and the sentence dated 16.1.2015 in Criminal Case No.29 of 2015 in Bondo Law Court before Hon. M.M. Nafula –SRM)

JUDGMENT

1. The Appellant **Walter Otieno Okumu** was charged with an offence of defilement contrary to **Section 8 (1) (2) of the Sexual Offences Act No. 3 of 2006**. The particulars of the charge are that on the 5th day of January 2015 at [particulars withheld] village, Nyawita sub-location in Bondo District within Siaya County intentionally caused his penis to penetrate the vagina of JA a girl aged 8 years.

The Appellant 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.** The particulars of the alternative charge are that on the same day, same place the appellant willfully and intentionally touched the vagina of JA a girl aged 8 years.

2. After full trial the appellant was found guilty on the main count, convicted and sentenced to life imprisonment.

3. Aggrieved by both the conviction and sentence the Appellant preferred the appeal setting out the following grounds of appeal: -

a) The medical evidence adduced on PW1 was not in itself conclusive to lead the court to positive findings to make a conviction to stand.

b) The Appellant was not availed for medical examination which was very essential in this matter to counter prove the allegations that were laid upon him.

c) The learned trial magistrate erred in law and fact by failing to consider all the contradictions that were based on by the prosecution hence failed to analyze the same.

d) The learned trial magistrate failed to be alive on Section 124 of the evidence Act and ended up relying on a misdemeanor of the PW1.

e) The trial court erred to find that the prosecution had proved its case beyond any reasonable time despite the glaring lack of evidence.

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 in support of his appeal put in written submissions in which he urged the medical evidence was not conclusive to lead the court to justice as the complainant was examined three (3) days after the incident, after she had taken bath and changed the clothes which interfered with the medical examination, that medical examination in the P3 form is full of contradictions as PW1 stated she was taken to the hospital one day after the incident, however the P3 form was fabricated, that the ingredients of the offence of defilement were not proved, that the appellant was not identified and evidence of PW1, a minor needed corroboration. The Appellant urged that this was a case of mistaken identity, he urged he should have been medically examined to ascertain the findings on the minor. In this case, he also orally submitted that he was not taken to the hospital and that he was not supplied with the witnesses statements. He prayed the appeal be allowed.

7. M/s. M. Odumba, Learned State Counsel, opposed the appeal both against the conviction and sentence, urging the Appellant was properly convicted and sentence imposed was proper. On the offence of defilement she submitted all the essential ingredients of defilement, thus penetration, recognition/identification and age of the victim were established to the required standards and urged the court to dismiss the appeal.

8. The facts of the prosecution's case form part of the record of appeal and I need not reproduce the same, however, I will briefly summarize the prosecution's case and the defence.

9. The Prosecution's case is that on 5.1.2015, PW1 JA a minor aged 8 years was at home with her young sister when Otieno Ariff came to her parent 's home, Otieno told Ariff to go away after which he asked PW1 JA to show him the toilet. That at the toilet the Appellant did ***"tabia mbaya"*** to PW1 after that he went away. PW1 did not scream as the Appellant threatened to cut PW1 with a panga. PW1 bled from her private parts. PW1's parents came back at night and found her sleeping. The following day PW1's mother took her to the hospital then they proceeded to police. PW1 knew the Appellant as a neighbour and by his name as he used to go to PW1's parent's home. PW1 gave the name of her defiler as Otieno Ariff. The Appellant was subsequently arrested and charged with this offence.

10. The Appellant denied the offence and gave a defence of alibi. He gave unsworn statement and stated that on 5.1.2015 he was at home when at about 5.00am, someone knocked the door and on opening he saw three police officers, who enquired whether he was Ariff and he told them that was his father but he was dead, that one of them went out, made a call and on return they started beating him. He was subsequently arrested, taken to Maranda AP Camp, later escorted to Bondo Police Station. He was subsequently charged with the offence.

11. The Appellant contends the Prosecution did not prove the ingredients of an offence of defilement. The essential ingredients of an offence of defilement are as follows:-

(i) Penetration.

(ii) Recognition/ identification of the assailant.

(iii) Prove *of the age of the victim thus she is a minor*.

PW1 in her evidence testified that the Appellant asked her to accompany him to the toilet where he did ***"tabia mbaya"*** to her leaving her bleeding from her private part after he had removed her skirt and his trouser. The English translation of ***"tabia mbaya"*** is "indecent act" or "bad manners." Usually used by minor victims to the sexual assault or defilement in this country. PW1 in her use of the words ***"Tabia Mbaya"***, therefore meant she had been defiled by the Appellant. PW2 testified his late wife called him when she went to check on PW1, as she was complaining of pain from her private parts and on checking on PW1, PW2's wife told PW2, PW1 was bleeding from her vagina. PW3, a Clinical Officer who examined Pw1 on 8.1.2015 noted whitish discharge from the vaginal swap. He noted her genitalia, there was pain on the cervix, hymen was broken and injury was fresh. PW3 noted there was evidence of defilement. I have perused the P3, form exhibit P2 and Treatment notes exhibit P1 and both confirm PW1 was defiled. I have found the evidence of PW1 is corroborated by evidence of PW2, PW3 and exhibits P3 form, exhibits P2 and treatment notes, exhibit P1. The Prosecution proved the ingredients of penetration, and recognition of the assailant. PW1 was categorical that two people came to her parent's home on 5.1.2015. The two were Otieno, the Appellant and Ariff. The Appellant Otieno told Ariff to go, leaving him behind with the complainant, PW1. He talked to her asking for the toilet and even asked her to accompany him to the toilet. She witnessed him removed her skirt and his trouser and defiled her in the toilet. On cross-examination by the Appellant. She stated as follows:-

"On the day of the incident I saw you very well."

PW1 told her late mother, who told PW2, that PW1 told her she had been defiled by Otieno Ariff. PW1 told PW4 that she was defiled by the Appellant. That though PW1 was a minor and her evidence required corroboration I find the same was corroborated by PW2 and PW4. The trial Court considered PW1's evidence and found it to be consistent and found no reason to doubt it. The trial court heard the case, observed the demeanour of PW1 and found her to be truthful witness and gave reason for finding her a truthful witness. I therefore find in accordance with provision of **Section 124 of the Evidence Act** the Evidence of PW1 did not need to be corroborated to find a conviction. The trial court found her evidence truthful, believed her and gave reasons for believing her hence as per **Section 124 of the Evidence Act** PW1's evidence could be used to convict without any need of corroboration.

12. I now turn to the issue of the victim's age. PW1 did not state her age, however PW2, her father stated the complainant was 8 years old and identified her original birth certificate MFI-3. PW4, the Investigating Officer, who received PW1's Birth Certificate, stating she was born on 7.6.2007 produced the same as exhibit 3. I have considered the evidence of PW2 and PW5 and perused PW1's Birth Certificate exhibit 3 and I am satisfied that she was born on 7.6.2007 and as of 5.1.2015, she was 8 years and 6 months, therefore a minor. I therefore find the prosecution proved all the three essential ingredients of the offence of defilement.

13. The Appellant contends the Learned Trial Magistrate did not analyze and evaluate the evidence on record hence wrongfully convicted and sentenced the appellant. I have perused the trial court's judgment

and I have noted that the trial court analyzed and evaluated the evidence. The trial court complied with the provisions of **Section 169 of the Criminal Procedure Code**. The judgment contains points for determination, decision therein and reasons for determination. I find even if that was not the case, the appellant would not have been prejudiced because as an Appellate Court I am required to examine the whole evidence, carry out my own evaluation and analysis and come to my own conclusion. I therefore find no merits on this ground of appeal.

14. The Appellant contends the medical evidence adduced by PW1 was not in itself conclusive to lead the court to positive findings to make a conviction to stand. PW1 gave evidence as to how she was defiled and what injuries she sustained, however, PW3 a Clinical Officer who examined her and treated her produced the treatment notes exhibit 1 and P3 form exhibit 2. The medical evidence was necessary to confirm whether there was penetration into genitalia organs of PW1 being one of the ingredients of the offence of defilement. The medical evidence from PW3, P3 form exhibit 2 and treatment notes exhibit 1 were essential and conclusive evidence to enable court make a finding on a defilement of PW1. I therefore find that this ground is without merits and I dismiss the same.

15. The appellant contends that he was not availed for medical examination which was very essential in this matter to counter prove the allegation that were laid against him. Where medical examination can link the accused with an offence of defilement such as having DNA test conducted is very important and valuable evidence, however, in an offence under sexual offence and more specifically an offence of defilement failure to have the assailant subjected to medical examination is not fatal to the Prosecution's case as medical examination of the assailant is not an ingredient of an offence of defilement. In the instant case, the appellant was not arrested in the very act or immediately after the offence. The charge sheet show that he was arrested on 15.1.2015, thus 10 days after the incident. Medical examination was conducted as per P3 exhibit 1 in which the appellant was complaining of assault. The P3 form had nothing to do with the sexual offence. I therefore find failure to have the appellant medically examined on the complainant's complaint did not prejudice either the appellant or the complainant, as there was other evidence to prove the charge. I find therefore no merits in this ground of appeal.

16. The appellant contends the trial court erred in law and fact by failing to consider all the contradictions arising in the prosecution's case. I have perused the proceedings of this case and I have not come across the alleged fundamental contradictions which could dent the prosecution's case or weaken the prosecution's case in any way. The appellant has not in his submissions pointed out the alleged contradictions nor has he submitted how the alleged contradictions dents the prosecution's case. I find no basis on this ground and I dismiss the same.

17. The appellant contends that the court shifted the burden of proof to the appellant and that his defence was not considered. The burden of proof in criminal cases always lies with the prosecution and never shift. The appellant in this case gave a unsworn defence of alibi. The appellant contended that he was away. That he was arrested at 5.00 a.m. on 5.1.2015 and stated he did not commit the offence. The appellant did not in his statement, state of his whereabouts during the day time. He did not in cross-examination of the prosecution witnesses raise the issue of his defence early in time to give the prosecution sufficient time to disapprove his defence. The defence was raised for the first time in the unsworn defence. PW1 saw him and gave the particulars of her assailant to PW2 and PW3. That evidence placed the appellant at the scene of crime and dislodged his defence. The appellants statement being unsworn could not be tested and challenged through cross-examination and in my view it is no evidence upon which any reliance can be placed. The appellant's defence was not considered by trial court but that did not shift the burden of proof. I have considered the defence and I find that the same cannot be sustained as it was raised late in the defence and his evidence was dislodged by evidence of the prosecution's witness. The appellant's defence being unsworn statement is no defence that can be taken seriously as it cannot be tested through cross-examination.

18. Whether evidence of PW1 a child of tender years can be relied upon to sustain a conviction in absence of corroboration.

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."

19. The complainant was at the material time of the commission of the offence with her younger sister who did not give evidence as she was sleeping at the time of the commission of the offence. That aside her evidence would also require corroboration. The evidence of PW1 requires corroboration, however, under the provision of **Section 124 of the Evidence Act**, corroboration is not required in a criminal case involving Sexual Offence where the only evidence is that of the alleged victim of the offence as the court may take 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 this case, the trial court referred to **Section 124 of the Evidence Act** and cautioned itself. The court stated the evidence of PW1 a child of tender years did not require corroboration and stated:-

"Further I had the opportunity of observing the demeanor of the complainant herein during her testimony, I did not observe or note anything that would have suggested that she was not telling the truth. I also noted the complainant was able to identify the accused person by his name, even she was asked to identify the person who went to their house."

I am satisfied the trial court complied with the provisions of **Section 124 of the Evidence Act,** and received the evidence of PW1, and convicted the appellant after finding the complainant was truthful witness and gave reasons for believing her. I find no error in convicting the appellant on evidence of PW1 which by virtue of the provision of **Section 124 of the Evidence Act** did not require corroboration, though in this case, I find PW1's evidence was corroborated by PW3, the Clinical Officer, the P3 form exhibit 2 and treatment notes Exhibit 1. I therefore find the appellant's contention that the evidence of PW1 was not corroborated and the trial court failed to be alive of the provision of **Section 124 of the Evidence Act** to be without merits and I dismiss the said ground of appeal.

20. The upshot is that this appeal fails. The conviction is upheld and sentenced confirmed.

DATED AND SIGNED AT SIAYA THIS 16TH DAY OF FEBRUARY, 2017.

J. A. MAKAU

JUDGE

DELIVERED IN THE OPEN COURT THIS 16TH DAY OF FEBRUARY, 2017

IN THE PRESENCE OF:

Appellant in person

M/s Odumba for the State.

C.A. 1. GEORGE NGAYO

2. PATIENCE B. OCHIENG

3. SARAH OORO

J. A. MAKAU

JUDGE