



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 77 OF 2016

(CORAM: J.A. MAKAU - J.)

JOSHUA OCHIENG OMOLLO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal against both the conviction and the sentence dated 25.7.2016 in Criminal Case No. 516 of 2015 in Bondo Law Court before Hon. M.Obiero-PM)

J U D G M E N T

1. The appellant **JOSHUA OCHIENG OMOLLO** was charged with the offence of defilement contrary to **Section 8(1) as read with Section 8(4) of the Sexual Offences Act No. 3 of 2006**. The particulars of the charge are that on the 20th Day of August 2014 within Siaya County intentionally and unlawfully caused his male organ (penis) to penetrate the female organ (vagina) of one JAE, 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 Act. No. 3 of 2006**. The particulars of the alternative charge are that on the same day, at the same place, the Appellant intentionally touched the vagina of JAE, a child aged 16 years with his penis.

2. After hearing of the case, the appellant was convicted with the main charge and sentenced to serve fifteen (15) years imprisonment.

3. The conviction and sentence provoked this appeal through the firm of M/S Adiso & Company Advocates setting out six(6) grounds of appeal being as follows: -

- a) That the learned magistrate erred in law and fact by not considering appellant was never subjected to medical examinations.*
- b) That the learned magistrate erred in law and fact when the doctor's evidence never confirmed defilement.*
- c) That the learned magistrate erred in law and facts when the evidence given by the complainant was at variance with the charge.*
- d) That the learned magistrate erred in law and fact in convicting the appellant on evidence which was not proved beyond reasonable doubt and not proved on a balance of probability.*
- e) That the decision of the learned magistrate was against the weight of evidence and did not*

weigh the evidence from both sides.

f) That the appellant's constitutional right was breached by being detained for over 24 hours as per Chapter 50 of the Constitution of Kenya 2010.

4. At the time of hearing, Mr. Adiso, Learned Advocate, appeared for the appellant whereas M/s Maurine Odumba, Learned State Counsel, represented the state.

5. The facts of the Prosecution's case form part of the record of appeal and I need not reproduce the same but I shall summarize the prosecution's case and the defence.

6. The Prosecution's case is as follows: that on 13th June 2015, the complainant JAE left home at about 11.00am going to watch sports at Barkowino but did not return home nor did she respond to her parents' calls. That on 16th June 2015, her father called his son C who was at Siaya and he told him he did not see the complainant. On 17th June 2015 at about 3.00pm, complainant's father received a call that the complainant had been seen at Nyamonye prompting him to inform the police who had received the initial report. Her father sent his wife and son who went to take her to Bondo Police Station. She was later taken to Bondo Hospital and treated. The prosecution produced treatment notes, certificate of birth showing the complainant as a minor aged 16 years. That after investigation, the complainant JAE disclosed that she went to [particulars withheld] Secondary School for ball games and as she was leaving she met Dan who invited her to visit him and she agreed. That they went to his home where they enjoyed themselves and had sex. That she stayed there up to 15th June 2015, then she went to her classmate's home and on 16th June 2015, she went to her aunt's place at Barkonyango and on her way to her aunt's home, the complainant met her mother. That she was arrested and taken to police and hospital. The complainant stated Dan was her boyfriend and described Dan as the accused.

7. The appellant on being part of his defence, he denied the offence. He stated that on 13th June 2015, he left home at 10.00am for Barkowino to attend sports and left at 4.00pm with a friend who was going to pick his children from the school and from there he went home, to attend to family cows. That on 16th June 2015, she was arrested by police officers from Maranda from his *Kinyozi* business. He was asked about a certain girl who he stated he did know, he was escorted to Bondo Police Station and on 19th June 2016, he was charged with this offence which he denied.

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. Mr. Adiso, Learned Advocate, for the appellant urged ground no. 1 urging the appellant was not subjected to medical examination as required under P3 form with *part 'D'* and that **Section 36 of the Sexual Offences Act** was not complied with. He then combined grounds no(s) 2, 3 and 4 of the appeal and argued them as one ground urging that the evidence adduced did not confirm that there was defilement as per Section 3 of the P3 form, he urged it indicated the complainant on examination was not

found to have been defiled as compared with doctor's evidence; that the charge was at variance with evidence in that the complainant did not state she was defiled but talked of sex, which Mr. Adiso urged would have meant oral sex. Mr. Adiso abandoned ground no. 5 and proceeded to ground no. 6 urging the appellant's constitutional rights were violated as he was not arraigned in court within 24 hours from the time of his arrest and that no reasons was given for the delay.

10. M/S Maurine Odumba, Learned State Counsel, concedes the appeal on the ground that the evidence did not disclose penetration urging the essential ingredients of the offence of defilement were not proved. On the issue of violation of the constitutional rights of the appellant she urged the appellant cannot rely on the alleged violations of his constitutional rights to have the appeal quashed for in this case, the court is not sitting as a constitutional court, and urged that argument is misplaced. She urged there were doubts as to whether the complainant was defiled and urged that benefit of doubt should be accorded the appellant.

11. **Whether failure to subject the appellant to medical examination is fatal to the prosecution case?** The appellant urged that *part 'D'* of the P3 form require male accused of any sexual offence to be subjected to medical examination. I have perused the P3 form and indeed *part 'D'*, provides for examination of male accused persons of any sexual offence. This means a male accused of sexual offence may be subjected to medical examination and especially where one is charged under **Section 36 of the Sexual Offences Act**. The court may under **Section 36** order the accused person to be subjected to medical examination. **Section 36(1)(2) of the Sexual Offences Act** provides: -

“36. (1) Notwithstanding the provisions of section 26 of this Evidence of medical Act or any other law, where a person is charged with committing an or forensic nature. offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.

(2) The sample or samples taken from an accused person in terms of subsection (1) shall be stored at an appropriate place until finalization of the trial.”

12. The part of P3 form relied upon by the appellant is not mandatory nor is there a provision under **The Sexual Offences Act** that makes it mandatory for the male accused person to be subjected to medical examination before being charged with a sexual offence. I agree with the trial court's findings that there is no law which specifically provides that a suspect of sexual offence must first be examined, however, the police in the course of investigation are free to collect any sample of the suspect either for DNA purposes to prove the sexual offence but where the police in their investigation find that it is of no evidential value to subject the male accused of sexual offence to medical examination that failure is not fatal to the prosecution case and especially in cases where the suspect is arrested after passing of time or after destroying evidence that may be incriminating against him.

13. **Whether the prosecution proved defilement in this case?** For the prosecution to prove the offence of defilement, it is required to prove the following ingredients: -

(i) penetration

(ii) age of the victim is below 18years

(iii) that identification / recognition of the assailant.

14. In the instant case, the prosecution through PW1 and PW2 stated that the complainant JAE was born on 9th January 1999. PW1 and PW2 identified the complainant's birth certificate as MFI-2. PW1 stated the complainant was born on 9th January 1999 whereas PW2 stated it was on 5th January 1999. PW3, the Investigating Officer stated the complainant was born on 8th January 1999 and produced the birth certificate as exhibit 2. I have carefully perused the birth certificate exhibit 2, No. [particulars withheld]

which indicates the date of birth to be 8th January 1999 issued on 27th November 2013. I therefore find that as of the time of the alleged commission of the offence the complainant was a minor aged 16 years.

15. The only prosecution witness who claimed to have known the appellant before the incident is only the complainant. She referred to the appellant as Dan who she claimed was her boyfriend. She stated the appellant took her to a certain house where they had sex. The complainant did not state where the appellant's home is situated or gave details of the location of the home nor did she take the police officers to the appellant's home. The complainant who claimed she knew the appellant as her boyfriend did not give full names of the appellant nor did she state his alias name was Dan nor did she state his profession or where he works, she identified the accused in the dock stating she could see Dan the accused person. The police did not state they had full details of the appellant before they arrested him and that they were given his name as Dan as stated by the complainant. PW3, No. [particulars withheld], PC Omudho Okwaro, the Investigating Officer did not state that the complainant JAE gave him the name of her perpetrator or her alleged boyfriend. Similarly, PW1 was not given the name of the appellant by his daughter as her assailant. PW3 only received a call from AP Inspector Odero of the arrest of a suspect, which had earlier been made by PW1, N O A. In the evidence of PW1 he did not give the name of the appellant and it is not clear what the report contained and in particular how the appellant was arrested without police having been given details of the assailant. No single witness was called to state, that the appellant was seen with the complainant and the allegation by PW3 that he had received information that accused had been seen with the complainant on 13/6/2015 is hearsay. I therefore find from the evidence of PW1, PW2 and PW3; the person who was with the complainant was not identified as per the required standard of proof.

16. I now turn to the next ingredient thus, as to **whether penetration was proved to the required standard?** The only evidence regarding penetration is that of PW2 and PW4 the Clinical Officer. PW2 evidence is not specific as regards penetration as she generally stated they enjoyed themselves, they had sex, she did not feel pain and that was her first time to have sex. PW4 who filled the P3 form on 18/6/2015 over JAE, the complainant, he stated she had normal external genitalia with vaginal discharge and blood stains in the vaginal opening which was reddish and whitish. There were no spermatozoa seen. PW4 testified it was hard for him to confirm defilement and that the hymen had been broken at the time of the examination. PW4 produced the P3 form as exhibit 3 and the examination (treatment) as exhibit 1. I have carefully perused the P3 form exhibit 3 and treatment card exhibit 1, in which it is indicated on examination, it was noted there was normal external genitalia with vaginal discharge and blood on the clitoris with whitish discharge. The P3 form did not mention of hymen having been broken. Secondly, PW4 did not state that the discharge and blood found at complainant's genitalia was not normal nor did he lay evidence to connect it with a sexual act. He stated it was very hard for him to confirm defilement. From the evidence of PW2, I find it hard to understand what she meant when she stated they enjoyed themselves and had sex. She did not make it clear to the court whether they had sexual intercourse or oral sex and that may be one reason why in the P3 form, the clinical officer did not make a finding that her hymen was broken or not. The clinical officer did not do a thorough job in examining the complainant as he even told the court he found it very hard to confirm defilement. He did not state why he found it very hard to confirm defilement. That evidence of PW2 and PW4 creates doubt in the court's mind as to whether penetration was achieved by the assailant to JAE, the complainant herein. I therefore find that all the essential ingredients of the offence of defilement were not proved beyond reasonable doubt.

17. The appellant contends that his constitutional rights were breached by being detained for over 24 hours as per **Article 50 of the Constitution of Kenya, 2010**. The appellant urged that he was arrested on 16/6/2015 and arraigned before court on 19/6/2015. He stated he was detained in police cells for 2 days contrary to **Article 49(1)(f)(i)(ii)** which provides: -

“49. (1) An arrested person has the right—

(f) to be brought before a court as soon as reasonably possible, but not later than: -

(i) twenty-four hours after being arrested; or

(ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;

The charge sheet gives the date of arrest as 16/6/2015 and the date, the appellant was taken to court as 19/6/2015. It is a constitutional right for every arrested person to be arraigned before court as soon as reasonably possible but not later than 24 hours after being arrested or if the twenty four hours ends outside ordinary court or a day that is not ordinary court hours or a day, the end of the next court day. In this case, 16/6/2015 fell on a Tuesday and 19/6/2015 on a Friday. It follows therefore that the appellant was not taken to court within 24 hours as provided for under **Article 49(1)(f)(i)(ii) of the Constitution of Kenya 2010**. The said Article states the arrested person is to be brought before court as soon as reasonably possible but not later than 24 hours. This court is not sitting as a constitutional court so as to fully deal with issues raised, and issues as raised could not in my view bar the trial court from dealing with the criminal case then before it. The issue can only be determined in a constitutional court, properly constituted, which can base its decision on issues and pleadings brought before it. I therefore find that the issue as it is, has been raised at the wrong forum and more specifically in a criminal case. That if the appellant is aggrieved by failure to comply with **Article 49 of the Constitution of Kenya 2010**, he can raise the issue in a constitutional court as his remedy do not lie in a criminal court but in a constitutional court. For these reasons, I find that this ground is misplaced in so far as it is raised to have the conviction quashed and the appeal allowed on that ground.

18. The State Counsel on her part concedes the appeal. I have considered the appeal and I am satisfied the State Counsel correctly concedes the appeal as penetration was not proved and the appellant was not identified as the assailant.

19. The Upshot is that the appeal is meritorious. The same is allowed, the conviction is quashed and sentence meted against the appellant is set aside. The appellant is forthwith set at liberty unless otherwise lawfully held.

DATED AND SIGNED AT SIAYA THIS 2ND DAY OF MARCH 2017.

J.A. MAKAU

JUDGE

DELIVERED IN OPEN COURT THIS 2ND DAY OF MARCH 2017.

In the presence of:

Mr. Adiso: for Appellant

M/S Maurine Odumba: for State

Court Assistants:

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

J.A. MAKAU

JUDGE