



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 129 OF 2016

(DEFILEMENT)

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

SAMUEL AYAMI ODONGO.....APPELLANT

VS

REPUBLIC.....RESPONDENT

(Being an Appeal against both the conviction and the sentence dated 05.07.2016 in Criminal Case No. 941 of 2015 in Bondo Law Court before Hon. M. Obiero – P.M.)

J U D G M E N T

1. The Appellant **SAMUEL AYAMI ODONGO** faced a charge of defilement contrary to **Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006**. The particulars of the charge are that on the diverse dates between the 29th day of September, 2015 and 14th day of October, 2015 in Bondo Sub-county within Siaya County, intentionally caused his penis to penetrate the vagina of **SAO**, a child aged 16 years.

2. The Appellant also faced an alternative charge of committing an indecent act with a child contrary to **Section II(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 committed an indecent act with **SAO**, a child aged 16years.

3. Aggrieved by the conviction and sentence, the Appellant filed the present appeal setting out the following three (3) grounds of appeal namely: -

(a) That the Learned Trial Magistrate erred in law and fact by failing to adhere to Article 50(2) of the Constitution of Kenya, 2010.

(b) That the Learned Trial Magistrate erred in law and fact by accepting the prosecution's evidence which was scanty.

(c) That the Learned Trial Magistrate erred in law and fact by not warning himself on the dangers of convicting on a single evidence.

4. At the hearing of the appeal, the Appellant appeared in person whereas M/S Odumba, Learned State

Counsel appeared for the state. The Appellant relied on his written submissions.

5. 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).”

6. The court proceedings and judgment of the Lower Court form part of the record of appeal and I need not reproduce the same but I will simply summarize the prosecution case and defence.

7. The facts of the prosecution case are as follows: that on the 29th September 2015, the Complainant, then 17years old at 10.00am, went to Ndori to visit her boyfriend one, Cliff and one Sammy, the Appellant came and Cliff left him behind as he went to his *Kinyozi* business. That the Appellant subsequently left for the shop, returning with *maandazi* and porridge for the Complainant. The Appellant requested the Complainant to accompany him to his place which she agreed to. That the Complainant and the Appellant spent the night together and had sex. The Complainant stated, that it was not her first time to have sex, as she has had sex with other boys before. That the Complainant stayed at the Appellant's place for three days during which time they had sex. That on the third day, people from the Complainant's home went to the Appellant's home, both were arrested, taken to Lwala Kotiende Police Station, then to Bondo District Hospital, whereby the Complainant was examined and treated. The Complainant identified her birth certificate as MFI-1 showing she was born on 20th October 1999. PW5, the Clinical Officer who examined the Complainant, produced P3 form exhibit 2, confirming the Complainant had been defiled.

8. The Appellant on being put on his defence, he gave sworn defence admitting that on 29th September 2015 at about 1.00pm, he met the Complainant after he had taken porridge to her at her boyfriend's home, one Cliff, who after discussion with the Appellant told him, her boyfriend Cliff was disturbing her and she asked the Appellant to be her boyfriend, to which the Appellant asked the Complainant if she was still going to school, to which she told him, she was no longer going to school. That the Appellant went with the Complainant to his parents, and she later returned to Cliff's home. The Appellant took the Complainant as an adult and continued talking to her on various days over the phone. On 13th October 2015, the Complainant told the Appellant she would like to come to his home. That on 14th October 2015, the Assistant Chief arrested both the Appellant and the Complainant. The Appellant denied having had sexual intercourse with the Complainant, alleging she was on her monthly periods adding he thought she was an adult.

9. Whether the prosecution proved the ingredients of an offence of defilement in this case? The essential ingredients of an offence of defilement can be summed up as follows: -

(i) Recognition and/or identification of the Assailant.

(ii) Penetration.

(iii) Age of the victim is below 18 years.

10. In the instant case, both the Complainant and the Appellant met on 29th September 2015 at 10:00am at Cliff's house, the boyfriend to the Complainant. Both agree the Appellant brought *maandazi* and porridge to the Complainant, they talked and were able to agree to go to the Appellant's home and stayed there together. I therefore find that there is no dispute, that the Complainant knew and did recognize the Appellant.

11. Section 2(1) of the Sexual Offences Act defines "*penetration*" as follows: -

"2 (1) "penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person."

12. The Complainant testified that on the night of 29th September 2015 and the three subsequent nights, she was with the Appellant at his home, they had sex. However, the Appellant on his part denied having had sex with the Complainant because she was on her monthly periods. PW5, the Clinical Officer who examined the Complainant on 14th October 2015, and who claimed she had been defiled between 3rd October 2015 and 13th October 2015 confirmed that the Complainant had been defiled as per P3 form exhibit 2. I have examined the P3 form exhibit P2 and indeed the same confirmed the Clinical Officer noted multiple lacerations, old and fresh on *labia majora* and *minora* and hymen perforated. There is evidence that the two stayed together as man and wife for three nights. This is also confirmed by PW2, PW3 and PW4. However, the Complainant in her evidence, stated that she was first found, by the Appellant at her boyfriend's home and secondly, she admitted she has had sex with other boys prior to that material time. The Appellant stated that he did not have sex with the Complainant at the time they were together simply because she was on her monthly periods. The only evidence against the Appellant is that of a single witness the Complainant. **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 court 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."

13. I have considered the conflicting evidence, adduced by both the Complainant and the Appellant as to whether the two had sex during the period they were together. I have perused the trial court's judgment as regards the Complainant's evidence and as to whether her evidence required any corroboration by virtue of **Section 124 of the Evidence Act**. I find from the evidence of PW5, the Complainant's evidence was corroborated, hence the prosecution proved defilement. On Appellant's defence, that the Complainant had monthly periods, I find if she had monthly periods, PW5 who examined her on 14th October 2015, immediately after the two were found together, he would have noted so and would have indicated so. The Appellant had an opportunity to put that to PW5 in cross-examination when he gave evidence but did not raise that issue. I find part of his defence to be an afterthought.

14. On the issue of age, the prosecution case is that at the time of the commission of the offence, the Complainant was aged 16years. The Complainant in her evidence in-chief, stated that she is 17years old and identified her birth certificate MFI-1. PW3, mother to the Complainant, testified that her daughter

was 16years having been born on 2nd October 1999. PW6 produced birth certificate of the Complainant as exhibit 1 stating she was born on 20th October 1999. I have perused it, and it reveals that the Complainant was born on 20th October 1999, thus at the time of the commission of the offence in September 2015, the Complainant was 16years old. However, that notwithstanding under **Section 8(5)(a)(b) of the Sexual Offences Act** provides as follows: -

“8. (5) It is a defence to a charge under this section if -

a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and

b) the accused reasonably believed that the child was over the age of eighteen years.”

15. In the instant case, the Appellant raised the defence under **Section 8(5)(a)(b) of the Sexual Offences Act**. I have considered the Appellant’s defence. The Appellant took precaution before involving himself into an affair with the Complainant. The Appellant in his defence on oath stated that he talked to the Complainant at the home of her boyfriend, Cliff, who told him of her problem with her boyfriend, Cliff, and she told the Appellant, she wanted him to be her boyfriend to which the Appellant enquired from her, whether she was still going to school. She told him she was no longer going to school and that is when he went with her to his place. The Appellant took her as an adult and continued talking to the Complainant. That on 13th October 2015, the Complainant told the Appellant she was in the process of obtaining identity card.

16. I have considered the Appellant’s defence and I am satisfied that the, Appellant proved from the conversation he had with the Complainant and her conduct of even having a boyfriend and asking the Appellant to be her friend, and telling him, she was awaiting for her national identity card, the Complainant, a child, deceived the Appellant into believing, that she was over the age of eighteen years at the time of the alleged commission of the offence. That the appellant also proved that he reasonably believed, that the child was over the age of eighteen, as she told him she was no longer going to school and that she had applied for her national identity card. The Appellant’s belief is reasonable and having regard to all circumstances of the case and that he Complainant had a boyfriend and wanted to change her boyfriend and get the Appellant as her boyfriend, including the steps taken by the Appellant to ascertain the age of the Complainant, in view of the aforesaid, I am satisfied with the Appellant’s defence and steps taken by him to ascertain the age of the Complainant which Defence should not have been brushed aside by the trial court by stating that the Appellant was doubtful of the Complainant’s age by asking her. The Appellant took appropriate steps and did indeed establish that the Appellant was an adult.

17. The Learned State Counsel concedes the appeal on the ground that the Appellant proved that the child deceived, the Appellant to believing that she was over the age of eighteen years at the time of the alleged offence, which he reasonably believed was so and further by taking steps to ascertain the age of the Complainant. I find the State correctly concedes the appeal.

18. The upshot is, the appeal is merited. The conviction is quashed and the sentence meted against the Appellant set aside. Accordingly, I direct the Appellant be set at liberty forthwith unless otherwise lawfully held.

DATED AND SIGNED AT SIAYA THIS 5TH DAY OF APRIL 2017.

J.A. MAKAU

JUDGE

DELIVERED IN OPEN COURT.

In the presence of:

Court Assistants:

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

Appellant: in person, present

M/S Odumba: for State

J.A. MAKAU

JUDGE