



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 117 OF 2016

(DEFILEMENT)

CLIFF ODHIAMBO OBURU APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal against both the conviction and the sentence dated 9.9.2016 in

Criminal Case No. 269 of 2016 in Ukwala Law Court before

Hon. G. Adhiambo -SRM)

JUDGEMENT

1. The Appellant **CLIFF ODHIAMBO OBURU** faced a charge of **defilement contrary to Section 8 (1) (2) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence are that on the 26th day of June 2015, in Ugenya District within Siaya County intentionally caused his penis to penetrate the vagina of RA a child aged 9 years. The Appellant also faced an alternative charge of **Committing an indecent Act with a Child Contrary to II(1) of the Sexual Offences Act No. 3 of 2006**. The particulars of the charge are that on the 26th day of June, 2015 at in Ugenya District within Siaya County, intentionally touched the vagina of RA a child aged 9 years with his penis.

2. After full trial the Appellant was found guilty, convicted and sentenced to serve life imprisonment.

3. Aggrieved by the conviction and sentence the Appellant preferred this appeal dated 23rd September, 2015, through the firm of M/s M.A. Ochanji Opondo and Company Advocates setting out six (6) grounds of appeal being as follows:-

(a) That the learned trial Magistrate erred in law and fact in finding that the Prosecution had proved its case beyond reasonable doubt inspite of glaring lack of evidence.

(b) That the learned trial Magistrate erred in law and fact by convicting the appellant yet the complainant's evidence and the P3 form produced did not support the charge against the appellant.

(c) The learned trial Magistrate erred in law and fact in relying on extraneous matters to convict the Appellant.

(d) That the findings of the learned trial Magistrate were against the weight of the available evidence on record.

(e) The learned Magistrate erred in law and fact when she failed to consider and or appreciate the defence of the Appellant's which was weighty.

(f) The sentence imposed on the Appellants was harsh in the circumstances taking into account the mitigation of the Appellant.

4. 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”

5. The record of Appeal contains the facts of the Prosecution's case and the defence, and I need not reproduce the same save to summarize the Prosecution's case and the defence.

6. The facts of the Prosecution case are as follows:- that on 26.6.2015, the complainant herein RA had been send by her mother, PW2, to go to a Posho Mill at around 4.30 p.m. and on her way home she met the Appellant, who entered into their home and enquired from PW1, the complainant, whether Steve was there, to which PW1, told the Appellant she had not seen him, he then pulled her as he was holding her into her deceased grandmother's abandoned house, laid down a mattress, laid the complainant there, removed her inner wear, slept on top of her and defiled her. When the Appellant was through he left PW1, who ran away home, informed her mother. The complainant was then taken to the Ukwala Sub-County Hospital. PW1 stated that the Appellant is the person who defiled her and that she used to see him before. The Complainant was issued with P.3. form, which was completed, that as PW1, narrated the incident to her Mother PW2, the suspect passed by and the child identified him, PW2 started running after him. PW2 was later told the Appellant had been arrested, handed over to the Police. PW2, identified PW1's P3 form, MFI- P1 (a) and the treatment notes, MFI – P 1 (b). The Appellant was subsequently charged with this offence.

7. PW3 No. 83706 Sgt. Charlotte Muga received first Report at 8.30 p.m on 26.6.2016 that a suspect had been arrested after committing an offence of defilement and held in a house in which members of Public wanted to set the house on fire. That the complainant was a minor aged 9 years. She informed OCS Ip. Muhonga, who visited the scene and arrested the suspect who on being brought to Ukwala Police Station he placed him in cells. PW3 produced the Birth Certificate of the minor, aged 9 years, having been born on 28.6.2006 as exhibit P2. The complainant was taken to the Police Station by her mother PW2. On cross-examination PW3 stated that he was not the Investigating Officer but one CPI. Machasio

8. PW4, the Clinical Officer at Ukwala Sub-County Hospital Patrick Okero, produced evidence on behalf of his colleague Calvince Otieno, who had been transferred to Kisumu. The Patient had been treated on 26.6.2015 at Ukwala Sub-County Hospital at about 6.35 p.m. on a complainant of having been defiled by a person unknown to her while going to the Market at about 5.00 p.m. On examination she was found to have sustained bruises with no traces of sperms. That the patient was reviewed at 7.20 p.m. and on examination of the genetalia, the hymen was found to be intact with slight bruises on the vulva area, thus

the outer part of the vagina. No blood stains or sperms were visible. In the P3 form signed on 28.6.2015 at 5.35 p.m. clothes were clean but her pants were torn. The Mother reported the child was defiled by a person known to her on 26.6.2015 at 5.30 p.m., the child was fine but reported of pain on her genitalia. On examination of the genitalia the external genitalia appeared normal with slight bruises on the vaginal wall but the hymen was intact, the doctor revealed that there were sign of penetration because the bruises on the vaginal wall. P3 form filled on 28.6.2015 and Treatment notes on 26.6.2015 issued to RA were produced as exhibit P. 1 (a) and 1 (b) respectively.

9. The Appellant on being put on his defence, gave his defence on oath. He denied the offence stating that on 26.6.2015 at around 6.00 p.m. he had gone to look for his friend Joseph Odhiambo at the Lower part of Ukwala but did not find him, as he was told by his mother, he had gone to school. He then drove back home, but after a short while he heard screams and wondered what was happening, as he was not a resident of the area and not familiar in that area. He saw people pursuing him who followed him to their rental house in Ukwala. That the people wanted to beat him and lynch him for an offence he did not commit. He was taken to Ukwala Police Station, and later charged with this offence. He denied defiling the child.

10. At the hearing of the appeal Mr. Ingotsi, Learned Advocate appeared for the Appellant whereas M/s. Odumba Learned State Counsel appeared for the State.

11. Mr. Ingotsi, Learned Advocate, appearing for the Appellant urged that he had put in six (6) grounds of appeal which grounds of appeal he consolidated and urged the appeal under ground No. 1 of the petition of the appeal. He urged the trial Court erred in failing to take into account the dictates of **Section 124 of the Evidence Act**, urging the evidence of PW1 was unsworn Evidence of a minor, that the trial Court relied on the speculation in arriving at its findings, that evidence of PW4 was speculation as his evidence was based on bruising of the vagina, that complainant in the treatment notes stated she was defiled by unknown person, that penetration was not proved as the bruises would have been caused by bacterial infection. That conviction was not safe. He urged the Court to quash the conviction.

12. M/s. Odumba, learned State Counsel, opposed the Appeal against both the conviction and sentence, urging the Prosecution proved all the ingredients of the offence of defilement. She urged the Prosecution proved penetration and that P.3. Form exhibit P 1 (a) and treatment notes exhibit P1 (b) corroborated PW1's evidence. She urged PW1 recognized the assailant who was arrested shortly after the incident at his parent's rental house. That the complainant identified her assailant. She urged it is true in the treatment notes it is indicated the perpetrator as unknown, however, in the P3 form it is indicated that perpetrator is known. She urged that this contradiction do not cause any prejudice to the Appellant as that was a minor error which the Court should overlook, on issue of the age of the Complainant, she urged a Birth Certificate was produced exhibit P2 confirming the Complainant was born on 28.6.2006 and was at the time of commission of the offence aged 9 years.. That she was not capable of consenting to the act.

13. In response Mr. Ingotsi, learned Advocate, for the Appellant urged that penetration was not proved. That the complainant's evidence was not corroborated and that **Section 124 of the Evidence Act** was not complied with, that evidence of PW1 was not credible as the Doctor who examined her immediately indicated her clothes were clean and pant torn, whereas, PW1 stated her pant was intact. He urged penetration cannot be achieved where hymen was intact.

14. The issue for consideration in this appeal is as per Appellant's ground of appeal No. 1. That is whether the Prosecution had proved its case as against the Appellant herein, beyond reasonable doubt? The State urges the Prosecution proved all the ingredients of the offences of defilement, thus penetration, age of the Complainant was 9 years and recognition and/or identification of the Assailant.

15. The Prosecution called PW1, RA the Complainant who after undergoing *voire dire* examination, the Court ordered the minor to give unsworn statement that after giving the unsworn statement the Court was silent on cross examinations of PW1, RA, the record does not indicate whether the defence opted not to cross-examine the witness (PW1) or not. The trial Court should at least have recorded something about cross-examination or failure to cross-examine the witness. (PW1)

16. Under Article 50 (1) (2) of the Constitution of Kenya it is provided:-

“(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

(2) Every accused person has the right to a fair trial, which includes the right-

(k) to adduce and challenge evidence;

17. In **DWM V Republic CRA No. 12 of 2014 (2016) eKLR**, the Court of Appeal addressed itself that:

“In Nicholas Mutula Wambua & Another versus Republic Mombasa Criminal Appeal No. 373 of 2006 (UR) this Court when confronted with a similar issue construed Sections 208 and 302 of the Criminal Procedure Code governing trials in the subordinate Court and the High Court respectively and arrived at the conclusion that cross-examination of a witness who has given evidence not on oath is permitted by law. The Court approved the view taken by the Supreme Court of Uganda in the Sula Case (Supra) that cross-examination of a child who gives evidence not on oath is meant to test the veracity of such child’s evidence in the Nicholas Mutula case (supra) the Court went over the responses given by the child witness both during the voire dire examination and in cross-examination of his/her unsworn testimony and then observed thus”

18. The trial Court at the Lower Court was commenced before a different Magistrate and concluded by another Magistrate. The trial Magistrate who delivered the judgment could therefore not for certain say whether the complainant was telling the truth in her evidence or not. Her evidence not given on oath and there having been no cross-examination by the Appellant’s Counsel, for unexplained reason, the evidence remained untested on its veracity.

19. In **John Otieno Mumbo V Republic HCRA 35 of 2008**, the Learned Judge quoted with approval from the case of **Johnson Muiruru Vs. Republic 1983 KLR 445** where the Court held thus:

“Where a child of tender years gives unsworn evidence then corroboration of that evidence is an essential requisite. But if a child gives sworn evidence no corroboration is required but the assessors must be directed that it would be unsafe to convict when there was no corroboration.”

That in the case of **Kibangeny arap Koli Vs. Republic [1959] EA 92**. Where it had been stated:-

“But even where the evidence of a child of tender years is sworn (affirmed) then although there is no necessity for its corroboration as a matter of law, a Court ought not to convict upon it if uncorroborated without warning itself and the assessors if any of the danger of doing so.”

20. In a trial the Court made a finding that the Appellant was positively identified as the person who had defiled the complainant RA. It is well settled principle that evidence of visual identification in Criminal Cases can cause a lot of miscarriage of justice, if not carefully tested. In the case of **R V Turnbull and others (1976) 3 ALL ER**, Lord Widgery C.J. had this to say:-

“First, wherever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was there any material

discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance?

21. PW1, RA, testified she met the Accused, who entered into her home, asked for Steve to which PW1 told the Accused she had not seen him. He then pulled her holding her hand into her deceased grandmother's abandoned house, laid mattress down, laid the complainant there and slept on her. He then defiled her. After which she ran away, told her mother and accused ran away, that she used to see the accused before. In **Maitanyi V. Republic (1986) KLR 198, the Court of Appeal** at page 201 held:

“In this case the complainant was identifying a person whom he was able to recognize thus reducing further the risk of a mistaken identity. We are satisfied that notwithstanding the fact that identification was by a single witness our view is that the identification was watertight.”

22. The complainant PW1, did not state the condition of light outside the house and inside the house however, from evidence of PW2, it is clear the offence was committed between 4.30 p.m. – 5 p.m. thus during day time. PW1 was therefore able to see and identify her assailant in her evidences. PW1 RA did not give description of the Assailant. She did not describe how he was dressed and whether she was able to see his face. She did not state what description she gave PW2, and PW4 as regards her Assailant. In her first Report to Police, PW4, she did not give description of the assailant nor did she state where she used to see him nor the mode of transport he was using. PW2 stated that PW1, RA told her she had met a certain guy with a bicycle who stopped her on the way, got hold of her pulled her into a certain abandoned house and defiled her. That as she explained the suspect passed by and PW1 identified the suspect to PW2 who started running after him. She was later called and told the suspect was arrested. From evidence of PW2 and that of PW1 there are glaring contradictions which dent the Prosecution's case. PW2 stated the child told her, she met a certain guy with a bicycle who dragged her on her way, got hold of her, pulled her into as certain abandoned house. In her evidence PW1 did not mention meeting a certain guy with a bicycle nor being stopped on the way. PW1 never in her evidence mentioned, showing the suspect to her mother nor identifying him as she was explaining the incident to her mother, PW2 never mentioned PW1 having given her the description of her assailant as a person she used to see around. PW1 when she went for her first treatment and was being attended to by the Doctor! In the treatment note exhibit P1 (a) she stated she was defiled by unknown person whereas two days after, thus 28.6.2015 she stated the Assailant was a person known to her. That if then the person was unknown to the complainant on 26.6.2015 how came he became known on 28.6.2015 to the complainant? That if that was a person known to her why is that in her evidence in chief or 30.6.2015 she was unable to comment that her assailant was known to her and describe how she knew her assailant. The complainant attempt to identify the Appellant at the dock is not sufficient identification and Court's should shun dock identification in criminal cases.

23. In view of the above, I find that the Prosecution failed to positively identify the Appellant as the person who had defiled the complainant. I further find the evidence of PW1 had not been tested for its veracity, and that it required corroboration as **Section 124 of the Evidence Act** was not complied with by the trial Court for it not to require corroboration.

24. PW4, the Clinical Officer testified that from exhibit P1 (a) the treatment notes, there was Evidence of slight bruises with no traces of sperms. Exhibit P1 (b), P3 form, revealed on examination of PW1's genitalia, normal genitalia with slight bruises on the vaginal wall but the hymen intact. No vaginal discharge or bleeding with signs of penetration because of the bruises on the vaginal wall. The Appellant suggested the bruises might have been caused by bacterial infection. I have very carefully examined exhibit P 1 (a) and exhibit P 1 (b) and I have noted the Doctor did not find on examination of the complainant any bacterial infection, that would have caused bruises to the complainant genitalia area. I find as correctly found by the Doctor these signs of penetration were caused by the penile organ.

25. In the instant case the Appellant urges as per Doctor's evidence as the hymen had not been broken and was intact penetration was not achieved.

“Penetration” is defined under **Section 2 (1) of the Sexual Offences Act No. 3 of 2006** as

follows:-

“Penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person;”

The fact that the hymen had not been broken does not in itself imply that there was no penetration of the genitalia organ of a person by genitalia organ of another person in view of the provisions of **Section 2 (1) of the Sexual Offences Act No. 3 of 2006.**

26. In **Erick Onyango Ondeng V. Republic CRA No. 5 of 2013 (2014)** eKLR Court of Appeal addressed itself as follows:-

“We do not share the Appellant’s suggestion that Dr. Muhombe’s report concluded that there was no hymen whilst that of Dr. Kamau concluded that the hymen was intact. Dr. Muhombe’s report was that the hymen had some old tears on the lateral and anterior side, suggesting that it was still there. We agree with the first appellate Court that to establish defilement, it is not necessary that the hymen must be broken; even partial penetration of the female genital by male genital will suffice to constitute the offence. In TWEHANGANE ALFRED VS UGANDA (supra) the Uganda Court of Appeal expressed the same view as follow:

“In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.”

27. On the age of the complainant, RA, during the **voire dire** examination, PW1 stated that she is 9 years and in class 2 at [Particulars Withheld] Girls. PW2 her mother stated PW1 is 9 years having been born on 29.6.2006. She identified PW1’s Birth Certificate [Particulars Withheld] Sgt. Charlotte Munga testified that the minor was 9 years having been born on 28.6.2006. He produced the Birth Certificate as exhibit P2. I have very carefully perused the Birth Certificate Exhibit P2, being uncertified photocopy of the Birth Certificate of RA, but though uncertified as true copy of the original, it indicates the date of birth of PW1, RA as 29.6.2006. I find that as of, 26th June 2015 she was 9 years. The Prosecution though did not produce the original Birth Certificate and the uncertified copy was produced, without any objection from the Appellant and as Appellant has not challenged the same document. I find that the Prosecution proved that the complainant was a minor aged 9 years.

28. Whether the evidence of PW1 was corroborated by the medical document?. PW1, RA, testified that she was defiled by her assailant. PW4, gave evidence on behalf of his colleague Calvince Otieno after he had laid down the basis why the maker of the document was not available. No objection was raised as of then by the Appellant’s Counsel. The treatment notes exhibit P 1 (a) and the P.3. form exhibit P.1. (b) corroborated the complainants evidence that she was defiled. In exhibit P1 (a) it was noted PW1’s genitalia area had bruises but hymen intact. The P.3 form exhibit P 1 (b) revealed, PW1’s genitalia was normal with slight bruises on vaginal wall with hymen intact, there was no vaginal discharge or bleeding. The doctor remarked that there were signs of penetration because of bruises on the vaginal wall. I therefore find from the evidence of PW4, the treatment notes exhibit P 1 (a) and P3 form exhibit P1 (b), the evidence of PW1 was corroborated by evidence of PW4 as regards defilement.

29. I find that though the Prosecution in this case was able to prove penetration and age of the victim, I find that the evidence on identification of the Appellant wanting. That though the offence occurred during day time, the evidence of identification of the Appellant cast some doubt as no description of the assailant were given by PW1, her evidence of identification is wanting and her evidence is heavily contradicted by PW2. PW1 was not able to give some description or identification of her assailant to those who came to her aid nor to the Police. Based on the above, I find that the identification of the Appellant is not safe to warrant Appellant’s conviction. I find the identification evidence was not overwhelming enough and did not displace the Appellant’s defence of alibi.

30. The upshot of the foregoing is that I find the appeal is meritorious. I accordingly quash the conviction, set aside the sentence. I accordingly direct the appellant be set at liberty forthwith

unless otherwise lawfully held.

DATED AND SIGNED AT SIAYA THIS 15TH DAY OF JUNE, 2017.

J. A. MAKAU

JUDGE

DELIVERED THIS 15TH DAY OF JUNE, 2017

IN THE PRESENCE OF:

APPELLANT IN PERSON PRESENT

MR. INGOTSI ADVOCATE FOR APPELLANT

M/S. M. ODUMBA FOR STATE

C.C.

1. LABAN ODHIAMBO

2. PATIENCE OCHIENG

3. SARAH OORO

LANGUAGE ENGLISH/KISWAHILI

J. A. MAKAU

JUDGE