



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
CRIMINAL APPEAL NO. 34 OF 2016

ALFRED OUMA OWITI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against Judgment, Conviction and Sentence imposed in Tamu Criminal Case Number 21 of 2015 by Hon. M.C.Nyingei RM on 7.10.15)

JUDGMENT

The trial

The Appellant herein **Alfred Ouma Owiti** has filed this appeal against his conviction and sentence on a charge 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 5.8.15 at [particulars withheld] location in Muhoroni District within Kisumu County intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of **FAAa** girl aged 6 years.

The prosecution's case

The prosecution called 5 witnesses in support of the charge. PW1 the complainant testified that she was 7 years old. She recalled that on the material day, she returned home from school and the appellant took her to his house where he defiled her and threatened to beat her if she reported the matter to anyone. That one Pamela witnessed the incident and called for help after which the appellant was apprehended and handed over to the police. She said she knew the appellant well since he lived near their home and had previously defiled her.

PW2 P A K, told court that the appellant lived in a house adjacent to hers. She recalled that on the material date at about 10.30 am, she was in her house when she heard the voice of a child in appellant's house. That she became concerned since appellant had no children and she peeped through a hole on the mabati wall and saw appellant defiling the complainant on his bed. That she went out and locked appellant's house from outside after which she called for help and appellant was apprehended and handed over to the police.

PW3 APC Polycarp Lusimba recalled that on the material date, he rescued the appellant from a crowd that was baying for his blood after he allegedly defiled a minor and escorted him to Chemelil Police Station.

PW4 P Doreen Ndinda the investigating officer recalled that on the material date; she received the complainant and the appellant and it was reported that appellant had defiled the complainant. That complainant was taken to hospital for examination. That she received complainant's certificate of birth PEXH. 2 which shows that she was born on 18.12.08.

PW5 Ednah Koech, a clinical officer stated when she examined complainant on 5.8.15 and found that she had bruises on both labia majora and minora, hymen was freshly torn and she had watery bloody discharge on vagina and both thighs. She further told court that she examined appellant on 5.8.15 and lab results revealed that he was HIV +. She produced complainant's and appellant's P3 forms as PEXH. 1 and PEXH. 3 respectively.

The Defence Case

When he was put on his defence, the appellant opted to remain silent.

Appellant was found guilty, convicted and sentenced to serve life imprisonment.

The Appeal

Being dissatisfied with the conviction and sentence, the appellant lodged the instant appeal. In his Petition of Appeal filed on 16.9.16, the appellant set out 4 grounds of appeal to wit:-

- 1. That the learned trial magistrate relied on the evidence of a single witness without considering the circumstances of the case.***
- 2. That the learned trial magistrate erroneously relied on contradictory and uncorroborated evidence***
- 3. That the learned trial magistrate relied erred in law and fact to convict the appellant by failing to find that forensic evidence was vital and necessary to establish the truth of the matter***
- 4. That the defence was not given due consideration whereas the same was capable of awarding an acquittal.***

During the hearing of the appeal, the appellant relied on his filed written submissions which he orally highlighted while, Mr. Muia, Counsel for the state made oral submissions in response thereto and stated that the conviction was legitimate since appellant was arrested in the act of defiling the complainant.

Analysis and Determination

This being a court of first appeal, I am guided by the ruling of the Court of Appeal in the case of **OKENO VS. REPUBLIC [1972] E.A.32**, where it held that:-

“It is the duty of a first appellant court to consider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld”

The trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and this court is in dealing with this appeal obligated to give allowance for that.

In dealing with this appeal, I will consider grounds 1 and 2 together and grounds 3 and 4 separately as follows:-

a. Did the learned trial magistrate rely on the evidence of a single witness?

Complainant's evidence that she was defiled by appellant in his house is well corroborated by PW2 P A K, who witnessed the incident, locked appellant's house from outside, called for help after which

appellant was apprehended and handed over to the police. Appellant's claim that the learned trial magistrate relied on the evidence of a single witness is untrue and it is rejected.

b. Forensic evidence/DNA

The Appellant argued that the trial magistrate made misdirection by failing to observe that there was no DNA test carried out to establish the appellant's complicity in the commission of the alleged offence.

In **AML v Republic 2012 eKLR**, the Court of Appeal upheld the view that:

“The fact of rape or defilement is not proved by way of a DNA test but by way of evidence.”

This was further affirmed in **Kassim Ali v Republic Cr Appeal No. 84 of 2005** where this Court stated that:

“The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence.”

Moreover, section 36 of the Sexual Offences Act that gives the trial court powers to order an accused person to undergo DNA testing uses the word **“may”**. I therefore find that the power to order an accused person to undergo DNA testing is discretionary and it was not a mandatory obligation on the trial court.

c. Defence

Appellant opted to remain silent when he was put on his defence. The trial court cannot be faulted for failing to consider a defence that was not tendered.

Decision

Appellant was sentenced to imprisonment for life. The sentence imposed on the appellant is the one provided for under Section 8(2) of the Sexual Offences Act and I find no fault in the decision of the trial court. The upshot of this is that the appeal is dismissed and the sentence imposed on the appellant is upheld.

DATED AND DELIVERED THIS 13th DAY OF July 2017

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant -

Appellant -

For the State -