REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 67 OF 2015

TONY KOKORO ….. APPELLANT

VERSUS

REPUBLIC ….. RESPONDENT

[Being an appeal from the conviction and sentence of the Principal Magistrate's Court at Maseno (Hon. M. C. Nyigei RM) dated the 15th January 2015 in Maseno PMCCRC No. 1334 of 2014]

JUDGMENT

The appellant was charged with Defilement Contrary to Section 8(1)(3) of the Sexual Offences Act No. 3 of 2006 and in the alternative committing an indecent act with a child Contrary to Section 11(1) of the Sexual Offences Act.

The particulars in the main charge were that on 23rd October 2014 at about 1PM at Holo Market in Kisumu West Sub-County in Kisumu County he intentionally and unlawfully caused his penis to penetrate the vagina of M A a child aged 14 years.

In the alternative charge it was alleged that on 23rd October 2014 at about 1PM at Holo Market in Kisumu West Sub-County in Kisumu County he intentionally touched the vagina of M A a child aged 14 years with his penis.

He pleaded not guilty to the charges but after hearing and considering the evidence of the complainant and two other prosecution witnesses and the accused's unsworn statement the trial magistrate found him guilty on the main charge, convicted him and sentenced him to serve twenty years imprisonment.

Being aggrieved he has filed this appeal which is premised on the following grounds:-

1. ***That the trial court erred in law and in facts by failing to observe that he was never subjected to any medical examination to corroborate the medical officer's report.***

2. ***That the learned trial magistrate erred in law and facts by failing to observe that he was never served with witness statements before the case commenced as the law stipulates.***

3. ***That the learned trial magistrate erred in both law and facts by failing to observe that he was never given ample time to defend himself as per the law.***

4. ***That the learned trial magistrate erred in facts and in law by finding and or holding that he was guilty of the offence charged in respect of the main count where the prosecution had not established guilty beyond the required standard of proof beyond reasonable doubt.***

Briefly the Prosecution's case was that the complainant is aged 14 years and suffers from epilepsy. According to the trial magistrate she is mentally retarded. She gave evidence that on the material day the appellant took her to his house where he removed her clothes and then proceeded to have sexual intercourse with her. The occupants of a nearby house allegedly heard what was happening and called the police. Otieno Omolo an Administration Police Constable (PW2) and his boss immediately went to the house and found the appellant leaving the house. He had not worn his shirt and was about to leave the house while the girl was sleeping on the bed. When they awakened her she looked for her pant but they took it. Both she and the appellant were taken to Holo Police Post and then to Maseno Police Station before they were taken to Maseno Sub-District Hospital. Upon examining her the clinical officer (PW3) found tears on the lower part of the complainant's vagina. She also had a whitish foul smelling discharge and signs of an infection. He also examined the appellant and found he had a similar infection as that of the complainant. He concluded the girl had been defiled and also confirmed her to be fourteen years old.

The appellant in an unsworn statement admitted that he was found with the complainant in his house. He however denied that he defiled her and stated that he had taken her to give her "mandazi" and a banana. He stated that he was arrested just as he was about to leave the house and that he together with the girl were taken to the hospital.

At the hearing the appellant relied on his written submissions where he abandoned grounds 2 and 3 in his petition but added a new ground on the deficiency of the charge albeit without obtaining the leave of this Court.

He submitted that the complainant was not consistent nor truthful; that there was no evidence to support her allegation and that the clinician was not honest in his testimony and did not give "key ingredients in support of defilement." He submitted that he had no bruises something that was critical and which misplaced the medical evidence and which required corroboration. He further submitted that the police investigations were shoddy as some of the witnesses were never summoned to testify. Further that the Prosecution failed to call defence witnesses and as such his own defence was overlooked.

On the charge he submitted that it was defective as drawn and that to the extent that it refers to an non-existent law he was entitled to an acquittal.

The appeal was opposed. Miss Wakio Prosecution counsel urged this Court to uphold the conviction and sentence. She submitted that the clinical officer corroborated the complainant's evidence as it was his evidence that the appellant and the complainant suffered from the same infection. She contended that the issue the appellant was present throughout his trial and never raised the issue of statements hence prayers 2 and 3 were an afterthought. She contended that the trial magistrate had evaluated the evidence of the prosecution and the statement of the appellant and there was no error.

In reply the appellant submitted that as the complainant had said she did not know him he ought not to have been arrested. He then stated that he had not been supplied with the charge sheet and that he did not understand what was happening or why he was charged. He then added that he did not understand the language used by the interpreter which was English.

As the first appellate Court my duty is to reconsider and evaluate the evidence afresh so as to reach my own conclusion. I am satisfied that the charge against the accused person was proved beyond reasonable doubt. The complainant vividly narrated how the appellant took her to his house where he undressed her and had sexual intercourse with her. She stated that this was against her will which in my view is immaterial as the Court did get confirmation from the clinical officer that she was fourteen years old and as such consent is irrelevant. The clinical officer testified that upon examining the complainant he found she had an infection and the appellant had the same infection when he examined him. The appellant in his unsworn statement admitted that the police found him with the girl in his residence. He stated that they found just as he was leaving the house. He also admitted that he was taken to the hospital where samples were taken from him. This corroborates the evidence of the police officer that when they went to the house they found the appellant leaving and pushed him back into the house and that the complainant was in that house. The allegation by the appellant that he had taken her to the house just to give her

"mandazi" and a banana is rebutted by the evidence of the clinical officer that upon examining the girl about 3 hours after the occurrence he found that she had tears in the lower part of her vagina and that she had an infection similar to the one found with the appellant. The appellant admitted he was taken to the hospital and that some samples were drawn from him. This means that the clinical officer was not lying. Moreover neither the clinical officer nor the police officer had any reason to lie against him as they did not know him.

Grounds 2 and 3 of the petition were abandoned as can be noted in the written submissions and in the appellant's oral reply. He did however raise new grounds which I need not consider as he did not apply for leave to amend the petition as provided for under Section 350(2) of the C.P.C. Nevertheless let me observe that whereas the charge as drawn was defective that was a defect that did not prejudice the appellant and is curable under Section 382 of the Criminal Procedure Code. As for him not being supplied with the charge sheet that must surely be an afterthought as it was raised in the very last minute. So is the allegation that he did not understand the language of the Court. The handwritten proceedings indicate that the language used by the Court was Kiswahili or English translated into Kiswahili and from the manner in which he cross-examined the witnesses and later made an unsworn statement it is safe to conclude that he very well understood the proceedings. The sentence imposed is the minimum provided for the offence charged and is therefore lawful.

In conclusion I find no merit in this appeal. Accordingly the same is dismissed and the conviction and sentence which was the minimum provided under the law is upheld. It is so ordered.

Signed, dated and delivered at Kisumu this 11th day of February 2016

E. N. MAINA

JUDGE

In the presence of

Miss Wakio for the state

Appellant in person

CA: Felix Magutu

Interpretation: English/Kiswahili