



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL APPEAL NO.57 OF 2010

BETWEEN

AYUB OKOBOLA WABUTIAPPELLANT

AND

REPUBLIC.....RESPONDENT

**(Being an appeal from the judgment of the trial Magistrate M/s Ochien’g SPM in Butere SPM
Criminal Case No.984 of 2007 delivered on 6th March 2009)**

J U D G M E N T

Background

1. AYUB OKOBOLA ABUTI the appellant herein was charged before the Senior Resident Magistrate’s Court at Butere Court at Butere Criminal Case No.984/2007 with the offence of defilement of a child contrary to Section 8(3) of the Sexual Offences Act No.3 of 2006. Particulars of the offence are that on the 6th December 2007 at [particulars withheld] in Butere district within the Western province, he willfully and intentionally had carnal knowledge of a child namely P.A.K a child of 13 years.
2. The appellant was also charged in the alternative with the charge of Indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act No.3 of 2006. The particulars of the offence are that on 6th day of December 2007 at [particulars withheld] in Butere district within Western province willfully and intentionally indecently assaulted P.A.K a child aged 13 years by touching her private parts namely vagina and thighs.

The Prosecution Case

3. In support of the said charges the Prosecution called a total of nine (9) witnesses. P.A.K (PW 1) was taken through a voire dire examination before being allowed to give a sworn statement. She was the victim in this case. The Prosecution case was as follows: PW1 was waiting for a vehicle together with her sister on the 6th December 2007 at Sabatia when the appellant approached them and told them that there were no vehicles and that he could give them a lift on his bicycle. PW1 was aged 13 years old. The incident happened at 2p.m. The appellant took them to his house and offered them sugarcane. Later the appellant waited for the younger sister to PW1 to fall asleep and then he removed PW1’s clothes and his trousers and inserted his penis inside her vagina. PW1 was in pain but could not scream as she had been threatened by the appellant. The appellant did this act to PW1 three times.
4. The next morning PW1 and her sister left the appellant’s house and as they walked together with

the appellant they met with some ladies PW4 (M A) and PW5 B M who got concerned at their appearance. The women PW4 and PW5 told PW1 and her sister not to walk with the appellant. They also inquired what the appellant had done to PW1 as she was not walking properly. The women took them to the village elder PW2 Joel Okoana Omutsa where PW1 told her story. The ladies took her to hospital which is Shiraha health centre where she was treated. She was then taken to PW3's house. PW3 was Roa Saya. The matter was reported to Police at Khwisero. PW2 the village elder got the report about PW1 and her sister from PW3. He took the children to hospital and assisted in the arrest of the appellant. PW3 was approached by PW4 and PW5 who brought to her the two children.

5. PW3 examined PW1 and noted that she had been defiled. She took her to hospital where the same was confirmed. PW4 and PW5 are the two women who met the appellant with the two children and became suspicious of him while PW4, M A was the grandmother of the two children. She told the trial Court that the two were her grandchildren who had visited her and who she released to go to their mother after giving them fare on the day of the incident. PW7 Number 61210 received the report at the Police station's children's desk. She also assisted in taking PW1 to hospital for examination. PW7 was the Investigating officer in the case.
6. PW8 Aggrey Nyongesa Nyongesa the Clinical officer attached to Butere hospital examined the child and formed the opinion that PW1 had been defiled. This matter was investigated by PW9 No.45062 PC Robinson Maina who then handed over the same to the children's desk.
7. After carefully considering the entire Prosecution evidence the trial Court found that the appellant had a case to answer and placed him on his defence.

Defence Case

8. The appellant gave a sworn statement. He told the trial Court that on the 7th December 2007 he woke up in the morning and went to the shop which was near his house. After making his purchases he started to walk towards his house when he heard screams behind him. He looked behind and saw the owner of the shop chasing him claiming he had stolen from the shop. He was beaten and his money stolen. He was taken to the Police station at Khwisero and later taken to Court. He claimed that he was surprised at the charges read to him when he was taken to Court. He denied the charges.
9. After considering the whole of the evidence by both the Prosecution and the defence the trial Court convicted the appellant of the main charge of defilement and sentenced him to serve twenty (20) years imprisonment.

The Appeal

10. Being dissatisfied by the said conviction and sentence the appellant brought this appeal on the following grounds:-

1. THAT the learned Trial magistrate erred in law and fact by basing his conviction on the evidence of single identifying witness which evidence was not sufficient to sustain a conviction.
2. THAT the Trial magistrate erred in law and fact by holding that the Prosecution did prove their case beyond all reasonable doubts notwithstanding that there was no circumstantial or direct evidence connecting the appellant with the offence.
3. The Trial Magistrate erred in law and fact by convicting the appellant on the basis of evidence which did not support the charge.
4. The sentence was harsh and excessive.
5. That the Trial magistrate erred in law and fact by failing finding a conviction while the eye witness mentioned by the complainant in her evidence was never called to give evidence.

6. That the Trial Magistrate failed to note that the evidence of PW1 (the complainant) lacks corroboration.
7. That the Trial magistrate failed in law and fact when he failed to consider that medical evidence of the appellant had not been undertaken confirming the appellant as the person who committed the offence.
8. That the Hon. Magistrate erred in law and fact by failing to appreciate that the Prosecution failed to prove the dates the complainant received treatment after the offence as alleged and this contradicts the evidence of PW8 Doctor as the date when the offence took place.
9. That the trial Magistrate failed and or ignored the evidence of PW4 and PW5 which contradicted the evidence of PW1 and therefore there was no proper analysis of the witnesses evidence before arriving at a just conclusion.
10. That the trial Magistrate erred in law and fact by to evaluate the appellant's statement of defence before arriving at a decision.
11. That the trial Magistrate erred in law and fact by failing to find that the appellant's Constitutional right to fair trial was infringed by being taken to Court after 24 hours and yet the offence was not a capital offence.
12. That the trial Magistrate erred in law and fact by not finding that the trial was a nullify as the appellants Constitutional right to fair trial was infringed.

11. The appellant filed written submissions and also made his oral submissions at the hearing of the appeal. He raised issue with the charge sheet which he claimed was defective on the grounds he has set out. He also raised issue with the age of complainant claiming that there was variance of evidence by the Prosecution witnesses and that there was no age assessment. The appellant noted the presence of PW6 in Court when others were testifying and he objected to her testifying but the trial Court allowed her to testify. He essentially reiterated the grounds of appeal in his submissions both written and oral.

12. Mr. Omwenga for the State opposed the appeal. He submitted that PW1's evidence was corroborated by PW4, PW5 and PW7 contended that the charge sheet was not defective and that the sentence was within the limits set out in the Sexual Offences Act No.3 of 2006. He added that there was no need for medical tests to be done on the appellant since the evidence of the child as to defilement had been proved and corroborated.

13. On the anomalies in dates Mr. Omwenga submitted that these cannot make a trial void since the offence was proved and further that since PW1 stated that she was born in 1992 by 2008 she was 16 years old and therefore a minor. On the violation of rights Counsel contended that the appellant could seek redress in a civil Court.

Analysis and Determination

14. This being a first appeal this Court has a duty to evaluate the evidence afresh and come to its own conclusions bearing in mind that it neither saw nor heard the witnesses. See **Okeno -vs- Republic [1972] E.A. 32.**

15. From the evidence on record the complainant PW1 was with her sister after visiting PW6 and they were on their way home on the 6th December 2007 when they met with the appellant who lied to them that there were no vehicles to take them home. The appellant then promised them that he could give them a lift on his bicycle but instead of taking them to the stage he took them to his house where he gave them sugarcane with the sole intention of defiling PW1. At his house the appellant waited for the younger sister of PW1 to fall asleep and after threatening PW1 with dire consequences, he defiled her three (3) times. The next morning the appellant left his house in the company of PW1 and her sister.

16. As they walked they were seen by PW4 and PW5 who became suspicious and inquired why the appellant was in the company of the young girls that morning. Both PW4 and PW5 also got suspicious and wanted to know why PW1 was walking with difficulty. PW1 explained what she had gone through at the hands of the appellant. The appellant then left the two girls with PW4 and PW5 who took them to PW3's home.
17. PW3 examined PW1 and concluded she had been defiled. She reported to the elder PW2 and they took the children to hospital and at the same time reported the case at Khwisero Police station. PW1 was examined by PW8 the Clinical officer who after examining her formed the opinion that there was penetration of her vagina and that she was defiled. This case was investigated by both PW7 and PW9 who were Police officers from Khwisero Police Station one of whom came from the children's department. Appellant was thereafter charged with the offence before the trial Court.
18. In his defence appellant claimed that on the 7th December 2007 he was arrested and beaten by his shopkeeper who claimed that he was a thief. He was thereafter arrested and taken to the Khwisero Police station. He was surprised to hear the charges of defilement read to him in Court. He maintained that he did not commit the crime.

Issues for Determination

19. Having analyzed the evidence both by the Prosecution and defence and considering the appeal as presented by the appellant the main issue for determination is whether the conviction of the appellant for the offence of defilement contrary to Section 8(3) of the Sexual Offences Act No.3 of 2006 is sustainable on the strength of the evidence adduced. The critical ingredients forming the offence of defilement are; the age of the complainant, proof of penetration and positive identification of the assailant.

Analysis and Determination

20. The age of the victim in sexual offences is critical because the punishment prescribed by the Sexual Offences Act is hinged on the age of the victim. Regarding the age of the complainant in this case, the complainant told the Court that she was born in 1992 so that by the time she testified in 2008, she was about 16 years old, although she gave her age as 13 years. PW2 Joel Okoyama Omutsa who testified as PW2 estimated the complainant's age to be 12 years while PW3, Road Soya said she was informed by M A, PW4 and B M, PW5, that the girls (meaning complainant and her younger sister) were about 16 and 13 years old respectively. The complainant's grandmother, M A who testified as PW4, and that the complainant appeared to be 14 years old. On his part, the Clinical officer, Aggrey Nyongesa opined that the complainant's age was 13 years.
21. It thus appears from the above evidence that the age of the complainant in this case was not properly established. The evidence given in Court is therefore inconsistent with the particulars in the charge sheet and the same cannot be used as a basis for a conviction under the main Count of defilement.
22. The next issue for determination is whether the appellant was clearly identified and the complainant's assailant. I have reconsidered the whole of the evidence on record and find that the incident occurred during the day. On the following morning, the appellant was found in the company of the complainant and her sister. That fact alone sent shivers down the spines of PW3 and PW5 who wondered why the complainant and her sister were in the appellant's company. The conclusion I have reached is that the appellant was properly and positively identified.
23. The final issue for determination is whether there was penetration. According to the complainant once the appellant satisfied himself that her younger sister had fallen asleep, he removed the complainant's clothes and put his penis into her vagina. After he finished, he took her white garment and wiped himself with it. He defiled her a second and third time during the night. The Clinical officer who examined the complainant 5 days after the alleged offence stated as follows: The vulva was swollen and examination of high vaginal swab revealed the presence of epithelial cells, which were proof of defilement. It is not in doubt therefore that the complainant was defiled and that it is the appellant who defiled her.

24. What then is the conclusion of this matter? Two of the ingredients for the offence of defilement, namely penetration and indentify of the appellant have clearly been proved beyond reasonable doubt, but the age of the complainant in this case remains doubtful, was the complainant 12, 13, 14 or 16 years? It was incumbent upon the Prosecution to establish the age of the complainant. If the complainant's mother had been called to testify this would have shed some light on the correct or was correct age of the complainant. The complainant herself testified that she was born in 1992, a fact which would then take her outside the bracket of Section 8(3) of the Sexual Offences Act No.3 of 2006. This being the case, the conviction of the appellant on the main Count cannot stand. I accordingly allow the appeal in this ground.

25. I am however satisfied that the offence in the alternative Count can stand. Accordingly, I quash the conviction on the charge of defilement and set aside the sentence of 20 years imprisonment. I however find the appellant guilty of the alternative charge of indecent act and convict accordingly of the same. I sentence the appellant to ten (10) years imprisonment. This sentence shall run from 6th March 2009. Right of Appeal within 14 days from today.

26. Orders accordingly.

Judgment delivered, dated and signed in open Court at Kakamega this 2nd day of March 2016.

RUTH N. SITATI

J U D G E

In the presence of:

Present in Person - for Appellant

Mr. Omwenga (present) for Respondent

Mr. Lagat - Court Assistant