



REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL NO. 40 OF 2015

BETWEEN

DAVID OCHIENG ADOYO alias OUNDE APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 518 of 2014 at Senior Resident Magistrates Court at Ndhiwa, Hon.B. R. Kipyegon, RM dated 8th June 2015)

JUDGMENT

1. The appellant, **DAVID OCHIENG ADOYO**, was charged with the offence of defilement contrary to **section 8(1) and (3)** of the ***Sexual Offences Act, 2006*** in the subordinate court. He was convicted and sentenced to 15 years imprisonment. The particulars of the charge were that on 16th November 2014 in Ndhiwa District of Homa Bay County, he intentionally caused his penis to penetrate the vagina of PAA, a child aged 15 years. He also faced an alternative count of committing an indecent act with a child contrary to **section 11(1)** of the ***Sexual Offences Act, 2006*** based on the same facts.
2. The appellant appeals against conviction and sentence based on the grounds set out in the grounds of appeal filed on 14th October 2015. The substance of his appeal is that the prosecution failed to provide him with statements and that the prosecution failed to prove the offence. He also contended that the trial court failed to consider his alibi defence. Mr Oluoch, counsel for the respondent, submitted that the prosecution proved all the elements of the offence. He submitted that the appellant was identified by the two principal witnesses as the assailant and that medical evidence confirmed that the complainant was defiled. In the circumstances, counsel maintained that the defence of alibi was a sham and was properly dismissed.
3. As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see ***Okeno v Republic [1973] EA 32***).
4. The complainant (PW 1) gave sworn testimony after a *voir dire*. She testified that she was 15 years old and that early in the morning on 16th November 2014, she was sleeping with her sisters in her parents' house when the appellant broke into the house through the window, dragged her outside, tore her clothes and proceeded to have sexual intercourse with her. She started screaming to attract attention. Her brother, who was sleeping in another house, came out. She testified that

she recognized the appellant as Ounde whom she used to see in the village.

5. The complainant's brother, PW 2, who was aged 16 years, recalled that at about 2.00am on 16th November 2014, he heard his sisters crying from the kitchen where they were sleeping. When he tried to open the door, he found that it had been locked from outside. He looked through the window and saw the appellant, whom he recognized as Ounde, walking around. He went back tried to pull the door until its broke from the bolt whereupon he found PW 1 who informed him that she had been defiled by the appellant. As the parents were away, he waited until morning when he called his mother who came back home and took PW 1 to Ndhiwa District Hospital.
6. The complainant's mother, PW 3, recalled that at about 7.30 am, she received a call from PW 1 who informed her that Ounde had broken into their house and defiled her. She went back home, took PW 1 to the Chief and then to Ndhiwa Hospital where tests were done. She also took PW 1 to the police station where she recorded her statement. PW 3 admitted in evidence that she knew the appellant and that their families had a long standing land dispute.
7. PW 4 examined PW 1 at Ndhiwa District Hospital on 16th November 2011. He testified that that he did not see any tears or bleeding on the genitalia. There was no infection or discharge or any evidence of semen. He could not comment on whether there was penetration given the time lapse and the fact that the complainant had taken a bath before coming for the examination.
8. The investigating officer, PW 5, recalled that PW 1 accompanied by PW 3 came to Ndhiwa Police Station on 16th November 2014 at about 11.40am to make the report of defilement. He took the report, issued a P3 form and recorded the statements of key witnesses and arrested the appellant. He visited the scene and took photographs of the broken window which he produced as exhibits.
9. The appellant elected to give sworn testimony and called two witnesses. The appellant denied that he committed the offence. He stated that on 15th November 2014 he was in Nairobi attending to political affairs and only came back on 17th November 2014. DW 2 also testified that he was with the appellant and that they left with him on 15th November 2014 at about 11.00am for Nairobi. They remained in Nairobi until 18th November 2014. DW 3 also testified that he was with the appellant and DW 2 when they left for Nairobi on 15th November 2014.
10. The learned magistrate was satisfied that on the basis of the evidence, the prosecution had proved its case and convicted the appellant thus precipitating this appeal. In order to prove its case under **section 8(1)** of the ***Sexual Offences Act***, the prosecution must show that the appellant did an act that amounted to penetration of a child. "*Penetration*" under **section 2** of the ***Act*** means, "*the partial or complete insertion of the genital organs of a person into the genital organs of another person.*"
11. On the issue of penetration, PW 1 gave clear testimony of how she was defiled. She described what happened to her as follows, "*[T]he accused person forced me to have sex with him. He used his penis to insert it in my vagina. He teared all my clothes that I had slept with I did not sustain any injuries but it was my first time to have sex.*" In light of the proviso to **section 124** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** it was not necessary that her testimony be corroborated as long as the learned magistrate was satisfied that PW 1 was telling the truth and recorded the reasons. The learned magistrate was satisfied that the child spoke the truth. Her testimony was however corroborated by the testimony of events as narrated by PW 2 and the fact that she informed PW 3 as soon as possible and the matter was reported on the same day which lends credit to the complainant's account of her ordeal.
12. Although medical evidence did not support the fact of penetration, I find that such evidence is not necessarily decisive on the issue of penetration. PW 1 testified that she was not injured while PW 4 testified that PW 1 had already taken a bath by the time she was examined. In this respect I accept the dicta of the Court of Appeal in ***Geoffrey Kioji v Republic***, ***NYR Crim. App. No. 270 of 2010 (Nyeri)*** where it stated that;

Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.

13. I now turn to the key issue of identification of the assailant. The learned magistrate correctly observed that in ***Cleopas Otiemo Wamunga v Republic [1989] KLR 424***, the Court of Appeal sounded a word of caution in matters of identification of suspects at night so as to avoid possible miscarriage of justice through mistaken identity. The Court urged careful examination of evidence in order to minimize risk or error which is possible even in the case of relatives or friends. The Court of Appeal noted in ***Anjononi & Others v Republic [1980] KLR*** that the evidence of recognition of a suspect is more assuring and reliable than the identification of a stranger but it nevertheless must be examined because mistakes can also be made.
14. In this case, PW 1 testified that although it was at night, there was sufficient moonlight hence she was able to recognise the appellant as Ounde. On this point, her testimony was corroborated by PW 2 who saw the appellant in the compound that night. She informed her mother and the police that Ounde was the man who had defiled her.
15. In his submission the appellant complained that the prosecution did not establish the exact time the attack took place and the time. According to PW 1, the offence took place at about 2.00am on 16th November 2014, PW 3 arrived her home at about 7.00 am after she had been called. According to PW 5, the complaint was made at the police station at about 11.40am. PW 4 the clinical officer examined her on the same day at about 12.14pm. I do not see any inconsistency in the dates to undermine the prosecution case as the incident took place early in the morning and was reported at sunrise. All the other events took place sequentially hence lending weight to the prosecution case.
16. The appellant proffered an alibi defence to the charge against him. In considering the alibi I am guided by the decision of the Court of Appeal in ***Wangombe v Republic [1976 – 80] KLR 1683*** where the Court held that when alibi evidence is proffered, the prosecution is obliged to investigate it but where the appellant had not given any notice that he would raise it and it was being set up well after the close of the prosecution's case, it was open to the trial court to weigh it against the evidence already tendered.
17. The defence of alibi was raised for the first time during the defence case. The issue was not even suggested in cross-examination of the investigating officer. Neither the appellant nor his witnesses produced the alleged bus tickets they referred to. The testimony of PW 1 and PW 2 was clear and consistent as to the events of the material night. PW 1 readily accepted that there was land dispute between the appellant and her parents hence I reject any arguments that a grudge could have led to fabrication of the charges against the appellant. The learned magistrate who heard and observed the witnesses believed the testimony of the children and I have no reason to depart from his sentiments. I therefore reject the appellant's defence and hold that the appellant committed the felonious act.
18. The appellant complained the trial was unfair as was denied witness statements. When the matter came up for plea on 24th November 2014, the learned magistrate directed that the appellant be supplied with all prosecution statements at his cost. When the trial commenced on 8th December 2014, the appellant did not raise the issue that he did not have statements and neither did he raise the issue throughout the proceedings. In the circumstances, the court could not have known whether or not the appellant had been supplied with statements hence this ground of appeal must fail. I however note that the statement ought to have been provided free of charge.

19. Lastly, the appellant complained that he was denied an adjournment and the matter proceeded for hearing to his detriment. The grant or otherwise of an adjournment is a matter within the discretion of the court. Although the appellant stated that he had malaria, the prosecution responded that he had been examined at the hospital and he was found to be negative. In the circumstances, the learned magistrate did not err in rejecting the application for adjournment.

20. Finally, there is no dispute that PW 1 was a child aged 16 years as evidenced by the birth certificate which was produced and which showed she was born on 12th November 1998. As the child is a was 16 years old, the appellant was properly sentenced to 15 years imprisonment which is the mandatory minimum sentence prescribed under **section 8(3)** of the ***Sexual Offences Act*** where the age of the child defiled is between 16 and 18 years.

21. For the foregoing reasons, the conviction and sentence are affirmed. The appeal is dismissed.

DATED and DELIVERED at HOMA BAY this 3rd day of March 2016.

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Oluoch, Senior Assistant Director of Public Prosecutions, instructed by the Office of the Director of Public Prosecutions for the respondent.