



REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL NO. 39 OF 2015

BETWEEN

KENNEDY OTIENO WANGURA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 328 of 2014 at Chief Magistrates Court at Homa Bay, Hon.P. Mayova, SRM dated on 2nd October 2015)

JUDGMENT

1. In the subordinate court, the appellant **KENNEDY OTIENO WANGURA** faced a charge of defilement contrary to **section 8(1) and (2)** of the ***Sexual Offences Act, 2006***. The particulars were that on 7th March 2014 in Homa Bay District, he intentionally caused his penis to penetrate the vagina of LAO, a child aged 10 years. After the trial he was convicted and sentenced to life imprisonment. He now appeals against conviction and sentence.
2. When the appellant was first brought to court on 12th March 2014 to plead, the learned magistrate observed that he appeared mentally disturbed. He directed that that the appellant be examined by a psychiatrist to determine whether he was fit to plead to the charge. Dr A. Onyango, a consultant psychiatrist at Jaramogi Odinga Oginga Teaching and Referral Hospital, examined the appellant and certified that he had an underlying mental illness and was not fit to plead. The appellant was thereafter committed to Mental Hospital for treatment. On 22nd October 2014, the Medical Superintendent of the Hospital certified that the appellant had recovered and was fit to stand trial. The appellant was brought before the court on 5th December 2015 to plead. He confirmed that he was mentally fit and that he was ready for trial. He pleaded not guilty and the trial commenced. The appellant now complains to this court that he ought to be acquitted as he was insane. I shall deal with this issue later in the judgment.
3. As this is a first appeal, I am required to review the evidence, evaluate it and reach an independent conclusion as to whether to uphold the conviction. In so doing, I am alive to the fact that I never saw or heard the witnesses testify (see ***Okeno v Republic [1973] EA 32***).
4. The complainant (PW 2) testified that she was in class 3. She described what happened to her in graphic terms as follows;

I recall on 7/3/14 at around 4.00pm I went to Koteng to look for firewood alone.... I recall what happened on that day. Otieno saw me. He told me ... "girl come and see." He came and held my

hand. He led me to the bush. He pulled my skirt down. He removed my short. He then inserted his penis into my vagina. He defiled me. He left me there bleeding a lot from my pain because a stick had pricked my eye. When he defiled me, I felt pain. Otieno removed my panty

5. PW 2 further testified that she knew the appellant very well as he was from Ndiru Village and he used to pass by their home. On the same day at about 5.00pm, the complainant's mother, PW 1, recalled that she was in the shamba harvesting cassava when the appellant passed by, greeted her and asked for cassava. She gave him the cassava and immediately thereafter PW 2 came from the direction he had come from. PW 2 told her that the appellant had delayed her in the bush but when she probed further, she told her that the appellant sexually assaulted her. The appellant fled while PW 2 was narrating her ordeal to PW 1. PW 1 later took the PW 1 to Ngegu Police Post and was to Homa Bay Police Station. PW 2 was examined at Ndiru Health Centre. PW 1 also reported the matter to PW 2's teacher (PW 3) who recalled that PW 2 left school on 7th March 2014 at 1.00pm and did not return to school on that day.
6. PW 4, a doctor at Homa Bay District Hospital, testified that PW 2 was examined at the hospital on 8th March 2014. He examined her and found the thigh area was tender which indicated injury, the genitalia were bruised and inflamed but there was no discharge and blood. The hymen was broken hence he concluded that there was penetration. He also examined the appellant and did not find any injuries.
7. PW 5, an administration police officer, recalled that on 8th March 2015 at about 8.15pm, he was Ndiru AP Camp. When PW 1 came with PW 2 to report an alleged defilement by the appellant, he referred them to Ngegu Police Station. On 10th March 2013, he learnt that the appellant was in Koderu, Karachuonyo and with the assistance of the public, he located the appellant at his uncle's place, arrested him and handed him over to the police at Ngegu Police Post. PW5, the investigating officer, from Ngegu Police Post, testified that on 8th March 2013, PW 2 came to the police post with PW 1. He noted that PW 1 was looked traumatized and he issued the P3 form and referred them to Homa Bay District Hospital. PW 2 identified the appellant as the assailant whereupon PW 5 instructed officers at Ndiru AP Camp to arrest him. He also produced a baptismal card which showed that PW 2 was born on 10th January 2004.
8. The accused elected to give an unsworn statement in his defence. The thrust of his statement was that he was arrested when he had gone to attend a funeral at Koderu. He denied that charges and accused PW 1 of giving false evidence. He alleged that he had been framed by the complainant's parents who coached her to give false testimony.
9. The learned magistrate was convinced that he had committed the offence and convicted him hence 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.*"
10. I have evaluated the evidence presented before the subordinate court and I find that the prosecution proved its case beyond reasonable doubt. PW 2 gave clear and consistent testimony of how she was defiled. Her blood stained dress (Exhibit No. 1) was produced in evidence lent additional weight to her testimony as did the testimony of her mother, PW 2, to whom she reported the incident so soon thereafter. The appellant was not a stranger to her and this fact was admitted by appellant in his unsworn statement. Her testimony was believed by the learned magistrate and as such it did not require corroboration under the proviso to **section 124** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)***. Notwithstanding this provision, there was sufficient corroborative evidence from the medical testimony of PW 4 who examined PW 2 on the very next day after the incident and confirmed penetration. The age of PW 1 was also proved by production of the baptismal certificate which showed that she was born on 10th January 2004 hence she was 10 years old when she was defiled. From the evidence I am satisfied that the

prosecution proved the offence of defilement beyond reasonable doubt.

11. I now turn to consider the issue of insanity. In a criminal trial, the issue of insanity is relevant in two instances. The first instance is where the accused is insane at the trial. This is where the accused is unable to plead or attend trial, follow and understand the proceedings by reason of insanity. The second instance is where an accused raises insanity as a defence to the charge. This is where the accused claims he committed the act but that he was insane at the time.

12. The procedure regarding mental illness is generally governed by **section 162** and **164** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)***. The relevant provisions state as follows;

162(1) When in the course of a trial or committal proceedings the court has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, it shall inquire into the fact of unsoundness.

(2) If the court is of the opinion that the accused is of unsound mind and consequently incapable of making his defence, it shall postpone further proceedings in the case.

164. Whenever a trial is postponed under section 162 the court may at any time, subject to the provisions of section 163, resume trial and require the accused to appear or be brought before the court, whereupon, if the court considers the accused to be still incapable of making his defence, it shall act as if the accused were brought before it for the first time.

13. From the proceedings I have outlined in paragraph 2 above, it is clear that the learned magistrate inquired into the appellant's state of mind and determined that he was unable to plead. After receiving the necessary medical attention and upon a certificate being issued by the relevant medical officer that the accused was fit to stand trial, the court resumed trial as provided under **section 164** of the ***Criminal Procedure Code***. The accused himself confirmed that he was ready to proceed with the trial. I am therefore satisfied the proceedings were regular in so far as the issue of insanity is concerned.

14. As regards the defence of insanity, the same is governed by **section 12** of the ***Penal Code*** which states as follows;

12. A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing or of knowing that he ought not to do the act or make the omission, but a person may be criminally responsible for an act or omission although his mind is affected by disease, if such disease does not in fact produce upon his mind one or more of the effects above mentioned in reference to the act or omission.

15. While the prosecution had a duty to prove its case beyond reasonable doubt, the accused must raise the defence of insanity and prove the same on the balance of probabilities (see ***Tadeo Oyee s/o Duru v R [1959]EA 407***). In this case though, the appellant did not raise insanity as a defence nor did it emerge from the prosecution evidence as a possible defence which the prosecution would have been required to disprove beyond reasonable doubt. The appellant cross-examined the witnesses and even gave an unsworn statement. In short the appellant did not allude to or even raise the issue that he was insane at the time he committed the felonious act.

16. The appellant was initially found unfit to plead and after treatment he was declared fit to plead and he so stated himself. There was no indication during the trial that he was insane or unable to understand the proceedings. I therefore dismiss the argument that insanity was an issue in the trial.

17. The prosecution proved the appellant's guilt. I affirm the conviction and sentence. 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.