



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KAKAMEGA.

CRIMINAL APPEAL NO. 187 OF 2014.

DICKSON ONYANGO.....APPELLANT.

VERSUS

REPUBLIC.....RESPONDENT.

(Being an appeal from original conviction and sentence of S.M. Shitubi – CM. in Criminal Case No. 2629 of 2011 delivered on 19th December, 2014 at Kakamega.)

J U D G M E N T.

1. Dickson Onyango (hereinafter referred to as the appellant) seeks to quash the conviction and sentence passed against him by the learned Chief Magistrate in Criminal Case No. 629/011, **Republic vs. Dickson Onyango** at Kakamega, delivered by S.M. Shitubi, CM on 19th December, 2014.
2. In the said case, the appellant was convicted of offence of defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act No. 3 of 2006 Laws of Kenya.
3. The particulars of the offence were that on 25th March, 2011 at Esangu village, Esumeya sub location in Kakamega Central District in Kakamega County intentionally and unlawfully inserted his genital organ namely penis into the genital organ namely vagina of VA , a girl aged 15 years.
4. The appellant faced an alternative charge of indecent assault contrary to section 11 (1) of the Sexual Offences Act. It was alleged that on 25th March, 2011 in Kakamega Central District within Kakamega County intentionally and unlawfully contacted his genital organ namely penis into genital organ namely vagina of V A, a girl aged 15 years.
5. The prosecution called 5 witnesses whose evidence is summarized below. In determining this appeal, this court fully understands its duty.
6. This question as to the duty of the first appellate court, was answered in the cases See **Okeno vs. Republic 1972 E.A. 32 and Mwangi vs. Republic 2006 2KLR 28** where the court stated the duty of an appellate court on first appeal as follows:-

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination”.

7. The above position was enunciated in the case of **Pandya vs. Republic** where the court held that:-

“An appellate court ought to treat the evidence as a whole to that fresh and exhaustive

scrutiny which the appellant is entitled to expectaffirm a conviction on evidence that has been reviewed.”

8. In other words, the first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is the function of a first appellate court to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.

9. Thus this being a first appeal, it is incumbent upon this court to re-analyse and re-evaluate the evidence adduced before the trial court and come up with its own conclusion while at the same time bearing in mind that the court did not have the advantage of seeing the witnesses testify. This role is in line with well-known and established principles of law which have been cited with approval in numerous cases. For example, in **Kiilu & another vs Republic** the court citing **Okeno v. R** held:-

“An appellant on a first appeal is entitled to treat, the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; it must make its own findings and draw its own conclusions; only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. ”.

The court now turns to the evidence adduced during trial.

10. PW1 V A , the complainant, a girl aged 17 years was the only eye witness. She testified that on 25th March, 2011 while looking for firewood from a forest on John Adira's Land appellant called her. At that time, he carried a panga. She knew him as a neighbour. On reaching her, he pulled her to a sugar cane plantation. She screamed but he covered her mouth with his hand and removed her underwear. Then he had carnal knowledge with her. He warned her that he would cut her if she informed her parents. She went home and informed her parents. They told her not to go to school as they would report to Esiongo Patrol Base. The following day she went to school and police officer came and took her to hospital for examination and treatment.

11. PW2, Titus Gregory Muganda, an assistant chief [particulars withheld] sub location testified that he got information about defilement and attempting to conceal it and reported to Esumeyia Patrol Base. He led police to home of the suspect, the appellant was arrested and later charged.

12. PW3 Nicholas ShisiaNangabo a teacher at [particulars withheld] Primary School where PW1 was pupil testified that, he got information of defilement on 29/3/2011 from school sponsor who launched a complaint. They were in the process of interviewing the complainant when PW2 came with police officers from Esiongo Patrol Base and took her away.

13. PW4, Joel Kuywa, a clinical officer at Gushiri Health Centre testified that he examined the complainant on 29th March, 2011. She was not a virgin. HIV test was negative while no infection was detected in urinalysis. However, there were bruises to the genital area (region). He concluded that PW1 was defiled and thus filled P3 form which he produced before the court.

14. PW5, CPL. Wekesa took investigations of the case from PC Mohammed of Esiongo Patrol Base. By then witnesses statements had been recorded. He produced a doctor's age assessment report on complainant Exhibit 1 (a) which showed that she was 17 years as at 4th July, 2012. He also produced a letter he wrote to the prosecution to assist compel the complainant to be availed for testimony.

15. After evaluating the above evidence, the trial magistrate was satisfied that a prima face case had been established and put accused on his defence and complied with section 211 CPC. The appellant elected to

give sworn defence and stated as summarized below.

16. He testified that the charge was a plan by complainant's family to have him jailed so that they may take his land. On cross examination, he said that his land and the complainant's parents border each other while the assistant chief was one who was planning to have him in jail.

17. The learned trial magistrate analysed the evidence of all witnesses and defence tendered and concluded that the appellant was guilty as charged and convicted him on the main count. After hearing the appellant in mitigation, the court noted mitigation and sentenced appellant to 15 years in jail. Aggrieved by the above verdict, the appellant appealed to this court seeking to quash conviction and sentence.

18. The appellant petition of appeal has itemized 9 grounds which can be grouped into 3 grounds:-

(i) That the trial court convicted appellant on insufficient evidence thus case not proved beyond reasonable doubt;

(ii) That his fundamental rights to fair trial were violated as he was not supplied with documents relied on by the prosecution;

(iii) That his alibi defence was not considered.

19. The appellant was represented by GK Mukele Adv. who filed and served written submissions and Mr. Oroni for the Republic relied on recorded evidence.

20. The appellant counsel in written submission argued that the appellant was convicted on evidence of PW1 alone. He raises the issue that it is not conclusive between date of offence and date of medical examination, PW1 was not with her husband. The trial court assumed PW1 was 17 years even before PW1 stated so. PW1 referred appellant as Elijah which is not his name. She allegedly reported to her mother who never testified. She left her birth documents at home which could have cleared confusion as to her age. In totality her evidence was uncorroborated. He cites the case of **Abuya vs. Republic: CRA. 164/09 (Kisumu)** on appellant/ alleged defiler's age and submitted there was no conclusive age proved of the PW1.

21. He takes issue on non-production of PW1 clothing she wore at the alleged moment of defilement. Further it is submitted that Article 50 (2) (c) and (i) of the Constitution together with Article 25 (c) and 159 (1) and (2) were infringed as appellant was not supplied with relevant documents. Further, it is submitted that the medical evidence was not sufficient to warrant conviction as the observed findings by PW4 could have been occasioned by PW1's husband. Finally, the appellant's side submits that his defence of alibi was not taken into account with evidence as a whole. He relied on the case of **PANDYA VS. REPUBLIC (1957) CA 336**, which held that the court did form unbalanced view of the evidence and reached a decision which was unsupportable if the defence was duly taken into account.

22. The state counsel urged court to refer to PW2 and 5 testimonies which corroborated PW1 testimony and urged court to dismiss the appeal.

23. I have carefully considered the submissions by the appellant's advocate and the state counsel. I have also reviewed the evidence on record and the relevant law. Before defence could be looked into the prosecution has to found its case on the threshold of prove beyond reasonable doubt. The court heard the complainant's evidence. She testified that she was alone at the time of the alleged offence and the time was 5 p.m. The accused pulled her into a sugar cane plantation and undressed her then proceeded to have carnal knowledge of her on 25th March, 2011. PW4 examined her on 29th March, 2011 and found her to have been defiled.

24. The question is whether her evidence is credible? She testified on oath after voire dire examination by the court. The court noted she was candid and never contradicted herself during cross examination.

There is no reason demonstrated for her not to be believed. The medical examination though conducted after 4 to 5 days after the incident of alleged defilement confirms defilement took place. Section 124 of Cap 80 Laws of Kenya empowers court to convict in offences of sexual in nature where the only witness is the victim child. The guiding element is whether the court can believe her testimony. Her testimony is firm, credible and unshaken and above all convincing.

25. The defence of alibi is displaced by the strength of the prosecution case as above analysed. The record does not show anywhere the appellant sought to be supplied with documents which were produced by the prosecution including witness statements. The appellant conducted his defence and cross examined without seeking the same documents. Even if he was non represented and assuming that his rights were impinged on, on that account alone the same cannot vitiate conviction but can be a base for seeking compensation. On the issue of prove of the age of the complainant, the same was proved and unchallenged. The doctor fixed same at 17 as at 4th February, 2012.

26. The offence was on 25th March, 2011 a span of one year and 5 months as from the date of the defilement to the date of the assessment of pw1 age. Even if, same span is deducted from the 17 years, it would be within the range of 15 years when the offence was committed. The court thus finds that the trial magistrate never erred in convicting the appellant.

27. On sentence, the accused person was awarded the minimum sentence provided by the law and thus lawful. I thus uphold both the conviction and sentence and dismiss the appeal.

SIGNED, DATED, and DELIVERED at **KAKAMEGA** this **1ST** day of **SEPTEMBER**, 2016.

C. KARIUKI.

JUDGE.

In the Presence of:-

.....N/A..... **for the Appellant.**

.....NG'ETICH**for the Respondent.**

.....ANUNDA **Court Assistant.**