



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CRIMINAL APPEAL NO.39 OF 2015**

**(AN APPEAL FROM ORIGINAL CONVICTION AND SENTENCE OF OGEMBO PM'S C CRIMINAL CASE NO. 1326 OF 2013 BY HON. N. WAIRMU SRM DATED 18<sup>TH</sup> MAY, 2015))**

**VINCENT MAUTI OBITA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. **VINCENT MAUTI OBITA**, the appellant herein was arraigned before the Principal Magistrate's at Ogembo on the charge of defilement contrary to **Section 8 (1) (2) of the Sexual Offences Act No. 3 of 2006**. The particulars of the charge were that on 21<sup>st</sup> August 2013 at [Particulars withheld] Sub-location in Nyamache District within Kisii County, he intentionally caused the penetration of his penis into the vagina of **C D S** (particulars withheld) a child aged 4½ years.
2. The appellant also faced an alternative charge of committing an indecent act with a child contrary to **Section 22 (1) of the Sexual Offences Act No. 3 of 2006**. It was alleged that on 21<sup>st</sup> August 2013 at [Particulars withheld] Sub-location in Nyamache District within Kisii County, the accused intentionally touched the vagina of **C D S** (particulars withheld) a child aged 4½ years.
3. The appellant pleaded not guilty to both charges but after a full trial, in which the prosecution called a total of 6 witnesses, the appellant was found guilty on the main charge of defilement, he was convicted and sentenced to life imprisonment.
4. The appellant is aggrieved by both the conviction and the sentence and has now appealed to this court vide a petition of appeal filed on 22<sup>nd</sup> May 2015 in which he has stated that the trial magistrate erred both in law and in fact in failing to consider that the case was not properly investigated, that the appellant's constitutional rights under **Article 50 (2) (j) and (k)** had been violated, that the case was not proved beyond reasonable doubt and that sentence imposed was harsh, inhuman and illegal.
5. When the appeal came up for hearing before me on 21<sup>st</sup> July, 2016, appellant chose to rely entirely on the written submissions he had filed in court. I have perused the appellant's written submissions and noted that appellant reiterates and expounds on the grounds set out on the appeal.
6. The appellant argues that his conviction was based on uncorroborated hearsay evidence as well as evidence of a single eyewitness who was a child of tender years. While the appellant acknowledges, in his submission, that a crime was committed on the date and time specified in the charge sheet, he denies his involvement in the said crime.

7. The appellant submitted that his rights under **Article 50 (2) (g) and (h)** were violated as an advocate was not assigned to him to represent him during the trial and that the prosecution's case was stage-managed and based on mistaken identity.

8. Lastly, the appellant contended that the defence he tendered before the trial court was overlooked and not taken into account in the judgment of the trial court.

9. In response to the appellant's submissions, Mr. Otieno, state counsel, opposed the appeal and submitted that the prosecution's case was proved beyond reasonable doubt. According to Mr. Otieno, PW1, who was the complainant gave a vivid account of the appellant led her to a toilet where he defiled her and that medical evidence was adduced to prove the complainant's age and the fact that she had been defiled.

10. On the issue of whether or not failure to appoint an advocate for the appellant was fatal to the prosecution's case, Mr. Otieno submitted that there is no mandatory requirement that a lawyer be appointed for an accused in our system at the moment.

11. Mr. Otieno argued that the evidence of PW1 was corroborated by the evidence of **PW4** and **PW5** and that by dint of the provisions of **Section 124 of the Evidence Act**, the court can convict an accused person on the evidence of a single eye witness.

12. Mr. Otieno added that the trial magistrate considered the defence of the appellant in his judgment and that the sentence of life imprisonment imposed on the appellant was lawful.

13. As the first appellate, I am taxed with the duty to re-evaluate the evidence tendered before the lower court afresh in order to draw my own conclusion while keeping in mind the fact that I did not hear or see the witnesses testify. **See Okeno Vs Republic [1972] E.A 32.**

14. The prosecution called a total of 6 witnesses whose evidence was as follows:

**PW1 C D S (name withheld)** then aged 7 years old testified that on 21<sup>st</sup> August 2013 at about 7.30 p.m. while on her way to her auntie's house from her grandmother's house, the appellant followed her to the toilet where she had gone for a short call and led her to the bathroom where he undressed her before defiling her. She informed her aunt of what had transpired and the following morning, she was taken to hospital at Ogembo. The complainant knew the appellant as by name as a person who lived next to her grandmother's house and identified him in court as his attacker.

**PW2 A K**, was the complainant's grandmother who confirmed that on 21<sup>st</sup> August 2013, the complainant was in her house until about 7.30 p.m. when she left to go to her aunt's house about 10 meters away. Later, the following day, PW2 learnt from PW4 that PW1 had been defiled by the appellant, her grandson who resides 30 meters away from her house.

**PW3, A N S**, was the complainant's aunt. She stated that on 22<sup>nd</sup> August 2013, at about 6 a.m. the complainant informed her that she had pains in her stomach and legs and upon being taken to hospital, it was discovered that she had been defiled.

**PW4, S N O**, was the father of the complainant. His testimony was that on 22<sup>nd</sup> August, 2013 he took the complainant to the hospital upon receiving information from PW3 that PW1 was not feeling well. He stated that while they were at the hospital, PW1 told him that the appellant had defiled her the previous evening. PW4 produced the complainant's birth certificate No. [Particulars withheld] as Pexhibit No. 1.

**PW5, Wycliff Atombo**, was a clinician based at Gucha Level 4 Hospital. He confirmed that the complainant was treated at the said Gucha Level 4 Hospital following a history of defilement and that on examinations the complainant's hymen was torn with vaginal wall bruises. He produced the P3 form, treatment notes and outpatient card as exhibits 2, 3 and 4 respectively.

**PW6, was No. 77316 Cpl. Emily Rop**, a police officer based at Ogembo police station who received the complainant's father's report at the station on 22<sup>nd</sup> August 2013. She investigated the case, recorded witness's statement and issued the complainant with the P3 form.

15. In his unsworn testimony in court the appellant testified that he was arrested on 23<sup>rd</sup> August 2013 after PW4 duped him to accompany him (PW4) to Ogembo where he would pay him some money only for the appellant to be arrested and locked up for the offence of defilement.

16. I have carefully evaluated the evidence tendered before the trial court by both the prosecution and the appellant. I have also considered the oral submissions made on the appeal.

17. This court is now tasked with the duty of establishing whether or not the complainant was defiled and if so, if the appellant was the culprit.

18. The evidence of PW1 was clear, vivid and consistent. She knew the appellant very well as a person who lived next to her grandmother's house and that they used to call him "V". It turns out that the appellant is a cousin to the complainant and PW2, who is the complainant's grandmother testified that the appellant was her grandson. PW1 narrated how the appellant followed her to the toilet where she had gone for a short call before leading her to the bathroom where he defiled her. She felt pain and informed PW3 of her ordeal. PW5, the clinician provided medical evidence showing that the complainant had bruises to the vaginal wall and torn hymen, a clear indication that there was penetration of her vagina.

19. The evidence on record leaves no doubt in my mind that the appellant defiled the complainant.

20. The complainant's birth certificate which was produced as Pexhibit1 showed that she was born on 25<sup>th</sup> September 2009. The offence of defilement took place on 21<sup>st</sup> August 2013 thereby placing the age of the complainant at 4 years at the time of the sexual assault.

21. The evidence of PW1 was cogent and was not challenged by the appellant through cross examination.

22. The appellant betrayed his position as an elder brother/cousin of the complainant by defiling her as darkness was gathering in the village. Even though PW1 was the only eyewitness to her own sexual assault, I find that her testimony was corroborated by the medical evidence tendered by PW5.

23. On the appellant's argument that his rights to a fair trial under **Article 50 (2) (g) and (h)** of the Constitution were violated, I note that the said Article provides as follows:

**“(2) Every accused person has the right to a fair trial, which includes the right—**

**(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;**

**(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly.”**

24. The appellant was unrepresented at the time of the trial before the lower court. **Article 50 (2) (h)** provides that an advocate be assigned to the accused at the expense of the state if substantial justice would otherwise result. The issue of the accused's right to legal representation first came up for interpretation before the Court of Appeal in the case of **Macharia Vs Republic** [2011]eKLR in which the court observed as follows:

**“Article 50 of the Constitution sets out a right to a fair hearing, which includes the right of an accused person to have an advocate if it is in the interest of ensuring justice. This varies with the repealed law by ensuring that any accused person, regardless of the gravity of their crime may receive a court appointed lawyer if the situation requires it such cases may be those**

**involving complex issues or law, where the accused is unable to effectively conduct his or her own defence owing to disabilities or language difficulties or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence. We are of the considered view that in addition to situations where “substantial injustice would otherwise result”, persons accused of capital offences where the penalty is loss of life have the right to legal representation at the state’s expense.”**

25. The court of Appeal is in the above case, of the view that where the accused faces a capital offence, then the state ought to provide him with legal representation. Other instances would then be decided on a case by case basis depending on the complexity of the issues of law or fact, accused’s inability to conduct his own defence or where public interest requires that legal representation be provided.

26. In the instant case, the offence of defilement attracts the sentence of life imprisonment upon conviction and my view is that legal representation ought to be accorded to the accused person in the event he is unable to hire his own lawyer.

27. On the other hand, the constitution under **Article 261** and **schedule 5** provides for the implementation of **Article 50 of the constitution**.

28. The constitution was promulgated on 27<sup>th</sup> August 2010 in which case 4 years lapsed on 27<sup>th</sup> August 2014.

29. Trial in the instant case commenced on 26<sup>th</sup> August 2013 and was concluded on 30<sup>th</sup> April 2015 when judgment was delivered. It has been argued that the provisions of **Article 50** relating to right to legal representation at the state’s expense are yet to be fully enforceable as the state was accorded time to put the mechanism in place.

30. I therefore cannot see any violation of the appellant’s constitutional rights to legal representation at the states expense in view of the above provision on 4 years implementation period.

31. In the case of **John Swaka Vs DPP & 2 others [2013] eKLR** an issue arose as to which point the right to legal representation coalesces and the court observed as follows:

**“It cannot have been the intention of the framers of the Constitution, or of the Court of Appeal, to halt all criminal prosecutions of persons charged with robbery with violence until the implementation of a scheme to provide legal representation to all persons charged with the offence of robbery with violence.”**

32. On the appellant’s claim that his evidence or defence was not considered by the trial magistrate in her judgment, I find that nothing could be further from the proof. The trial magistrate considered the testimony of the appellant at the tail end of her judgment at page 36 of the proceedings and found it wanting as it consisted of mere denial and an explanation on the circumstances under which he was arrested.

33. I have equally perused and evaluated the appellant’s testimony in the lower court record and I note that the defence was a mere afterthought.

34. In the case of **May Vs Republic [1981] KLR 129** it was held that whereas no adverse inference can be drawn against the appellant for electing to make an unsworn statement, its potential value is less cogent.

35. In the instant case as I have already noted in this judgment, the prosecution’s evidence as to the victims age was not challenged, the appellant was positively identified by the complainant. Medical examination of the complainant proved that she had been defiled, and the evidence adduced by the prosecution was not contradictory or inconsistent.

36. On sentence, a person found guilty of defilement contrary to **Section 8 (1)** as read with **8 (2)** shall be sentenced to life imprisonment.

37. The sentence of life imprisonment passed on the appellant was therefore lawful and I find that there is no reason to interfere with the sentence passed by the magistrate as the trial court exercised its discretion on sentence judiciously.

38. In the end, I dismiss the appeal for lack of merit and uphold the sentence imposed.”

39. It is so ordered.

**Dated, signed and delivered in open court this 8<sup>th</sup> day of September, 2016**

**HON. W. A. OKWANY**

**JUDGE**

**In the presence of:**

Miss Mbelete for the State

Appellant present in person for the Appellant

Omwoyo court clerk