



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISUMU

HCCRA NO. 8 OF 2016

(CORAM: J. A. MAKAU – J.)

JAIRO OLUOCH ODUOR..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

*(Being an appeal against both the conviction and the sentence
dated 12th October, 2014, in Criminal Case No. 371 of 2014
in Ukwala Law Court before Hon. R.M. OANDA – S.R.M.)*

JUDGMENT

1. The Appellant **JAIRO OLUOCH ODUOR**, was charged with an offence of **defilement contrary to section 8 (1) (3) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence are that on 5th day of July 2014 at around 1.00 p.m. at *[particulars withheld]* within Siaya County the appellant intentionally caused his penis to penetrate the vagina of PAO a child aged 12 years.
2. After full trial the appellant was found guilty, convicted and sentenced to twenty (20) years imprisonment.
3. Being aggrieved by the conviction and sentence the appellant lodged this appeal setting out the following grounds of appeal:-
 - i. *That the trial magistrate erroneously erred in law and in fact by convicting the appellant on contradictory evidence.*
 - ii. *That the trial court did not ascertain age properly hence convicted the appellant.*
 - iii. *That the trial learned magistrate erred in law and in fact by admitting the evidence of the medical practitioner on an unauthenticated P3.*
 - iv. *That I cannot recall all that transpired during the trial and hence request for the court proceedings to adduce more grounds at the hearing.*

4. At the hearing of the Appeal the Appellant appeared in person whereas Mr. E. Ombati Learned State Counsel appeared for the State.

5. I am the first appellate court and as expected of me have to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I neither saw nor heard any of the witnesses and have to give due allowance. I am guided by the Court of Appeal case which sets out the principles that apply on a first appeal. These are set out in the case of **ISSAC NG'ANGA ALIAS PETER NG'ANG'A KAHIGA V REPUBLIC CRIMINAL APPEAL NO. 272 OF 2005** as follows:-

“in the same way, a court hearing a first appeal (i.e. a first appellate court) also has duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same. There are now a myriad of case law on this but the well-known case of OKENO -VS- REPUBLIC (1972) EA 32 will suffice. In this case, the predecessor of this court stated:-

The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) E.A. 570). 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 court's finding and conclusion; 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 (See Peters Vs. Sunday Post, (1958) EA 424)'

6. The facts of the prosecution's case form part of the record of appeal, and shall not proceed to reproduce the same, however I shall summarize the prosecution's evidence and the defence.

7. The prosecution's case is that PW1, PAO a girl aged 12 years was on 5.7.2014 collecting firewood with her friends, PW2 and PW3 when they decided to go and look for sugarcane. Then the appellant met them and enquired from them whether they were collecting firewood and advised them to go to the further end of the forest. That as the complainant and others were collecting firewood, the appellant called the complainant, she proceeded to where the complainant was, he asked her not to speak as he was enquiring from her whether he should go for a condom. The appellant then proceeded to remove the complainant's clothes and had sexual intercourse with her. The complainant went home and reported the matter to her mother PW4 who took her to Sigomere Health Centre, then Ambira Hospital. PW4 subsequently reported the matter to the Police. PW1, PAO was treated and treatment notes MFI P1 (A), P3 form – MFI P1 (B) issued. PW3 stated PW1 was born on 14.8.2002 and produced Baptismal card – ***[particulars withheld]***. The Appellant was identified. PW5, Clinical Officer Ambira Sub-District Hospital examined PW1, PAO and filled P3 form on 7.7.2014. He produced the treatment notes and P3 form as exhibit PI (A) and P1 (B). His finding were that there were earlier genital penetration. PW6, a Police Officer attached to Sigomere Police Station received a call on 6.7.2014 at 8.30 a.m. about the complainant PW1, PAO from her parents about her, having been defiled by the Appellant. That he subsequently recorded witnesses statement and issued a P3 form. PW6 later arrested the appellant and charged him with this offence. PW6 produced copy of PW1's Birth Certificate exhibit P2 and letter from the school exhibit P3.

8. The Appellant opted to give unsworn statement stating that he is a shamba boy at a certain home and that on 5.7.2014 at 8.00 a.m. a friend called him informing him to run away, he then informed his boss and his wife of that. That later three Police Officers went to the house and he was arrested. That the girl PAO was still with him and that he knows the other girls. That he met the complainant with three other girls and told them to hurry up as the area was bushy. He concluded by stating that he was taken to police station but was charged before being taken to the hospital for medical examination. He further informed the court he does not know whether he committed the act or not.

9. The Appellant in his written submissions and oral submission before me urged, that the prosecution did

not prove their case beyond reasonable doubt, that the trial court erred in law and in fact by convicting the appellant on contradictory evidence, that the age of the complainant was not ascertained, and that the court erred in admitting the evidence of the medical practitioner on unauthentic P3 form.

10. Mr. E. Ombati, Learned State Counsel opposed the appeal urging, that the prosecution proved all the necessary ingredients of the offence of defilement beyond any reasonable doubt, that the prosecution proved the complainant's age through production of relevant documents, that the appellant was recognized and penetration was proved.

11. The Appellant contends the prosecution did not prove their case beyond any reasonable doubt and that he was convicted on contradictory evidence. The prosecution to succeed in proving the ingredients of defilements required to prove the age of the victim, identification of the perpetrator and penetration. In this case PW1 testified that she was at the material time aged 12 years, PW4 her mother, E A O testified that PW1, PAO was aged 12 years having been born 14.8.2002. She identified PW1's Baptismal card [*particulars withheld*], which was produced by PW6 an exhibit P2, which shows her date of birth as 14.8.2002. PW6 also produced a letter dated 8.7.2014 from [*particulars withheld*] confirming PW1, PAO was a Standard III pupil as of 2014. The school's letter does not state the age of the complainant. The P3 for dated 5th July, 2014 indicates the complainants age to be 12 years. Similarly from the evidence of PW5, the Clinical Officer who examined the complainant, her age is indicated as 12 years. I am from the above satisfied that a Baptism card and a leaving certificate or a letter from school are amongst the documents that can be used to prove the age of a person. The Baptism card produced as exhibit P2 confirms that PW1 was born on 14.8.2002. The Appellant did not challenge its production nor raised any questions over its authenticity during cross-examination. I therefore find and note the prosecution proved the age of the victim as at the time of the commission of the offence to be 12 years.

12. On the issue of identification, PW1, PAO saw the Appellant on 5.7.2014, she talked to him, she explained in detail what he did to her from a zero range. PW2 a minor who was with PW1 and PW3 testified that as they were collecting firewood they found the Appellant at the same area, he talked to them and told them to go deep to the forest, that he followed them, PW1 witnessed the appellant calling PW1, PAO, pulling and taking her to the forest. PW3 a minor also who was with PW1, PAO and PW2 testified that on 5.7.2011 as they were collecting firewood they met the appellant, who told them he was going to show them from where they could fetch firewood, she heard the appellant calling the complainant, who refused his advances, he pulled her and that PW2 and PW3 started shouting. PW1 reported the incident to their grandmother. The evidence of PW1, PW2 and PW3 placed the appellant at the scene of the incident. PW1, PW2 and PW3 gave the name of the assailant of PW1, PAO to PW1's mother and their grandmother. The Appellant in his statement did not challenge the evidence of PW1, PW2 and PW3 as regards meeting him at the forest at the material time. The Appellant in his unsworn statement admitted that PW1 PAO is a neighbor and that he knew PW1, PW2 and PW3, that at the material time he talked to the three girls. In view of the evidence of PW1, PW2 and PW3 and in view of the appellant having not denied being known to the complainant and PW2 and PW3, I find that the appellant was recognized by PW1 and her companions and that there is no case of his identification being mistaken.

13. I now turn to the third ingredient of the offence of defilement, thus penetration. Section of the **Sexual offences Act** defines penetration as *follows*:

“Penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person; ”

14. PW1, PAO in her evidence testified that the appellant removed her clothes and forced her to have sexual intercourse with her. PW1 informed her mother of the incident. PW2 and PW3 testified the appellant pulled PW1, PAO into the forest and had sex with her and when she returned to PW2 and PW3 she was crying. That they saw the Appellant dressing immediately after the act. PW2 reported the incident to her grandmother. PW4 confirmed PW1, PAO informed her that she had been defiled by the Appellant. PW5, a Clinical Officer at Ambira sub-district hospital, who examined PW1, PAO testified that her genital had a whitish mucus discharge (spermatozoa), that she had normal external genitalia with

no intact hymen. That his clinical findings showed an earlier genital penetration. The P3 form exhibit P 1 (b) and treatment notes exhibit P1 (a) confirmed there was penetration into genitalia organs of PW1, PAO. The prosecution therefore proved all the necessary ingredients in proving of an offence of defilement beyond any reasonable doubt.

15. The Appellant contends the trial magistrate erred in law and fact in convicting him on contradictory evidence. The appellant in his written submission and oral submissions did not point out what was contradictory in the evidence of the prosecution witnesses. I have very carefully considered the evidence of eye witnesses PW1, PW2 and PW3 and I have found their evidence to be consistent. I have not found any contradiction in their evidence. The evidence of PW4, PW5 and PW6 do not contradict the evidence of PW1, it indeed corroborates her evidence. I therefore find no merits in this ground and I dismiss the same.

16. On the medical evidence the Appellant contention is that the medical document thus P3 is unauthenticated. The Appellant other than alleging the P3 form is unauthenticated he has not given any details in support of this ground of appeal. The P3 form was produced before the trial Court. PW4 gave evidence testifying that he filled the P3 form before producing the same. The appellant in his cross-examination of PW5 did not raise that issue nor did he object to the production of the P3 form. I have perused the P3 form and have noted it bears the official stamp of the Police Station, the hospital and it is duly signed by the medical officer who filled it and it has the stamp of the hospital. In view of the above I am satisfied that the P3 form exhibit P1 (b) is genuine and authenticated. The treatment notes bears the stamp of the hospital and signature of the marker. The same is also authentic. I therefore find no merits on the ground of appeal and I dismiss the same.

17. The Upshot is that the appeal is without merits, I uphold the conviction and confirm the sentence.

DATED AND SIGNED AT SIAYA THIS 6TH DAY OF OCTOBER, 2016.

J. A. MAKAU

JUDGE

DELIVERED THIS 6TH DAY OF OCTOBER, 2016

IN THE PRESENCE OF

APPELLANT IN PERSON

MR. E. O. OMBATI FOR STATE

C.C.

K. ODHIAMBO

L. ATIKA

J. A. MAKAU

JUDGE