REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL NO. 9 OF 2014

BETWEEN

REPUBLIC ……..……..... APPELLANT

AND

VICTOR OMONDI ARODA ……..... RESPONDENT

(Being an appeal from the original acquittal in Criminal Case No. 507 of 2012 at Senior Principal Magistrate's Court at Migori, Hon. E. M. Nyagah, Ag PM dated 9th July 2014)

JUDGMENT

1. This is an appeal against the acquittal. The respondent faced a charge of defilement contrary to **section 8(1)** and **(3)** of the ***Sexual Offences Act, 2006*** in the subordinate court. The particulars of the offence were that on 6th September 2012 at [Particulars Withheld] Village in West Kanyamkago location within Migori County, he caused his penis to penetrate the vagina of MAO, a child aged 14 years.

2. The appellant appeals against the judgment of the subordinated court on grounds set out in the petition of appeal dated 20th July 2014 as follows;

a. *The learned trial magistrate misdirected himself in law and in fact by finding that the prosecution case was not proved beyond reasonable doubt and hence acquitting the respondent whereas there was overwhelming evidence to support the charge.*
b. *The learned trial magistrate erred in both law and in fact when he disregarded the direct and credible evidence of the complainant/victim which was corroborated by medical records.*
c. *The learned trial magistrate erred in law and fact in disregarding the medical records whereas they were crucial evidence in a sexual offence.*
d. *The learned magistrate erred in both law and in fact by relying on the evidence of the respondent's witnesses to acquit whereas they were not eye witnesses.*

3. It is important to recall that an appeal by the State against an acquittal is limited to matters of law. Although the provision has since been amended by the ***Security Laws (Amendment) Act, 2014***, the applicable provision, **section 348A** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)***, provided as follows;

Right of appeal against acquittal, order of refusal or order of dismissal

When an accused person has been acquitted on a trial held by a subordinate court, or where an order

refusing to admit a complaint or formal charge, or an order dismissing a charge, has been made by a subordinate court, the Director of Public Prosecutions may appeal to the High Court from the acquittal or order on a matter of law. [Emphasis mine]

4. What constitutes a matter of law was dealt with by the Court of Appeal in ***Paul Kobia M'Ibaya v Republic***, **Criminal Appeal No. 267 of 2003 [2007]eKLR where it stated as follows;**

We recognize that what constitutes a question of law for purposes of an appeal to the superior court would ultimately depend on the nature of the determination by the subordinate court and will vary infinitely from case to case. In some cases, the point of law can be gleaned from the decision without much ado. For instance, the subordinate court could make findings which are ex facie, erroneous in law or embark on an erroneous statutory interpretation. Those cases where the error of law is patent or is apparent on the face of the record present no difficulty. There are other less obvious cases where the error of law may arise from the manner the subordinate court has treated the evidence adduced at the trial. The cases of Republic v. Kidaga [1973] EA 368; Republic v. Wachira [1975] EA 262 from the High Court and Patel v. Republic [1968] EA 97 from the predecessor of this Court are good illustrations of this category of cases. In all the three cases, the respective subordinate courts acquitted the accused without putting him on his defence on the ground that there was no case to answer. In all the three cases, the Attorney-General appealed to the High Court under section 348A of the CPC against the acquittal. The appeals were invariably allowed on the ground that the respective Magistrates reached a conclusion on the evidence which no court properly directing itself could have reached. That ground was recognized to be an error of law. So a question of law warranting an appeal to the High Court by the Attorney-General arises if the subordinate court reaches a decision which, on evidence, no reasonable court properly directing itself on the evidence and the law could arrive at.

5. In order for the appeal to constitute on based on matters of law, the appellant must show that the that conclusions of the learned magistrate were based on 'no evidence', or that the conclusions were not supported by the established facts or evidence on record, or that the conclusions were 'so perverse' or so illegal that no reasonable tribunal would arrive at that conclusion. It is not enough for the appellant to contend that the trial magistrate would probably have arrived at a different conclusion upon appraisal of the evidence. In ***Mathani v Republic*** **[1965] EA 777, 781** the Court of Appeal expressed the view that;

As regards the question whether it was open to the Resident Magistrate and the Chief Justice to draw the inference …… this is an inference of fact and an appeal could not lie to this court unless it was not reasonably possible to draw such an inference from the primary facts proved. If it was reasonably possible to do so then, even if a different inference could also be drawn from the primary facts proved, no appeal lies to this Court as the drawing of the inference of fact in preference to other inferences which could equally be drawn is not a question of law.

6. What then was the evidence in the subordinate court? PW 1, the complainant testified that she was 14 years old and that on 6th September 2012 she did not go to school. She was left at home while the rest of her family had gone to fetch water. She narrated how the respondent came into her mother's bedroom where she was resting and had sexual intercourse with her. She managed to escape from the room whereupon she reported the matter to her mother.
7. PW 2, the mother of PW 1, testified that on the material day at about 2.00 pm when she was at the river, PW 1 came and reported to her that the appellant had had sexual intercourse with her. On the way back with PW 1 she met the appellant who, when confronted, denied that he had sexually assaulted PW 1 and insisted that they report the matter to his father. PW 2, then went to look for the appellant's father, found him and informed him of the incident. He suggested that she take PW 1 to see a doctor but she rejected this suggestion as she feared the doctor would be compromised. She instead took PW 1 to Sibuoche Health Centre and later to Migori Police Station. She later reported the matter to the Police Station and was issued with a P3 form which was later filled out by the clinical officer.

8. PW 3, a clinical officer, testified on behalf of another clinical officer who had proceeded for

further studies. He confirmed that from the records, PW 1 was treated on 6th September 2013 as having been defiled by a person known to her. At the time she was examined she was in pain and upon examination there was blood on the vagina but there were no bruises.

9. PW 4, the investigating officer, testified that on 6th September 2012, PW 2 came to the station with PW 1 to report that PW 1 had been defiled by the appellant. He investigated the matter, recorded statements and charged the appellant who was arrested on 12th September 2012.

10. When put on his defence, the appellant elected to give sworn testimony. He denied that he had sexually assaulted PW 1 and that on the material date he was fetching water when PW 2 confronted and accused him of sexually assaulting PW 1. He testified that PW 2 was his sister in law and when her husband passed away, she wanted him to be her boyfriend about a month prior to the incident but he rebuffed her hence the accusation that he had defiled PW 1.

11. DW 1, the appellant's father, testified that PW 2 informed him that the appellant had defiled PW 1. He stated that he suggested that they proceed to visit the doctor but PW 1 refused. He stated that the appellant had informed him earlier that PW 2 had tried to seduce the appellant.
12. DW 2, a neighbour, testified that on the material day, he found PW 2 alleging that the appellant had defiled her daughter. He inquired if he could inspect PW 1 but PW 2 refused. He stated that he did not observe anything wrong with the child. DW 3, the appellant's brother, testified that on the material day he was with the appellant the whole time fetching water.

13. In his judgment the learned magistrate identified two issues for determination. First, whether PW 1 was defiled and if so whether it was by the appellant. Second, whether the case was proved beyond reasonable doubt. In analyzing the evidence, he found fault with the P3 Form and the Post Rape Case Form on the ground that the P2 form stated that the injuries were 4 days old and that it was signed on 10th September 2012. He also found that although PW 1 alleged that there was a struggle between her and the appellant, there were no bruises. He also found that the demeanor of the victim and her mother were suspicious. He stated that PW 1 refused to seek medical help immediately and instead they ran away to an unknown place. He also noted that PW 1 testified that the appellant was arrested the day after the incident yet the he was arrested after 6 days. The learned magistrate believed that PW 2 had made advances to the appellant who had rejected the same hence the complaint. He also found that the PW 1 stated that she had been in the homestead for only 3 weeks yet PW 2 testified that PW 1 had been living there since 2012. He found the defence case more credible than that of the prosecution and as a result dismissed the prosecution case and acquitted the respondent.

14. Ms Owenga submitted that that the learned magistrate failed to consider the overwhelming evidence of the prosecution and in particular the fact that PW 1 gave clear and convincing testimony which was corroborated by the medical evidence. She submitted that the defence case was a sham but the learned magistrate opted to discredit evidence of PW 1 and PW 2 without giving any reasons. She urged that the verdict was unlawful and should be set aside and the respondent convicted.

15. The appellant, on his part, submitted that the learned magistrate dealt with the evidence properly and he was properly acquitted. The appellant further submitted that in the event the court finds that he was wrongly acquitted, he should be retried.

16. I have reviewed the evidence and I find that there is ample evidence that PW 1 was defiled. This is clear from her testimony. The testimony was corroborated by the medical evidence produced by PW 3. The treatment notes from Migori District Hospital show that she sought treatment on 6th September 2012. The P3 Form shows that the incident report was made on 6th September 2012 at about 6.00 pm and that the time the offence was stated to have occurred was at 2.00 pm on the same day. The learned magistrate put a lot of weight on the Post Rape Case Form which indicated that the incident was reported to the police on 7th September 2012. However, the form was filled

on 6th September 2012 which means the date recorded was a mistake. The evidence is consistent that the incident occurred at about 2.00 pm and was reported on the same day in the evening. The evidence of PW 1 and PW 2 was therefore consistent and credible.

17. The medical evidence also confirms PW 1 hymen was broken. The initial treatment note from Migori District Hospital confirms that upon inserting the finger in the genitalia there was blood but no cuts or bruises. This is consistent with penetration. The P3 form was prepared on 10th September 2012 which is 4 days after the incident. This fact does not lessen or in any way diminish the evidence recorded in the treatment notes which are evidence that she was treated so soon after she was defiled.

18. The final issue is whether the respondent is the person who defiled PW 1. There is no doubt that the accused was a person known to PW 1 as he was her uncle. The tenor of the accused's defence was two-fold. He stated that he was being framed as a result of rebuffing PW 2's entreaties. When suggested the affair to PW 2 in cross-examination she denied it. DW 2, the accused's father also testified that the accused informed him of PW 2's advances.

19. As regards the alibi, DW 3, the accused's brother, was with him the whole day fetching water. It is the duty of the court to weight the alibi presented by the appellant against the prosecution evidence and decide whether it is reasonably true. PW 1 and PW 2 stated that the incident occurred at about 2 pm. The accused in his testimony did not give an account of where he was at 2 pm. Likewise DW 3's statement was very general. Immediately after the incident took place, PW2 went to look for and complain to DW 1, the respondent's father. In light of this evidence, I find the prosecution proved that it is the respondent who committed the felonious act. It is also in light of the credible testimony of PW 1 that I reject that respondent's case that he was framed as a result of a grudge. I also find that there is no other person who could have defiled the PW 1 other than the respondent.

20. The learned magistrate saw and heard the witnesses testify before him. He had the advantage of observing them testify and his impression based on their demeanour should not be lightly interfered unless such observation and impressions are inconsistent with the evidence adduced. I find that the learned magistrates observations on demenour were wholly inconsistent with evidence.

21. According to the birth certificate produced in court PW 1 was born in August 1998. At the time of the incident she was aged 14 years old. I therefore find and hold that the age of PW 1 was proved.

22. I have come to the conclusion that the findings of the learned magistrate could not be supported by the evidence that was led by the prosecution. The verdict was perverse and this conclusion falls within *"matter of law"* under **section 348A** of the ***Criminal Procedure Code***. The appeal by the respondent is therefore allowed.

23. As to whether a re-trial should be ordered, the general principle was summarized in ***Manji v Republic*** **[1966] EA 343** as follows;

In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it;

24. The trial before the subordinate court was regular, the respondent had the opportunity to call his witnesses and I do not detect any deficiency in the trial. I therefore decline to order a re-trial.

25. I find that the prosecution proved its case beyond reasonable doubt and I accordingly convict the respondent of defilement contrary to **section 8(1)** and **(3)** of the ***Sexual Offences Act***.

26. As the age of the child was 14 years old, the respondent is sentenced to twenty years imprisonment in accordance with **section 8(3)** of the ***Sexual Offences Act***.

DATED and **DELIVERED** at **MIGORI** this 7th day of **April** 2015.

D.S. MAJANJA

JUDGE

Ms Owenga, Principal Prosecuting Counsel, instructed by the Director of Public Prosecutions for the appellant.

Respondent in person.