



REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL NO. 17 OF 2015

BETWEEN

GODFREY OLUOCH OCHUODHA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence+e in Criminal Case No. 399 of 2014 at the Chief Magistrate's Court at Migori, Hon. E. M. Nyaga, PM dated on 4th March 2015)

JUDGMENT

1. The appellant was charged with two counts of defilement contrary to **section 8(1) and (2)** of the ***Sexual Offences Act, 2006***. The first count was that on the night of 14th and 15th June 2014 at [Particulars Withheld] Sub-location within Migori County he caused his penis to penetrate the anus of EO, a child aged 9 years. The second count was at the same time and place, he caused his penis to penetrate the anus of FO a child aged 10 years. After trial, he was convicted and sentenced to life imprisonment.
2. The case of the prosecution was on 15th June 2014 at around midnight EO and FO has gone to watch a football match at Kamuseti. After the match the appellant decided to escort them home because it was late but instead of taking the children to their respective homes, he took them to his home. He slept with both children in one bed and subjected them to anal sex.
3. The next morning at about 10 am, PW 3, the mother to EO, found them explaining to MA what had happened to them. EO also told her what had happened. She took the boys to the Macalder Sub-District Hospital where they were examined and each of them found to have a laceration on the anus. She reported the matter to the police. She also reported the matter to FO's parents.
4. The appellant, in his sworn statement, denied that he committed the offence. He stated that he was in church on 15th June 2014 until mid-night. He went home and woke up at 6 am on the next day. He was arrested at 4 pm on that day by a village elder and taken to the police station.
5. On the basis of the evidence I have outlined, the appellant was convicted. He now appeals against the conviction and sentence based on the petition of appeal dated 17th March 2014. The appellant's grounds of appeal were rather prolix but Mr Nyagesoa, counsel for the appellant, consolidated all of them and urged that the charges against the appellant were simply not proved. On the other hand, Ms Owenga, contended that the prosecution had proved the case beyond reasonable doubt.

6. In considering the grounds of appeal outlined above this court is enjoined to follow the principle established in ***Okeno v Republic* [1972] EA 32** where the Court of Appeal held that the first appellate court is enjoined to conduct an independent evaluation of all the evidence and reach an independent conclusion as to whether to uphold the conviction taking into account that it neither heard nor saw the witnesses testify.
7. In order to secure a conviction for the offence of defilement under **section 8(1)** of the ***Sexual Offences Act*** (“the **Act**”), the prosecution must establish that the person has committed an act which causes penetration with 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.*” While, “*“genital organs” includes the whole or part of male or female genital organs and for purposes of this Act includes the anus.*”
8. Mr Nyagesoa argued that penetration as envisaged in the **Act** was not proved and the medical evidence indeed exculpatory. Both complainants stated that the appellant sodomised them. EO, PW 1, described what happened to him as follows;

In the middle of the night he sodomised me. I began screaming but no one came to my rescue. He told me to keep quiet because he promised to give me money the following day.

9. FO, PW 2, described his ordeal as follows;

He then decided we sleep in his house. He opened the radio loudly. We shared a bed all of us. He then slept between us and sodomised EO first then he did the same to me also.

10. It is unlikely that children of such an age would use the word “sodomised.” In common parlance “sodomy” refers to anal penetration. Perhaps it would have been appropriate for the learned magistrate to record the precise words the children used to describe the act which the accused did so that the court may determine whether the act amounts to penetration within the meaning of the ***Sexual Offences Act***. In ***Samson Aginga Ayieyo v Republic KSM CA Crim. App. No. 165 of 2006 [2006]eKLR***, the learned magistrate recorded that the child stated she had been defiled. The Court of Appeal stated as follows, regarding the necessity of recording the precise words of the child;

“Defiled” is a technical term. It is quite improper to use such term or any other technical term when recording the evidence of a witness unless the witness himself or herself has used it. The correct approach is to use the words used by the witness.

11. I find that the testimony of both complainants’ was descriptive of what happened and each child gave a credible account of the fact that they were subjected penetration in the anal area by the appellant.
12. Mr Nyagesoa, submitted that spermatozoa were not taken for examination to confirm that it was the appellant who defiled the children. He also contended that the medical reports were not produced by the clinical officer who prepared them and that the appellant was not given an opportunity to examine the said the clinical officer who prepared the reports. Counsel cited the case of ***Peter Odera Daniel v Republic KSI Crim. App. No. 234 of 2008(UR)*** where Asike-Makhandia J., held that where the court did not specifically invoke **section 77** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** then the evidence produced was mere hearsay and could not be relied upon.
13. PW 4 who produced the medical reports (P3 Forms) and the treatment notes on behalf of another clinical officer, Joshua Nyangau. PW 4 stated he had worked with the said officer before and was familiar with his handwriting. In my view, the procedure adopted accords with **section 77** of the ***Evidence Act*** which provides as follows;

77. (1) *In criminal proceedings any document purporting to be report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.*

(2) *The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.*

(3) *When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.*

14. The provisions of **section 77** of the **Evidence Act**, which I have set out above, do not impose any preconditions for admission of the documents by the court other than the court must be satisfied that the signature is genuine and the person who signed it had the qualification which he was professed to hold. This was done by PW 4 and the court was so satisfied. In the circumstances it was not necessary to call the maker as the P3 forms were signed by a clinical officer and stamped with the official stamp of Muhuru Health Centre. The court was entitled to presume the same genuine. The medical evidence revealed that the both children were initially treated at Muhuru Health Center. An examination of EO revealed that his anal orifice had been ulcerated from the 10 O'clock to the 2 O'Clock position while that of FO was ulcerated from the 11 O'clock to 1 O'clock. The P3 forms confirmed the fact that the children had their anal orifices lacerated which is consistent with penetration.

15. I reject Mr Nyagesoa's suggestion that as spermatozoa were not taken from the complainants, the offence was not proved. The offence in question concerns penetration and not ejaculation. The absence of spermatozoa is not decisive in proving defilement. I restate the dictum of the Court of Appeal in **Geoffrey Kioji v Republic**, **NYR Crim. App. No. 270 of 2010 (UR)** where it stated that;

Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.

16. The children were examined on 16th June 2014, a day after the incident when the injuries were still fresh. The contents of the initial treatment notes and the P3 forms were consistent with the testimony of the children and corroborated their testimony. I therefore find that there was proof of penetration for each of the complainants. The medical examination revealed that both the children had their anal orifices lacerated as a result of the penetration.

17. The other issue raised by Mr Nyagesoa is the issue of identity of the perpetrator. He contended that the children referred to the person who defiled them as "Godie." On the issue of identification, the guidance of the Court of Appeal in **Wamunga v Republic [1989] KLR 424 at 426**, is instructive:

[I]t is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.

18. The two children testified that after they had watched the football match “Godie” offered to escort them home. The learned magistrate concluded that the appellant was a person known to the children. I agree with this conclusion as it is unlikely that the children would have agreed to be escorted by or let alone sleep in his house if they did not know him. PW 1 when cross-examined stated that the appellant stayed near the road confirming that he knew the appellant. Nothing was suggested to the complainants in cross-examination that the appellant was a stranger to them. There is also no reason to believe that the children had a motive to lie or implicate the appellant. I therefore find and hold that appellant was the person referred to as “Godie.”
19. The appellant proffered an alibi in his defence. The learned magistrate in the judgment stated, “*The accused was not honest in his testimony he failed to call very crucial witnesses despite mentioning them..*” Mr Nyagesoa suggested that the learned magistrate seemed to shift the burden of proof on the appellant.
20. The law is settled that an accused person who raises the defence of alibi does not thereby assume the burden of proving it. The burden always remains with the prosecution to prove that the accused committed the crime. In this case the appellant did not give notice of his intention to give alibi defence in order for the prosecution to call evidence in rebuttal, the court was therefore left with the task of comparing the alibi defence with the prosecution evidence (see ***Wangombe v Republic [1976 – 80] KLR 1683***).
21. Despite the sentiments of the learned magistrate, he went on to find that the testimony of the children was truthful and was corroborated by medical evidence hence the alibi was rejected. I do not find fault with this finding and I likewise reject the appellant’s alibi.
22. As regards the failure to call a crucial witness, Mr Nyagesoa submitted that MA was not called as witness as she was the first person to whom the report of the incident was made. Ms Owenga submitted that the witness was not a material witness. According to the testimony of both children, they made a report to the said MA whom they go to church with who then informed their mother. PW 3 testified that she found FO explaining to MA what happened and it is then EO also narrated to her his ordeal. I therefore find that the MA was not a material witness as PW 3 was also present when FO was explaining the incident to MA and EO also explained to her what happened. I also take into account that the report was made at 10.00 am on the morning after the incident. I therefore find and hold MA was not a material witness. She would not add anything to the prosecution evidence nor would a negative inference be made against the prosecution. I therefore find and hold that the appellant is the person who defiled both EO and FO.
23. I now turn to the issue of age of the children. Proof of age of a child is a question of fact and as regards the offence of defilement it is necessary on two grounds. First, to establish the offence of defilement which is committed if the victim is below the age of 18 years and second, to establish the penalty applicable. Mr Nyagesoa submitted that the childrens’ age set out in the charge sheet and in the evidence was inconsistent.
24. According to the initial charge sheet, EO was stated to be aged 9 years old. He stated in evidence that he 9 years old and in Standard 3. The charge sheet was later amended to show that he was 10 years old. PW 3, his mother, testified that he was born on 9th September 2004. PW 5 produced an acknowledgment of birth notification which showed that his dated of birth was 9th September 2004. According to the charge sheet, FO was 10 years old. He testified he was 9 years old. The child health card produced by PW 5 for FO showed that he was born on 29th June 2004.
25. It was not contended that EO and FO were adults. The evidence was clear that they were children and from the available evidence, I find that EO and FO were both 10 years old and accordingly their age was proved.
26. Mr Nyagesoa contended that the court ought to have considered mitigating circumstances in arriving at the sentence. He cited the case of ***Julius Amollo Oremo v Republic NRB CA Crim.***

App. No. 176 of 2010 (UR) where the court held that the court in arriving at a sentence ought to consider mitigating circumstances. In response, Ms Owenga submitted that the sentence imposed was lawful as it was that prescribed by the law.

27. In the **Julius Amollo Oremo Case** cited by the appellant, the Court was dealing with the offence under the **Penal Code (Chapter 63 of the Laws of Kenya)** which did not prescribe a mandatory penalty. The **Sexual Offences Act** provides for a mandatory penalty for the offence of defilement. The age of the children, both being under the age of 11 years, fell within the age bracket of **section 8(2)** of the **Sexual Offences Act** that attracts life imprisonment.

28. The appellant complained that he was arrested on 15th June 2014 and taken to court on 17th June 2014 and therefore his constitutional rights were violated. Mr Nyagesoa cited several cases with upheld the position in the case of **Albanus Mwasia Mutua v Republic Criminal Appeal No. 102 of 2004 [2006]eKLR** where it had been held that the violation of the accused's rights would lead to an acquittal. The cases cited by learned counsel are no longer good law in light of the Court of Appeal decision in **Julius Kamau Mbugua v Republic Criminal Appeal No. 50 of 2008 [2010]eKLR** where the Court held that such violations do not have any bearing on the innocence or guilt of the accused and may be vindicated by filing a separate petition under **Article 22** of the Constitution.

29. Mr Nyagesoa complained the court did not state which count the appellant was convicted as there were two counts and hence the conviction was a nullity. In concluding the judgment, the learned magistrate stated, *"It's my finding that the prosecution has established a case beyond reasonable doubt against the accused person. Accordingly he's hereby convicted under section 215 of the CPC."*

30. The learned magistrate did not specify the specific count under which he convicted the appellant contrary to **section 169(2)** of the **Criminal Procedure Code (Chapter 75 of the Criminal Procedure Code)** which states as follows;

In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.

31. In **Republic v Edward Kirui NBI CA Crim App. No. 198 of 2010 [2014]eKLR**, the Court of Appeal held that non-compliance with the provisions of **section 169** of the **Criminal Procedure Code** was not fatal to the proceedings where the error did not occasion a failure of justice. In this case it was very clear that the appellant faced two counts and the prosecution proved its case in respect of both counts.

32. After evaluating the evidence I am satisfied that the prosecution proved all the elements of the offence of defilement and I accordingly affirm the conviction on both count 1 and 2 of the charges. I affirm the sentence but in light of **section 169(2)** of the **Criminal Procedure Code**, I sentence to the appellant to life imprisonment on each count and direct that the sentence run concurrently.

33. The appeal is dismissed.

DATED and DELIVERED at MIGORI this day of 8th May 2015.

D.S. MAJANJA

JUDGE

Mr Nyagesoa instructed by Nyagesoa and Company Advocates for the appellant.

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