



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 57 OF 2012

ALFRED OTIENO APPELLANT VERSUS

REPUBLIC RESPONDENT

{Being an appeal arising from the original conviction and sentence of E. K. Mwaita - PM in Criminal Case No. 21 of 2011 delivered on 4th April, 2012 at Lodwar.}

J U D G M E N T

Alfred Otiemo (The Appellant), appeared before the Principal Magistrate at Lodwar charged with defilement contrary to Section 8 (1) read with Section 8 (3) of the Sexual Offences Act, in that on the night of 3rd January 2011 at Kakuma Township, he defiled C N, a child aged sixteen (16) years old.

The appellant denied the offence but was convicted after trial and sentenced to serve twenty (20) years imprisonment. He had alternatively been charged with indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act, in that he touched the genital organ of the child C N on the material date at the material place.

Being dissatisfied with his conviction and sentence on the main count, the appellant filed the present appeal on the basis of the grounds contained in his petition of appeal filed herein on 15th April, 2012.

He appeared in person at the hearing of the appeal and relied on his written submissions in support of his case.

The Learned Prosecution Counsel, **M/S Limo**, appeared for the State/Respondent and opposed the appeal by submitting that the age of the complainant was a vital issue and in that regard an age assessment report indicated that the complainant was aged sixteen (16) years at the time of assessment meaning that she could have been about 14 or 15 years at the time of the offence.

The Learned Prosecution Counsel submitted that even if the complainant was 16 years at the time of the offence, the sentence provided for a girl aged 16 years would be a minimum of fifteen (15) years imprisonment.

With regard to the “voire dire” examination, the Learned Prosecution Counsel noted that it was not necessary if it was taken that the complainant was 16 years old and therefore not a child of tender years. It was further submitted by the Learned Prosecution Counsel that the appellant's defence was considered by the trial Court and that he was given an opportunity to call all his witnesses but failed to do so. That any contradiction in the prosecution case did not go to the root of the offence. That the complainant's evidence remained unshaken and was sufficient enough to be relied upon even in the absence of corroboration which existed in this case.

The Learned Prosecution Counsel contended that it was an afterthought for the appellant to say that this witnesses were threatened and called for a dismissal of this appeal.

Having considered the rival submissions by the appellant and the state, the duty of this Court is to re-visit the evidence and draw its own conclusions bearing in mind that the trial Court had the advantage of seeing and hearing the witnesses. In that regard, the prosecution case was briefly, that on the material date at about 4.00pm, the complainant, C N (Pw 1), was on her way home when she went to a market within Kakuma Refugee Camp known as Hong Kong to take a motor-cycle taxi (boda-boda). With the help of a Police Officer she managed to find a motor cycle taxi operated by the appellant. She boarded the taxi but on the way, the appellant departed from the designated route saying that he had spotted a Police vehicle and was fearful. He by-passed the complainant's home and took her to a house within Kakuma Township where he locked her in and allegedly went to fetch his mobile phone. He returned later and forcefully removed her clothes. He wrestled her to the ground and she fell on a mattress whereupon he went ahead to defile her.

The complainant walked out of the house at about 5.00am in the morning. Her body was in pain. The appellant offered her a ride to her home and she agreed. She was dropped near her home where she went but did not find her foster parents. She then reported to the Police and was escorted to the IRC Main Hospital in Kakuma where she was later examined by **Dr. Moses Musawa (Pw 4)**, who completed a P3 form confirming that she had been defiled.

P. C. Samuel Kanyi (Pw 2), was the Police Officer who assisted the complainant find a motor-cycle taxi. He confirmed that he waved a motor-cycle operator to stop and asked him to drop the complainant to her home. He said that the said motor-cycle operator was the appellant and that it was reported on the following day that he had defiled the complainant.

P. C. Paul Sum (Pw 3), investigated the case and thereafter preferred the present charge against the appellant.

In his defence, the appellant denied the offence and gave lengthy statement of defence which in essence indicated that the complainant may have been defiled by a person or persons other than himself. He indicted that he was instructed by P. C. Kanyi (Pw 2) to take the girl to the house of one O where he left her. He collected her on the following morning and took her to her home. He was later questioned by the Police Officer after it came to their notice that the complainant had been defiled. He implied that he was arrested and charged after being implicated by P. C. Kanyi through the complainant. He alluded to a grudge existing between himself and P. C. Kanyi over illegal sale of cigarettes.

The appellant's witness, Julius Eregae Lokai (Dw 2) indicated that he was with the appellant when he was arrested and that he (Dw 2) did not know the reason behind his (appellant's) arrest.

The witness (Dw 2) indicated that he opened the gate for the appellant on the previous night at 11.00 pm when he (appellant) arrived at his brother's house where he usually slept outside. We again opened the gate for the appellant on the following morning at 5.00 am but it was later alleged that he had raped a woman.

It is apparent from the foregoing evidence by both the prosecution and the defence that the occurrence of the offence was not disputed. Indeed, the complainant's evidence coupled with the medical evidence by Dr. Musawa (Pw 4) established that the complainant was indeed sexually assaulted. Although her actual age at the time of the offence was not stated with certainty, it was undisputed that she fell within the definition of a child since she was under eighteen (18) years old. The age assessment report contained in the lower Court file indicated that she was 16 years old at the time of assessment on 6th March, 2012. The offence occurred on 3rd January, 2011 thereby placing the complainant at the age of approximately 15 years and this is the age reflected in the P3 form. It may therefore be safely stated that the complainant was aged 15 years old at the time she was defiled on the 3rd January, 2011.

The basic issue which arose for determination was whether the appellant was positively identified

as the person responsible for defiling the complainant.

The defence raised in a denial and a suggestion that the complainant was defiled by another or other persons. However, there was ample evidence from the prosecution through P. C. Kanyi (Pw 2) that the appellant was the last person seen with the complainant. He admitted as much but he made an attempt to show that he handed over the complainant to a person called O in whose house she spent the night. This was contrary to what was stated by the complainant to the extent that instead of taking her home as she intended, the appellant changed route and took her to his home in Kakuma Township where he defiled her and dropped her home on the following morning. She remained firm in stating that she was defiled by no other but the appellant. The Learned Trial Magistrate carefully considered her evidence and found it to be consistent and credible as compared to that of the appellant which he found to be an afterthought and based on untrue concocted facts. In essence, the Learned Trial Magistrate found the complainant to be a credible person and relied on her sole evidence to convict the appellant notwithstanding the absence of direct independent corroboration.

Indeed, by dint of Section 124 of the Evidence Act, the Learned Trial Magistrate was entitled to convict the appellant on the basis of the evidence of the complainant, without corroboration as long as the complainant was telling the truth.

The Learned Trial Magistrate was convinced beyond reasonable doubt that the complainant told the truth and when it comes to the question of credibility of witnesses, the Learned Trial Magistrate is in a better position to make a finding on such as compared to an appellate Court which did not have the advantage of seeing and hearing the witness. This Court cannot therefore interfere with the findings of facts made by the Learned Trial Magistrate based on the credibility of the witnesses. In that regard, it suffices to hold that there was sufficient and credible evidence from the complainant establishing beyond reasonable doubt that the person responsible for defiling her was the appellant. Consequently, the appellant's conviction by the Learned Trial Magistrate was sound and proper. Given that the complainant was aged 15 years old at the time of the offence, the sentence imposed upon the appellant was lawful.

With regard to "voire-dire" examination of the complainant, an issue raised in this appeal, it was not necessary for the trial Court to conduct it for the simple reason that the complainant was not a child of tender years. She was 15 years at the time of the offence and at the time she testified in Court. In the case of **Yaga Vs Republic [2001] 1 EA 318**, the Court of Appeal held that :-

"Under Kenyan Law, in the absence of any statutory definition in the Oaths and Statutory Declaration Act the expression of a "child of tender years" meant any child of under 14 years of age"

In the end result, this appeal is without merit and is hereby dismissed.

(Delivered and signed this 2nd day of October, 2013)

J. R. KARANJA

JUDGE