



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
CRIMINAL APPEAL NO 4 OF 2012

TONNY ODHIAMBO OKUL.....APPELANT

VS

REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the Senior Resident Magistrate, Kitale dated 19th February 2012 in Criminal Case No 377 of 2011)

JUDGMENT

Introduction

The Appellant, TONNY ODHIAMBO OKUL was charged with defilement of a child contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act No 3 of 2006, the particulars of the charge being that on diverse dates between 13th January 2011 and 8th February 2011 at *[particulars withheld]* Village within Trans Nzoia County, the Appellant intentionally caused his penis to penetrate the vagina of L W, a child aged 16 years.

The facts of the case as recorded by the trial court are that the Appellant and the Complainant, L W lived together from 15th January 2011 until 8th February 2011 when they were arrested and that during this period, they had sex on several occasions. On medical examination, the Complainant's hymen was found to be torn and old looking. In the course of the trial, the Prosecution produced a letter allegedly written by the Appellant to the Complainant imploring her not to testify against him.

The Appellant denied the charge, raising the defence of alibi to the effect that between 19th December 2010 and 7th February 2011, he was in Siaya for the burial of his parents who had died in an accident. He testified that the house from which he was arrested together with the Complainant on 8th February 2011 did not belong to him but to one Rasbocha and that on the day of the arrest, he had gone to visit the said Rasbocha, who was allegedly married to the Complainant. The Appellant was tried and convicted at the Chief Magistrate's Court at Kitale and was sentenced to fifteen (15) years' imprisonment.

The Appellant's Appeal

Being aggrieved by both conviction and sentence, the Appellant filed a Petition of Appeal on 25th January 2012, raising the following Grounds of Appeal:

- a. That the Prosecution failed to call some essential witnesses to testify;
- b. That the learned trial Magistrate erred in law and fact by relying on a letter allegedly written by the Appellant to PW 1 whose authenticity was doubtful as it did not bear the Appellant's name or signature;
- c. That the learned trial Magistrate erred in law and fact in failing to consider material contradictions by prosecution witnesses as to the owner of the house where the Appellant was arrested;
- d. That learned trial Magistrate erred in convicting the Appellant yet he did not analyse the evidence by the Clinical Officer (PW 4) who did not find any evidence of sexual intercourse between the Complainant and the Appellant ;
- e. That the learned trial Magistrate erred in law and fact in disregarding the Appellant's defence without assigning any reasons therefor.

Concession by the State

Mr. Konga learned State Counsel conceded the Appellant's appeal on the following grounds:

- a. That the letter allegedly written by the Appellant to the Complainant asking her not to testify against him was not subjected to expert examination to confirm its authenticity;
- b. That the Complainant had testified that the Appellant was not known to her prior to the incident;
- c. That there were material contradictions in the evidence of prosecution witnesses;
- d. That material witnesses were not called to testify;
- e. That PW 1 changed her testimony after being remanded in custody upon the Prosecution's request;
- f. That the Appellant's defence of alibi which was corroborated by DW 2 was not given due consideration.

Findings and Determination

Although the State has conceded the Appellant's appeal, the Court will proceed to make its findings. The Appellant's conviction by the trial court was based on the evidence of the Complainant who was a single identifying witness and some letter that emerged in the course of trial allegedly written by the Appellant to the Complainant. An examination of the Complainant's testimony revealed material contradictions and inconsistencies. At some point she testified that the Appellant was not known to her but after committal to custody, she changed her story. It seems to me that she was put under pressure and was obviously coached. Her evidence therefore had minimal probative value. As was held by Muga Apondi J in the case of *David Gitau Ndung'u Vs R [2003] eKLR* doubts created by prosecution witnesses should be resolved in favour of the accused.

With regard the letter allegedly written by the Appellant to the Complainant, the Court finds that there was no attempt by the Prosecution to prove its authenticity.

The Appellant advanced a defence of alibi which was corroborated by DW2, David Wanjala Simiyu. In the case of *Anthony Kinyanjui Kimani Vs R [2011] eKLR* the Court of Appeal restated the well settled law that there is no burden cast on an accused person to prove his alibi. The prosecution always has the burden of negating the alibi. In the case before me, the Appellant's alibi was not dislodged and I find no evidence that the trial court gave it due consideration.

In light of the foregoing, I find that the conviction of the Appellant by the trial court was unsafe. I therefore allow the Appellant's appeal, quash his conviction and set aside the sentence imposed upon him. I direct that the Appellant be set at liberty forthwith, unless otherwise lawfully held.

DATED AND SIGNED AT NAIROBI THIS 1ST OF NOVEMBER 2013

LINNET NDOLO

JUDGE

DELIVERED IN OPEN COURT AT KITALE THIS 6TH DAY OF NOVEMBER 2013

J.R KARANJA

JUDGE

In the Presence of:

.....Appellant

.....Respondent