



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A)

CRIMINAL APPEAL NO. 88 OF 2014

BETWEEN

GEORGE OTIENO OYIEKO APPELLANT

AND

REPUBLIC RESPONDENT

**(An Appeal from the Judgment of the High Court of Kenya at Kisumu, (H. K. Chemitei, J.) dated
20th January, 2014**

in

HCCR.A. NO. 111 OF 2011)

JUDGMENT OF THE COURT

1. The appellant, George Otieno Oyieko, was charged with the offence of defilement of a girl contrary to section 8(2) of the Sexual Offences Act. The particulars of the offence were that on 24th November 2010 at Wichlum in South Sakwa Location in Bondo District within Siaya County, he unlawfully and intentionally caused his penis to penetrate into the genital organs (vagina) of DM, a child aged 6 years. He also faced an alternative charge of indecent act with a child contrary to section 11(1) of the Sexual Offences Act.

2. He was tried before the Senior Resident Magistrate's Court at Bondo and convicted for the offence of defilement contrary to section 8(2) of the Sexual Offences Act in a judgment delivered on 21st July 2011. He was subsequently sentenced to life imprisonment.

3. The appellant's first appeal against the conviction and sentence was dismissed by the High Court in a judgment delivered on 20th January 2014.

Background

4. DM (PW3), testified that on the material day, she was at home with other children when the appellant,

whom she knew by the name George and as a fisherman at [particulars withheld] beach, came and brought them sweets; that the appellant then asked her to accompany him to the lake; that at the lake he told her to remove her pants but she refused; that the appellant then forcibly removed her pants after which he told her “we go and urinate at the lake”; that they went into the water and on getting out of the water, the appellant “inserted his penis into my private parts and injured me” and “did bad things to me”; that she felt pain in her thighs; and that he then told her to wear her clothes before asking her to go back to her house. DM went on to say that on getting home, her mother, PW1, scolded her because she did not find her at home and that she then informed her mother that the appellant had taken her to the lake and “did bad things” to her.

5. PW1, was IAO, the mother of the victim, DM. She recalled that on 24th November 2010 at about 5.00 pm, the appellant, a local fisherman at [particulars withheld], came bearing biscuits for her children and those of her co-wife. Thereafter PW1 left and went to the market. Upon her return she found that one of her children, DM, was missing. Her enquiries with the neighbours as to the whereabouts of DM bore no fruit. Later that evening, DM returned with the appellant. On enquiring from DM where she had been, she (DM) informed her that the appellant had asked her to accompany him to the lake. On enquiring from the appellant, he denied. PW1 then noticed that DM “had a problem.” In the course of bathing, DM informed her mother, PW1, that her thighs were painful. When PW1 asked her what had happened, DM revealed that the appellant had removed her clothes and inserted his penis into her private part and told her not to tell anybody. DM’s father, one O, reported the matter to the Beach Management Unit, [particulars withheld] .

6. Edward Nyambeka, (PW2), the chairman of [particulars withheld] Beach Management Unit, testified that on 24th November 2010 he received a report from DM’s father, O, that the appellant had defiled his child. As it was late, he asked O to return the following day. The following day at about 11.00 am, he met with the appellant, DM and DM’s parents. On interrogating them, PW2 stated that DM claimed that she had gone with the appellant to the lake “and he did sin with her”; and that the appellant admitted that he had gone to the lake with DM. He advised DM’s parents to report the matter to the police as he detained the appellant.

7. Corporal Nelson Mwanica, (PW5), of the Crime Section at Bondo Police Station, testified that he was at the police station on 25th November 2010; that PW1 and a small girl reported that the girl had been defiled the previous evening at about 7.00 pm; that the matter had been reported to the Beach Management Unit and that the girl had already been taken to hospital; that the girl was escorted to hospital to obtain a P3 form; that he proceeded to [particulars withheld] and arrested the appellant and took him to Bondo District Hospital for examination before his subsequent arraignment in court. He produced the P3 forms in respect of DM and the appellant as exhibits.

8. Jared Otieno Opondo, (PW4), a senior clinical officer at Bondo District Hospital, testified that he examined and treated DM, a girl aged 6 years, at the hospital on 25th November 2010 when she presented him with a history of defilement. On examination, he noted that there was tenderness on DM’s thighs; there was redness of her vulva and she had seminal discharge and her hymen was torn.

9. In his defence, the appellant stated that at 10.00 am on 25th November 2010, he was walking at [particulars withheld] when he was called by the chairman Beach Management Unit and taken to the Beach Management Unit offices; that he enquired from him why he was arresting him; that the chairman Beach Management Unit detained him at the offices until 8.00pm when Bondo Police came and re-arrested him and took him to Bondo Police Station; that he was never informed of the offence he had committed.

10. As already stated the trial court found the appellant guilty, convicted him and sentenced him to serve life imprisonment, and the appeal therefrom to the High Court subsequently dismissed. Still dissatisfied, the appellant lodged the present appeal.

The appeal and submissions

11. In his memorandum of appeal, the appellant complained that the lower courts failed to consider that his rights under Article 49(1)(f) of the Constitution were violated; that the charge sheet was defective; and that the age of the complainant was not ascertained. During the hearing of the appeal, the appellant who appeared in person, though relying on his written submissions that amplified the complaints contained in his memorandum of appeal, pleaded for a reduction of the sentence saying that he has reformed; that the sentence that was meted out is harsh, and that this Court should reduce the sentence.

12. As regards violation of Article 49(1)(f) of the Constitution, the appellant complained that he was not taken to court upon arrest within 24 hours; that having been arrested on 25th November 2010, he was not taken to court until 29th November 2010.

13. As for the charge sheet, the appellant complained that the statutory provision creating the offence with which he was charged, namely section 8(1) of the Sexual Offences Act was not indicated in the charge sheet.

14. Finally, he complained that the age of the victim was not proved.

15. In her brief submissions in opposition to the appeal, learned Senior Prosecution Counsel, Ms. Khaemba, urged that the appellant was taken to court within the period stipulated; that the charge sheet was not defective; that all the ingredients of the offence were established; and that the offence was proved to the required standard. According to counsel, the evidence of DM, the victim, was not contested at all; the age of the victim was established and the appeal is totally devoid of merit.

Analysis and determination

16. We have considered the appeal and the submissions. This is a second appeal which, under section 361(1) of the Criminal Procedure Code must be restricted to questions of law. [See **M’Riungu vs. R [1983] KLR455**].

17. The issues for determination are whether the appellant’s rights under Article 49(1)(f) of the Constitution were violated; whether the charge sheet was defective and whether the offence was proved to the required standard.

18. Under Article 49(1)(f) of the Constitution an arrested person has the right to be taken before a court as soon as reasonably possible but not later than 24 hours after being arrested. If the 24 hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the arrested person should be brought not later than the end of the next court day.

19. According to the appellant’s testimony before the trial court, he was arrested by Bondo Police at about 8.00 pm on Thursday, 25th November 2010. Although he could have been taken to court on Friday 26th November 2010, 24 hours after his arrest ended outside ordinary court hours. The next court day was Monday 29th November 2010 which was when he was taken to court. There was accordingly no violation of Article 49(1)(f) of the Constitution.

20. As to whether the charge sheet was defective, we accept that the provision creating the offence should have been referred to in the charge sheet as required under section 137(a)(i) of the Criminal Procedure Code. The relevant provision in this case is section 8(1) of the Sexual Offences Act as it is the one that creates the offence with which the appellant was charged. Section 8(2) of the Sexual Offences Act which prescribes the penalty for the offence with which the appellant was charged was cited on its own.

21. Care must be exercised in drafting charge sheets so as to ensure that an accused person is not prejudiced in the conduct of his defence. The appellant has however not demonstrated what prejudice he suffered on account of the reference to section 8(2) of the Sexual Offence Act in the charge sheet, and the omission to include section 8(1). Furthermore, the appellant could and should have raised this matter before the trial court. He did not do so. Neither did he do so on his first appeal. The omission is one which

in our view is excusable under section 382 of the Criminal Procedure Code. We therefore hold that there is no merit in the complaint that the charge sheet was defective.

22. Regarding the issue whether the prosecution case was proved to the required standard, we can only interfere with the findings of the lower courts if such findings are not based on evidence, or are based on a perversion of the evidence or unless no reasonable tribunal can reach such findings. In **Adan Muraguri Mungara vs. R [2010] eKLR**, this Court said that we must:

“Pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere.”

23. The findings by the lower court are well supported by the evidence as demonstrated above. The appellant has not controverted this in any way.

24. For the above reasons, the appellant’s appeal has no merit. It is therefore dismissed.

Orders accordingly.

Dated and delivered at Kisumu this 11th day of October, 2016

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

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DEPUTY REGISTRAR