



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, MWILU & M'INOTI, J.J.A)

CRIMINAL APPEAL NO. 525 OF 2010

MAURICE OTIENO ODUORAPPELLANT

AND

REPUBLICRESPONDENT

(Appeal from a sentence of the High Court of Kenya at Nairobi by (Justice Khaminwa) dated 1st November, 2010

in

HCCCRA 778 of 2007)

JUDGMENT OF THE COURT

1. Maurice Otieno Oduor, the appellant was charged, tried, convicted and sentenced to life imprisonment for the offence of defilement contrary to the provisions of **section 8(1)(2)** of the **SEXUAL OFFENCES ACT, Act No. 3 of 2006**. He had faced two counts of the charges of defilement and an alternative one of indecent act with a child contrary to the provisions of **section 11(1)** of the **SEXUAL OFFENCE ACT**.

2. The appellant was dissatisfied with his conviction and sentence and appealed to the High Court. That appeal was unsuccessful hence this, appellant's second attempt at protesting his innocence. In his Supplementary Grounds of Appeal the appellant alleges breaches of the provisions of **Article 49(f)(a)** and **(b)** of the **2010 Constitution**, previously **section 72(3)(6)** of the retired Constitution and the provisions of **sections 150, 169, 199** and **214** of the **Criminal Procedure Code**.

3. In the appellant's written submissions he stated that his constitutional right was breached as he was held in custody from 27th March 2007 until 4th April 2007 when he was taken to court and the prosecution proffered no explanation for that delay. He faulted the two courts below for failing to analyze and evaluate evidence. He added that vital witnesses were not called to give evidence, one such witness being the arresting officer. The appellant further argued that the failure to call that witness rendered the prosecution case unproved to the requisite standard of proof. He attacked the trial court's failure to record what it made of the demeanor of the prosecution witnesses, especially that of the complainant. As concerns the Superior Court's finding on the unnatural offence, the appellant submitted that since the charge sheet was not amended so as to introduce the charge of sodomy, and as that offence came out only

from evidence adduced during trial for the other counts, then there was variance between the charge sheet and the evidence and the appellant should not have been convicted. The appellant cited various authorities in his written submissions to support his grounds.

4. At the hearing of the appeal before us the appellant relied on his written submissions, adding orally that this court should consider both sides of the appeal more particularly his defence and the fact that the charge sheet did not carry the offence of unnatural offence.

5. The Republic, through Senior Assistant Deputy Public Prosecutor, G. Murungi, strenuously opposed the appeal on the grounds that there was overwhelming evidence against the appellant. Learned counsel submitted that the complainant had proved, as required, that the appellant had defiled and sodomized her on two different days. As regards the alleged defect on the charge sheet, counsel submitted that the particulars of the offence were enough to show what charge the appellant faced. We were then urged to reject the appeal.

6. This is a second appeal. The law, to wit, **section 361** of the **Criminal Procedure Code** limits this court's involvement to considering points of law only when it provides:

“A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the court of appeal shall not hear an appeal under this section –

(a) on a matter of fact, and severity of sentence is a matter of fact;”

Case law on the point is plenty and suffice to cite only one, for the purpose of this appeal, that of **Boniface Kamande & 2 others v Republic [2010]eKLR** (Criminal Appeal 166 of 2004) wherein it was stated as hereunder;

“On a second appeal to the Court, which is what the appeals before us are, we are under legal duty to pay proper homage to the concurrent findings of facts by the two courts below and we would only be entitled to interfere if and only if we were satisfied that there was no evidence at all upon which such findings were based or if there was no evidence, that it was of such a nature that no reasonable tribunal could be expected to base any decision upon it.”

7. The attack on the failure of the two courts below to analyse and assess the evidence is not borne out by the record. On the contrary we find that the trial court discharged its mandate as was required of it. Sample the following:

“The issue to be determined by the court is whether the prosecution has proved its case against the accused person beyond reasonable doubt. From the report (sic) produced by

Dr. Ketra Muhombe (PW5) and Dr. Kamau (PW7) who filled in the P3 form, it is clear that the complainant was defiled and sodomized. The report from the Nairobi Women's Hospital which was exhibited in court (exhibit 2) shows that the complainant was examined in that hospital on 26th March 2007. She was found to have a fresh torn hymen. Her anal sphincter was torn at six o'clock. This shows clearly that she was penetrated through the vagina and the anus. The issue for the court to determine is whether the accused person was properly identified as the culprit.

The complainant positively identified the accused person as the one who defiled and sodomized her. She knew the accused person since they used to live in the same plot. She also told her teachers and mother that it is the accused person who defiled her. The incident happened in the house of the accused person. Since the complainant knew the accused person before and the fact that he was her neighbor I see no possibility of a mistaken identity. Accused person was properly identified.”

The above is an apt analysis and evaluation of the relevant adduced

evidence.

8. On its part the Superior Court below found thus; after a detailed analysis of the evidence;

“Appellant was put to defend himself. He made unsworn statement. His statement was of mere denial. From the evidence produced by the prosecution it is clear that the appellant penetrated the complainant twice on the vagina and from the anus --- considering the grounds of appeal the trial magistrate did not misdirect himself.”

Further down after an evaluation of the events as given by the complaint the judge stated;

“He pulled her to his house, covered her mouth, he put his penis into her vagina. That penetration is a sexual act --- on following Sunday she again went to the shop at 8.00 p.m. He penetrated her again. He made her to lie on floor facing down and he penetrated her anus. He sodomized. I do not doubt her evidence.”

And by the above the attack on lack of record of demeanor of the complainant as seen by the trial magistrate and confirmed by the first appellate court is dislodged.

9. As regards the ground of appeal alleging failure by the prosecution to call important witnesses, we do not think there is any merit in the complaint. In our opinion, by no means can it be said that the evidence adduced against the appellant barely established the case against him, so as to lead to an inference that had a particular witness been called, his or her evidence would have been advance to the prosecution. (See **Bukenya & Others v. Uganda** [1972] EA 549). In **Donald Majiwa Achilwa & 2 Others v Republic** [2009] eKLR, this Court stated as follows on the issue:

“The law as it presently stands, is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses’ evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court, in an appropriate case, is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution case.”

We find that in the circumstances of this appeal, nothing turns on the failure by the prosecution to call the arresting officer, whose evidence would, after all, have been to confirm the appellant’s arrest, a fact that was never in dispute.

10. We have carefully perused the entire record and nowhere did we find the appellant raising a complaint on a breach of his constitutional rights, not before the trial court, not before the first appellate court. It is trite that constitutional breaches must be brought to the court at the earliest opportunity so that the prosecution is accorded an opportunity to give an explanation for the breach, as that is all that the retired constitution required. At any rate even if there had been a breach which was not sufficiently explained, and there was no such breach shown in this case, the remedy would be a claim for damages which would in no way affect the criminal proceedings. (See **Julius Kamau Mbugua v Republic, Crim. APP. No. 50 of 2008**) That therefore discharges the complaint on delay in being presented before court.

11. The appellant made a big deal of the fact that the charge sheet did not contain a count on the commission of an unnatural act. Firstly, the appellant, though convicted by the trial court of both defilement and sodomy, was only sentenced to life imprisonment for the offence of defilement. Secondly there was abundance of evidence to prove sodomy and a mere citation of **section 214** of the **Criminal Procedure Code** without showing what prejudice ensued to the appellant cannot possibly aid him. Nothing therefore turns on the issue of a defective charge as no defect was shown to exist.

12. We agree with both courts below on their concurrent findings that both defilement and sodomy were proved to the required standard and so was the identity of the appellant as the perpetrator of the offences,

seeing as the courts below did, and correctly so we might add, that the appellant's defence was a mere denial, evasive and irrelevant. We agree with the two courts below that there was overwhelming evidence against the appellant on the offences he was tried for and as a consequence find, as we hereby do, that this appeal is completely devoid of merit. We dismiss it in its entirety for that reason.

It is so ordered.

Dated and Delivered at NAIROBI this 24th day of April, 2015.

E. M. GITHINJI

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR