



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MARAGA, MWERA & GATEMBU, J.A)

CRIMINAL APPEAL NO. 216 OF 2008

BETWEEN

PETER ODHIAMBO ONYUONGO.....APPELLANT

AND

REPUBLIC.....1ST RESPONDENT

(Appeal from the judgment of the High Court of Kenya

at Nairobi (Ojwang, J) dated 29th day of September 2008

in

H.C.C.R.A. NO. 205 OF 2007)

JUDGMENT OF THE COURT

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3. The Appellant’s memorandum of appeal has three grounds: that the learned High Court Judge erred in law in failing to realize that the charge against him was defective; that his conviction was based on contradicted evidence; and that his defence was not considered.
3. When the Appellant appeared before us on 30th May 2013, he said he would rely entirely on his written submissions which he had filed.
4. On the first ground the Appellant submitted that the charge of defilement was defective for two reasons. One that the particulars of the charge did not allege that the sexual act was “forceful or unlawful”. Secondly, the complainant, as the doctor, PW3, testified was at the material time aged 18 years old and she consented to the sexual act. The Appellant blamed the two courts below for failure to note that crucial point.
5. On ground two, the Appellant submitted that when the charge of defilement was read to him, he admitted that he had indeed had sexual intercourse with the complainant whereupon the prosecutor stated the facts of the case and alleged the Appellant had grabbed the complainant as she opened the toilet door and had carnal knowledge of her. When, in response to those facts, the Appellant

said the sexual act was consensual, a plea of not guilty was entered and the case was thereafter heard. On the basis of that narration, according to the appellant, the sexual act must have taken place inside the toilet. He submitted that that contradicted the testimony of the complainant and her mother both of whom said he defiled the complainant in his room. The Appellant therefore submitted that the two versions cannot be true and he should have, in the circumstances, been given the benefit of doubt.

6. On the last ground, the Appellant complained that his defence that the sexual act was consensual was wrongly dismissed off-hand. He referred us to his unsworn statement in which he had stated that he had met the complainant selling beer in a bar on 23rd April 2006 and dated her. The following day, the complainant went to his room and they had sexual intercourse as earlier agreed. Unfortunately the complainant's mother happened to pass by the Appellant's room at that time and on seeing the complainant's sandals she stormed into the Appellant's room and found the complainant sitting on his bed. Thereafter the story changed and he was accused of defiling the complainant. The Appellant urged us to consider that defence along with the doctor's evidence that the complainant was, at the material time, aged 18 years old and find that this was a consensual act between two adults.
7. For the state, Mr. Ondari, learned Senior Assistant Deputy Public Prosecutor, dismissed this appeal as totally unmeritorious. He submitted that the complainant having been a minor that she consented to the sexual act is immaterial and urged us to dismiss this appeal.
8. We have considered these submissions and carefully read the record of appeal. As stated above, this appeal is on three grounds, namely, that the charge of defilement was defective; that the prosecution case was contradictory and that the Appellant's defence was not considered.
9. On the first ground, it is true that the prosecutor, in the statement of facts before the plea of not guilty was entered, said that the Appellant grabbed the complainant as she was opening the toilet door. It is, however, not true that he said or implied that the Appellant defiled the complainant in or outside the toilet. It is not clear who gave that version of the story to the prosecutor. At any rate that is not evidence. The testimony of the complainant together with that of her mother, PW3, was consistent that on the material date, the complainant went to the Appellant's house and took the key for the shared toilet from the Appellant. When she returned it the Appellant grabbed her hand and dragged her into his room where he defiled her. When he was done with her, he got out apparently to check if there was anybody around. The complainant's mother happened to be passing by the Appellant's room at that time and on seeing the complainant's slippers outside the Appellant's room she stormed into the Appellant's room and found the complainant seated on the Appellant's bed. It is clear from this evidence that the Appellant defiled the complainant on his bed and not in or outside the shared toilet.
10. It is also true that Dr. Githuka, PW3, is recorded in the typed proceedings as having said that the complainant was 18 years old. However, the figure on complainant's age in the hand written record of the trial magistrate is altered. On the P3 form which Dr. Githuka completed the complainant's age is stated as 13. Taking those factors into account, we find that the figure of 18 years appearing on the typed copy of the proceedings is clearly a typographical error. In the circumstances we find no merit in the first and second grounds of appeal.
11. The last ground of appeal is that the High Court did not consider or consider adequately the appellant's defence. That contention has no basis. Throughout the hearing, the Appellant conceded that he had had sexual relations with the complainant but maintained that it was consensual. At pages 3 and 4 of the judgment (which are pages 23 and 24 of the record of appeal) the High Court quoted verbatim the trial court's judgment where that defence was analysed dismissed as untenable given the complainant's age. Having ourselves confirmed that the complainant was indeed 13 years old at the material time, the law at that time and even today is that consent of such child is immaterial. So whether or not the complainant indeed consented to the sexual act does not avail the Appellant. Other than the Appellant's unsupported contention

that he had first met the complainant in a bar where she worked, there is nothing in the record of appeal to show that the complaint's stature misled the Appellant to believe that she was an adult so that that line of defence would be founded on the proviso to repealed

Section 144(2) of the Penal Code. In the circumstances the last ground of appeal also fails.

12. For these reasons, we find that this appeal has no merit and we accordingly dismiss it.

DATED and delivered at Nairobi this 26th day of July 2013.

D.K. MARAGA

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JUDGE OF APPEAL

J.W. MWERA

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JUDGE OF APPEAL

S.K. GATEMBU

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

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