



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJ. A)

Criminal Appeal No. 92 Of 2012

BETWEEN

J O O “ALIAS” D O O.....APPELLANT

AND

REPUBLICRESPONDENT

(Appeal from a Judgment of the High Court of Kenya at

Kisumu, (Chemitei, J) dated 5th March 2012

in

HCCRA NO. 49 OF 2005)

JUDGEMENT OF THE COURT

The appellant J O O alias D O O was charged, tried and convicted by the learned Resident Magistrate (S. O. Temu) and was sentenced to life imprisonment. His first appeal to the High Court (H. K. Chemitei, J) was dismissed in a judgement delivered on 5th March, 2012. The appellant was not satisfied and filed this appeal. This therefore is a second appeal and we can only consider matters of law because Section 361 (1) (a) Criminal Procedure Code limits our jurisdiction to entertain only legal issues. This position has been stated and restated in the many judgements that have come from this court like M'Iriungu v Republic [1983] KLR 455 where the following passage appears:

“Where a right of appeal is confined to questions of law an appellate court has loyalty to accept findings of fact of the lower courts and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law and it should not interfere with the decision of the trial or first appellate court unless it is apparent on the evidence that no reasonable tribunal could have reached that conclusion which would be the same as holding that the decision is bad in law – Martin v Glyneed Distributors Ltd t/a MBS Fastenings [The Times of March, 30, 1983]”

See also Kiarie v Republic [1984] KLR 739.

The appellant was faced with the following charges before the magistrate's court:-

On Count 1 the appellant was charged with incest contrary to Section 20 (1) of the Sexual Offences Act No. 3 of 2006 particulars being that on the 14th June, 2010 in S District in Nyanza Province the appellant intentionally touched the vagina of P A with his penis knowing that she was his daughter aged 6 years.

On Count 2 the appellant was charged with committing an Indecent Act with a child contrary to Section 11 (1) of the Sexual Offences Act particulars being that on the same day 14th June, 2010 at the same place he intentionally touched the vagina of the said girl of 6 years with his penis.

On Count 3 the appellant was charged with Deliberate Transmission of H.I.V and Sexually transmitted disease contrary to Section 26 (1) of the said Act particulars being that on the said date 14th June 2010 at the same place he intentionally penetrated the vagina of the said girl of the said age and transmitted disease using his penis.

The appellant denied the charges and the trial proceeded before the said magistrate. The prosecution case was through 5 witnesses and can be summarized as follows:-

After carrying out a *voire dire* examination and finding that the complainant, a child of tender years, was not able to understand the nature or meaning of an oath the complainant P A (PW1) gave an unsworn statement where she testified that she shared a room with her father (the appellant), her mother having died. She slept on the floor while her father occupied a bed in the room. On the night of 14th June, 2010 her father picked her up from her sleeping position on the floor and placed her on his bed where he proceeded to remove her pants, removed his clothes and defiled her. PW1 went to school the next day where her teacher J M T (PW3) noticed an unusual walk on the part of PW1, examined her, saw evidence of defilement and summoned PW1's uncle D O O (PW2) who took the child to Yala Sub-District hospital. PW1 informed PW2 and PW3 that her father the appellant had defiled her. PW1 was examined by a Clinical Officer, Zadika Mwita (PW4) who found that there had been partial penetration of PW1. PW4 also found that it was possible to infect PW1 with HIV as there were bruises on her private parts.

PW4 also examined the appellant and found him to be HIV positive.

The last prosecution witness was No. 41015 PC Joseph Kagiri (PW5) who upon receiving a complaint arrested and charged the appellant.

On being put on his defence the appellant elected to give an unsworn statement where he denied the charge stating that he was going through his normal duties when he was arrested and charged with the offence which he knew nothing about. The appellant called his mother as a witness who apart from introducing herself had nothing to say relevant to the matter before the court.

The trial magistrate reviewed the whole matter and was persuaded that the appellant committed the offences.

The appellant filed 6 grounds of appeal before the first appellate court complaining of lack of understanding of the language used at trial; that the evidence was not corroborated; that the age of the minor child was not established; that the medical report was inconclusive and that Section 211 of the Criminal Procedure Code was not complied with. When the appeal came for hearing on 30th January, 2012 before the first appellate court the appellant only complained that he did not cross examine witnesses and that he gave an unsworn statement. The learned judge although not addressed on the grounds of appeal reviewed each of them and made findings based on the evidence on record.

The appellant has before us filed 3 grounds of appeal relating to charge sheet which the appellant says was defective; that the P3 form produced did not show that there was defilement and that the record did not show compliance with Section 211 Criminal Procedure Code.

On the alleged defective charge sheet it will be noted that the appellant did not raise this before either of the courts below. We have nevertheless perused the same. We can see no irregularity in the form of the charge sheet at all. It lays the charges preferred against the appellant with necessary particulars. The complaint on the issue of an alleged defective charge sheet has no merit at all.

We have perused the P3 forms (Medical Examination Reports) which originated from the Officer Commanding Station, Yala. One was for the complainant P A while the other was for the appellant J O. Both are completed in every respect and executed by the Medical Officer, Yala, who testified in court as PW4. He is the one who examined both the complainant (PW1) and the appellant and made the findings already alluded to. There can be no basis for this complaint at all.

On the complaint that Section 211 of the Criminal Procedure Code was not complied with we agree with the learned Judge on the first appeal - the appellant elected to give an unsworn statement and even called a witness.

We are satisfied that the learned judge on the first appellate court properly re-evaluated the evidence as it was his duty to do. We can see no merit in this appeal which we accordingly dismiss.

Dated and Delivered at Kisumu this 12th day of July 2013

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR