



IN THE COURT OF APPEAL
AT KISUMU
(CORAM: WAKI, AGANYANYA & NYAMU, J.J.A.)
CRIMINAL APPEAL NO. 282 OF 2009

BETWEEN
ELMADA OMOLLO OWAGA.....APPELLANT

AND

REPUBLIC.....REPONSPONDENT

*(Appeal from a judgment of the High Court of Kenya at Kisii (Musinga, J) dated 5th October, 2009
in
H.C.C.R.A. NO. 48 OF 2008)*

JUDGMENT OF THE COURT

Elmada Omollo Owaga, the appellant herein, was on 19th June, 2007 convicted by Oyugis Resident Magistrate (Z. Nyakundi) for the offence of defilement of a girl contrary to **section 8(2)** of the Sexual Offences Act, and was sentenced to life imprisonment. The particulars of the offence were that on the 19th day of November, 2006 at midday in Rachuonyo District within Nyanza Province he had carnal knowledge of **J.A.O**, a girl under the age of 11 years. There was an alternative count of indecent assault contrary to **section 6 (a)** of the same Act but this was displaced by the conviction on the main charge. He was aggrieved by that conviction and sentence and preferred an appeal to the High Court in Kisii (Musinga, J) who dismissed the appeal, hence this second and final appeal which may only be on issues of law.

A supplementary memorandum of appeal was belatedly filed by learned counsel for the appellant Mr. B.A. Nyang'a but it was admitted on record, laying out seven grounds as follows:-

1. *The Constitutional rights of the appellant were infringed under articles 49(f) (1), 50(2) (c), 50(2) (c), 50 (2) (k).*
2. *The superior court erred in law and fact by failing to note the material discrepancies and contradictions in the trial proceedings in the failure of the complainant to inform her grandmother and her mother of the identity of the appellant by name and the eventual identification of the appellant on the dock in court by the complainant as Baba Tony.*
3. *The superior court erred in law and fact by misapprehending when analyzing the evidence at the trial court that in the absence of evidence of an identification parade being conducted and also in the absence direct evidence of Dr. Okunga the identification of the culprit to the offence namely Baba Tony could not be narrowed to the appellant only on the allegation of the PW2, 3 & 5 who were all partisan.*
4. *The superior court erred in law and fact by failing to note the material discrepancies and*

contradictions in the trial court proceedings in the P3 Form, the evidence of PW5 and PW2 as to the identification and name of the appellant and failing to charge the appellant with the alias as Baba Tony.

5. *The Superior court erred in law and fact by relying heavily on hearsay evidence of the Doctor PW4 and purporting to shift blame and burden of proof on the appellant to explain laceration his foreskin.*

6. *The superior court erred in law and fact by finding that the appellant had been properly identified by failing to appreciate that the contradiction on the identity and name of the appellant was caused by the bad blood between the 2 families of the complainant and the appellant.*

7. *The superior court erred in law and fact in failing to appreciate, evaluate and analyse that during the taking of evidence at the trial court there was no link and no cogent basis was laid between the so called Baba Tony and Elmada Omollo Owaga the appellant and the assumption that Baba Tony was the appellant was a materially also basis on which to convict in view of the obvious and admitted coaching of the complainant on what to say in court by the mother PW2.”*

It becomes apparent at once that several of those grounds lay largely on findings of fact which this Court would be slow to interfere with unless they were based on no evidence at all or on a misapprehension or perversion of the evidence or looking at the evidence as a whole, no reasonable tribunal would arrive at such findings which is the same thing as saying the judgment is bad in law.

What were the concurrent findings of fact made by the two courts below?

On the 19th November, 2006 at about midday, the complainant who was aged about 7 years left the toilet in her parents' home and was walking to her grandmother's house about 30 metres away. Then a person she knew very well as Baba Tony, caught her dress from behind. He was her uncle. He lifted her and took her to a banana plantation where he removed her underpants, threatening to kill her if she screamed. He lay her down, stretched her thighs and put in her private parts “something like her brother has”. He defiled her and she was hurt in her private parts. He then left her there. She struggled to reach her grandmother's house but did not tell her what had happened.

The grandmother was **J.O** (PW3). She was at the doorstep of her house when she saw the complainant approaching at about 1 p.m. When she arrived she told J.O that her cloth was wet with water but did not disclose what happened. J.O went close to her and told her to bend. When she did, J.O saw her private parts were enlarged and were red. She gave her traditional herbs for first aid and lay a mat for her to sleep. She woke up after sometime and clotted blood oozed out of her private parts. J.O started looking for someone to take her to hospital without success since the complainant's mother had left that morning for R market.

The complainant's mother was **J.A.O** (PW2). She returned from the market at about 5 p.m. and found the complainant sleeping on a mat at the grandmother's house bleeding from her private parts. She enquired what was wrong but the complainant said there was nothing wrong. J.A.O took her to Rachuonyo District Hospital and told the doctor that the child was bleeding but did not tell her the reason. The child was examined and admitted for treatment for two weeks when she was discharged. According to J.A.O, the complainant was able to open up to the doctor who was treating her and disclosed the person who had defiled her. She reported the matter to the police on 20th November, 2006.

There were two doctors at Rachuonyo Hospital who received and examined the complainant; **Dr. Peter Ogolla** (PW4) and one **Dr. Okungo** who completed the P3 form but could not testify as he had gone on leave and was not traceable. The report was produced in evidence by Dr. Ogolla under **section 77** of the Evidence Act and he stated in part as follows: -

“I also saw the child and we examined the child together. On examination the child had clothing stained with blood, the vaginal entrance had wet blood. The child was apprehensive and there were multiple bruises, the hymen was breached and there was bleeding from the vagina. The upper thighs suggested

injuries which occur when they are forcefully placed aside. The injuries of the upper thighs were categorized as harm (grievous). The alleged offender was examined and there was a laceration of the foreskin of the penis, no other injuries were noted. Specimens taken were blood. HIV test was negative. Syphilis was negative. P3 was signed on 23.11.06. I would like to produce as Ex. 1 – p3 – MFI P2 - Ex.2”

Cross-examined further, Dr. Ogolla stated: -

“I did examine the minor with Dr. Okongo (sic). Not the form was examined by Dr. Okongo (sic). The minor was admitted in the hospital. We both examined the minor. It is Dr. Okongo(sic) who followed upon treatment. There was semen but the child was bleeding. I did not get to know the accused person, the child had bruises on the thighs, which suggested that the thighs were placed aside forcefully. The child was brought to hospital on the same day, the child came with the panties which were stained.”

After the matter was reported to the police, **Corporal Richard Kibori** (PW5) of Oyugis Police Station commenced investigations and took various statements on 21st November, 2006 before proceeding to look for the appellant who had been mentioned to him by the complainant. He was arrested on 22nd November, 2006 and charged with the offences stated earlier. Although the investigating officer learned that the complainant, her mother, grandmother and the appellant were related, he was not informed about any bad relationship between them. In her own evidence in court however, J.O had said the appellant was her stepson and their relationship was not good, while J.A.O, her sister-in-law, said they were not in good terms.

In his defence, the appellant denied that he was anywhere near the homestead on 19th November, 2006 as he had left home at 6.30 a.m. to look for herbs at K, some 4 kilometres away. He only returned home at 8 p.m. and could not therefore have committed the offence as alleged. He was arrested on 22nd November, 2006 which was three days after the alleged offence. He was taken before a doctor who examined him and prescribed treatment. He stated that he had a bad relationship with J .A.O whose husband had died and she suspected he had killed him. He called two of his children A (DW2) aged 13 and O (DW3) in class 3 to confirm his *alibi* that he was not at home on that day and that they did not notice anything unusual although they were at home. One of his two wives, **A. A. M** (DW4) also testified that when she returned home from the market, she found the complainant sick at home but did not know what had happened to her. All she knew was that her husband , the appellant, was impotent and could not sustain an erection. He was diabetic and had not performed his conjugal rights with her for two years. They were using separate beds. According to A, it was the grandmother J2 who brought the false accusations because she believed the appellant killed her three sons.

In evaluating the evidence on record, the trial court had no difficulty in establishing that the complainant was defiled as there was medical evidence and the evidence of J2 and J to support the finding. The High Court made a similar finding. The big question was “*Who defiled the young girl?*” The trial court believed the evidence of the complainant that it was the appellant who did so, stating in part:

“I have looked at the prosecution (sic) and note that the accused person was well known to the complainant, the alleged incident took place during day, and in her evidence she was consistent that it is the accused person who defiled her. I have looked at her evidence keenly and do not have even the slightest doubt in her testimony. It is clear from the evidence of the prosecution that the complainant was taken to hospital on the same day and the evidence of PW4 Dr. Peter Ogolla who produced the P3 form as Exhibit I confirms the allegations of defilement.

The upshot is that the offence of defilement has been proved beyond reasonable doubt and the accused is convicted as charged under section 8 (2) of the Sexual Offences Act.”

The High Court for its part delivered itself on the same issue as follows: -

“The complainant did not tell PW2 and PW3 what had been done to her. She only opened up to Dr. Okanga (sic) who was treating her. The young girl testified that during the ordeal she had been

threatened by the appellant that he would kill her if she screamed. This threat and the shocking painful experience upon a 7 year old girl was sufficient to cause her to fear disclosing the name of her assailant at the time although during the trial she repeatedly said that it was “Baba Tony” (the appellant) who had defiled her. The complainant gave the same information to PW5 and police woman Brenda Akinyi. I do not think that the complainant had any reason to frame up the appellant. The relationship between PW2 and PW3 on the one hand and the appellant on the other was strained. That *per se* cannot be stretched to imply that whatever the complainant said about the appellant was false and only meant to settle a score against the appellant at the instance of PW2 and PW3.

The appellant was medically examined immediately after his arrest and his penis had laceration of the foreskin. In my view, this may have been as a result of the said defilement. Though the appellant was not under an obligation to explain how such laceration came about, his failure to say anything about the same strengthened the complainant’s evidence.”

It is from those findings that this appeal lies.

The first issue of law raised by Mr. Nyanga was that the appellant’s constitutional rights were violated in that the appellant, according to the arresting officer, was arrested on 21st November, 2006 but was not taken before the court until 23rd November, 2006 which was beyond the permissible limit of 24 hours. With respect that complaint was not only belatedly raised but was raised without factual basis. It is clear from the record, and it is confirmed by the appellant himself, that he was arrested on 22nd November, 2006 and was taken before court the following day. We find no breach of his rights as alleged and we reject that ground of appeal.

The second ground of appeal urged by Mr. Nyanga relates to discrepancies and contradictions which in his submission the High Court did not sufficiently appreciate. They included the fact that the complainant did not disclose the name of the assailant to her mother and grandmother although she purported to know him as “*Baba Tony*”. He pointed out that in the handwritten notes of the trial court she referred to the assailant as “*Baba Terry*”. In that confusion therefore an identification parade should have been arranged to test the complainant’s recollection since the appellant’s name is not either of those names and he was not charged under those names as “*alias*”. Furthermore the doctor to whom the name of the assailant was disclosed did not testify. In all probability therefore, he submitted, the name was suggested to the complainant by her mother who was admittedly not in good terms with the appellant, and that is why the complainant had stated in court she was telling the court what her mother told her to say. Finally Mr. Nyanga submitted that the defence of the appellant was plausible as it established his alibi and inability to commit the offence charged.

In response to those submissions, learned State Counsel Mr. Kiprop, submitted that there were no material contradictions or discrepancies worth considering since the offence took place in broad daylight and the appellant was related to the complainant who knew him well. The name “*Baba Tony*” or “*Baba Terry*” was a common one which a seven year old child would use. Furthermore, the same name was given to the doctors who treated the complainant as well as the police and there was no difficulty in tracing the appellant for arrest under the name. In his view, the complainant told the truth as she knew it, not what the mother told her to say. The P3 form completed by the doctor showed clearly that the assailant was known and was not therefore hearsay.

We have anxiously considered these submissions and have come to the conclusion that the complainant was a credible and truthful witness and we find no reason to impeach her evidence. The fact that she did not immediately disclose the name of the assailant to the first persons she met - her grandmother and mother - was explicable by her age and the trauma inflicted on her by the assailant. We also accept as the two courts below did, that she disclosed the identity of the assailant to her doctor who also examined the appellant and the police who subsequently managed to arrest him. In all the circumstances the defence of the appellant was self-serving and was properly dismissed by the two courts below.

The upshot is that this appeal has no merits and we order that it be and is hereby dismissed.

Dated and delivered at Kisumu this 4th day of November, 2011.

P.N. WAKI

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

J.G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR