



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT KISUMU
(CORAM: OMOLO , GITHINJI & ONYANGO OTIENO, JJA.)
CRIMINAL APPEAL NO. 155 OF 2011**

BETWEEN

DANIEL MAKOKHA OGUTUAPPELLANT

AND

REPUBLICRESPONDENT

(Appeal from a judgment of the High Court of Kenya at Busia (Ombija J.) dated 5th December, 2007

In

H.C.CR. A. No. 77 of 2005)

JUDGMENT OF THE COURT

The appellant was convicted by the Resident Magistrate Busia of the offence of defilement contrary to Section 145(1) of the Penal Code and sentenced to life imprisonment with hard labour. His appeal to the High Court, at Busia, was dismissed. This is his second and last appeal.

The charge sheet stated that on 8th July 2005 the appellant had unlawful carnal knowledge of F.A.S a girl under the age of 16 years.

The complainant testified at the trial among other things, that on 8th July 2005 at 5 p.m she was standing near a gate of her uncle with two other children, F and M; that the appellant who is her other uncle went there and told her that he would escort her to her uncle’s home; that on the way the appellant gave her Shs 50 to buy mandazi; that, thereafter the appellant held her, pulled her into a cassava plantation, knocked her down and had sexual intercourse with her after which he fled to his house carrying the complaint’s underpant. The complainant reported to her uncle D.E.E (PW3) (D) who in turn reported to a village elder V.O (PW4) (V). The village elder in company of other people went to the appellant’s house. He found the appellant in his elder wife’s house and after interrogation the appellant left the house and fetched a pant from one of the flowers. The appellant was arrested and taken to P.C. Oscar Chesaine (PW5) at Adungosi Police Station, who issued a medical examination form to the complainant and advised that she be taken to hospital.

At the trial the prosecutor asked that the medical examination

report (P3 form) be produced by the investigation officer as the clinical officer who had filled it had been sacked from the Government employment and his whereabouts were not known. The appellant objected saying that there was no evidence that the officer was sacked. The trial magistrate nevertheless allowed

the production of P3 form by the investigation officer to save the court's time.

The appellant gave sworn evidence at the trial. He denied that he defiled the complainant and stated that he did not know her before and that the pant was not recovered at his home. He claimed that the complainant's uncle (D) and the village elder (V) had fabricated the case because they were required to pay him Shs. 8,000 for assaulting him but that, they only paid Shs. 2,000. He produced documents to verify assault and agreement to pay compensation.

The appellant raised several grounds of appeal among them, that the superior court failed to properly or at all evaluate and analyse the evidence and also to take into account that there was no medical evidence as the clinical officer failed to testify.

This is a case involving close relatives and neighbours. The appellant who, from the evidence of V appears to be married to two wives is an uncle to the complainant. The material witnesses to whom the report was made D and V are closely related to the appellant. The appellant produced documents at the trial to show that V had assaulted him before and that he was required to pay him Shs. 8,000 as compensation. This evidence was not rejected by either the trial magistrate or the superior court. The trial court merely said that the police dealt with the people who assaulted the appellant and that the complainant did not assault him. The trial court did not consider the evidence of appellant as required by law.

The superior court also failed to evaluate the evidence of the recovery of the underpant and the weight to be given to it. Although D and V testified that the appellant produced the underpant from outside his house before they arrested and took the appellant to the police station, the under pant was not taken to police station immediately. According to PC Chesaine, it was taken to police station by the village elder on 9th July 2005. Even then the pant was not produced in court when the complainant testified and was not thus identified by the complainant as hers. The trial magistrate speculated without evidence, that the appellant took the underpant to conceal the evidence. The evidence that the appellant had taken the complainant's underpant was not credible. Furthermore as we have said, the complainant did not identify it in court as hers.

The trial magistrate relied on the medical Examination Report (P3.) The superior court made a finding that, the medical examination report afforded the requisite corroboration of the evidence of the complainant. Corroboration in law is evidence to show not only that a crime was committed but also the identity of the person who committed the offence. The P3 form was filled on 11th July 2005 about 3 days later. The clinical officer who filled the P3 form did not testify.

The appellant objected to the production of the P3 form by the investigation officer. The P3 form indicated, among other things, that the complainant's hymen was intact. The complainant testified that she was taken to a local dispensary and she referred to a treatment record in her evidence which was not however produced as exhibit. It is apparent that at the time of examination by the clinical officer the complainant had already been treated. There was no sufficient ground to support the production of a medical examination form apparently under **Section 77(1)** of the **Evidence Act** without calling the maker. The appellant was denied the opportunity to cross-examine the maker to test the source of the findings in the P3 form and also correctness of those findings.

In the final analysis this was a case dependent solely on the evidence of a child aged 12 years. There was no eye – witnesses. The prosecution failed to call as witnesses the two children who were in the company of complainant. The appellant denied the commission of the offence on oath and through documents demonstrated that he had a dispute with. V the village elder who arrested him. The medical examination report was produced by the investigating officer. The appellant having objected to its production was denied an opportunity to cross-examine the maker. It cannot, in the circumstances, be relied on as genuinely corroborating the complainant's evidence.

We are satisfied that had the superior court performed its duty and reappraised the evidence properly it could have found as shown above that the offence was not proved to the standard required by the law.

In the result the appeal is allowed, the conviction is quashed and the sentence set aside. The appellant shall be set free forthwith unless otherwise lawfully held.

Dated & Delivered at Kisumu this 2nd day of November, 2011.

R. S. C. OMOLO
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JUDGE OF APPEAL

E. M. GITHINJI
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JUDGE OF APPEAL

J. W. ONYANGO OTIENO
.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR