



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT KISUMU
(CORAM: OMOLO, GITHINJI & VISRAM, J.J.A)
CRIMINAL APPEAL NO. 324 OF 2010
BETWEEN

DANIEL OTIENO ORACHA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Kisumu (Ali – Aroni, J) dated 23rd July, 2010

In

H. C. Cr. A. No. 79 of 2008)

JUDGMENT OF THE COURT

Following his trial for the offence of defilement contrary to **section 8 (3)** of the Sexual Offences Act, No. 3 of 2006, Daniel Otieno Oracha, the appellant herein, was convicted and thereafter sentenced to 21 years imprisonment by the Senior Principal Magistrate’s Court at Siaya. The complainant, M. A. O, was, on the material date of the offence, under the age of 13 years. The particulars of the offence alleged that on the 2nd day of January 2007 in Siaya District, within Nyanza Province, the appellant had carnal knowledge of the complainant M.A.O, a child of 13 years, without her consent.

The appellant’s first appeal against conviction and sentence was dismissed by the High Court.

The evidence before the trial court which that court and the High Court accepted, was that on the 21st January, 2007, at about 7.00 pm, the appellant and his young sister C went to the house of G.A (PW2) (A), a community health nurse, to buy some medicine. There they met the complainant, M.A.O (PW1) (M) who is A’s daughter, and was, at that time, C’s friend. C asked M if she could accompany her to the shop outside. M obliged. They proceeded to the shop where C bought some sugar, and as they were returning home someone grabbed M, and told C by her name to go home. He then led M into the bush, removed her clothes, and had sex with her warning her not to scream or to tell anyone, or else he would harm her with the knife that he brandished. He continued having sex with M for about 15 minutes when, suddenly, C arrived, called the man by his name “Otieno” and asked him to stop as M’s mother was “quarrelling”. Thereupon, the man left M alone, warning her not to tell anyone. M went home crying, reported the matter to her mother who raised alarm, attracting many neighbours, some of whom searched for, and eventually apprehended, the culprit, and handed him over to the police. PC Boniface Mahinda (PW4) investigated the incident and charged the appellant with the offence stated earlier. Mr. Cyrus Osanya, then a clinical officer at Siaya District Hospital, examined M and completed the P3 form. He noted on the P3 form that the vaginal wall was torn around penium; that there was bleeding and evidence of dried semen and generally offensive smell. He noted that the victim was a “juvenile”. In the absence of Mr. Osanya, who had since left employment with the Government, the P3 form was produced by PC Boniface Mutinda, who testified that he knew Mr. Osanya, and that the form bore his signature. The appellant did not object to this.

In his defence, the appellant denied the offence, but admitted having met M at her mother’s house where he went to buy medicine.

However, at the end of it all, the Senior Principal Magistrate believed the prosecution case; rejected the appellant’s testimony; convicted and sentenced him to 21 years imprisonment.

The appellant appealed to the High Court and by its judgment dated 23rd July, 2010 that court (Ali-Aroni, J) dismissed the appeal against both conviction and sentence.

The appellant is now before us in this second and final appeal and that being so the jurisdiction of this Court is confined to considering only issues of law- see **section 361** of the Criminal Procedure Code.

In his home-made memorandum of appeal, the appellant essentially complained that the case had not been proved beyond reasonable

doubt; that the alleged incident happened in the dark making positive identification difficult; that he was convicted on the reliance of a single witness who was a child, and whose evidence was not corroborated; that there were contradictions in the evidence between witnesses; that there was no medical evidence to connect him with the offence; and finally that the P3 form was produced in court by an unqualified witness.

At the hearing before us, the appellant who was unrepresented, sought to rely on his written submissions, elaborating on the grounds of appeal, and arguing essentially issues of fact, not law.

Mr. B. L. Kivihya, learned Principal State Counsel, for the respondent, submitted that under the Sexual Offences Act, it was lawful to convict on the basis of the testimony of a single witness; that corroboration of a child's testimony was no longer required; that, in any event, the evidence of identification was water-tight; and finally that the sentence being a lawful sentence could not be interfered with.

With regard to identification and the credibility of witnesses, the trial court, in believing the prosecution witnesses expressed itself as follows:-

“The main issue I am to determine is whether the accused was identified as the defiler. Let me state from the outset that there is no evidence that the accused was visually identified. The complainant was very clear that she did not see the rapist. Her verbatim testimony is as follows:-

“I did not see the rapist due to darkness. I however saw the rapist's clothes.”

The circumstantial evidence on the rapist's identity is that when the rape ordeal was going on, the accused's sister C came and called the rapist by his name. She called him by the name of Otieno. She told “Otieno” that the victim's mother was quarrelling and she “victim” was supposed to go home immediately. The rapist stopped his act and followed his sister. The complainant's further evidence on the identity of the rapist is that she was snatched by the rapist when she was with C. In the circumstances, C was to be in a position to know who the rapist was and where he took the victim. Though the complainant did not identify the rapist, she saw his clothes and has described them in her testimony. This is that he wore a black trouser, a jeans jacket and a white shirt. I have considered the testimony of the complainant's mother on how the accused was dressed when they arrested him. She testified that he wore a jeans jacket. The complainant also identified the same jeans jacket as the one the rapist had worn. The same jacket was recovered by PC Boniface Mutinda and he had exhibited it to the court (Exh.2)”

In its own assessment of the evidence before the trial court, the High Court expressed itself as follows:-

“From the evidence of PW1 and the corroboration by the doctors of injuries sustained there is no doubt that the complainant was raped. The court has no reason to doubt her testimony and finds that she was indeed raped.

The next question that begs an answer is who committed the act of rape.

The complainant PW1 points a finger at the appellant her reasons are that, upon following them, the assailant asked C to go home. Then after sometime C followed them to the bush called out his name “Otieno” and told him that the complainant's mother was looking for her. The attacker respondent (sic) by leaving, her and following C. She also identified the clothing which were similar to the ones the appellant wore.

It is instructive that C when asked about the complainant's whereabouts knew where to find her. She then knew who the attacker was, called him by name and he left the complainant. This is too much of a coincidence. Although C denied having gone to the shops with the complainant and her brother taking complainant to the bush, the court formed the impression that DW2 C was out to save her brother's skin and did not tell the truth, she is the only witness who denied walking to the shop with the complainant a fact the appellant acknowledged.

Although, PW1 did not immediately recognize the appellant, circumstantial evidence linking the appellant to the offence is overwhelming.”

There are, therefore, concurrent findings made by the two courts below that the appellant was properly identified – first by the clothes he was wearing and secondly by C's intervention in calling him by his name, and asking him to stop the act as M's mother was looking for her. Mr. Osanya's medical report, together with the evidence of A regarding M's physical condition immediately after the incident clearly proves her defilement. With regard to the appellant's complaint that the P3 form was produced by a person other than its maker, the record clearly shows that the appellant did not object to its production by PC Mutinda (PW 4).

Finally with regard to sentence, **section 8 (3)** of Sexual Offences Act, No 3 of 2006, provides as follows:-

“A person who commits an offence of defilement with a child between the age of 12 and 15 years is liable upon conviction to imprisonment for a term of not less than 20 years.”

The sentence of 21 years imposed upon the appellant herein is a lawful sentence, and we are unable to interfere with the same.

Accordingly, and for reasons outlined, this appeal fails and is dismissed. It is so ordered.

Dated and delivered at Kisumu this 2nd day of November, 2011.

R. S. C. OMOLO
.....
JUDGE OF APPEAL

E. M. GITHINJI
.....
JUDGE OF APPEAL

ALNASHIR VISRAM
.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR.