Case Number:	Criminal Appeal 18 of 2016
Date Delivered:	20 Dec 2016
Case Class:	Criminal
Court:	High Court at Kisumu
Case Action:	Judgment
Judge:	David Amilcar Shikomera Majanja
Citation:	Stephen Odhiambo Juma v Republic [2016] eKLR
Advocates:	Omondi, Abande and Company Advocates for the appellant, Director of Public Prosecutions for the respondent
Case Summary:	-
Court Division:	Criminal
History Magistrates:	C.N. Njalale
County:	Kisumu
Docket Number:	-
History Docket Number:	1104 of 2015
Case Outcome:	-
History County:	Kisumu
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL NO. 18 OF 2016

BETWEEN

STEPHEN ODHIAMBO JUMA …….... APPELLANT

AND

REPUBLIC ……..……..... RESPONDENT

(Being an appeal from the original conviction and sentence of Hon.C.N. Njalale, RM dated 30th March 2016 at the Senior Resident Magistrates Court at Winam in Criminal Case No. 1104 of 2015)

JUDGMENT

1. The appellant, **STEPHEN ODHIAMBO JUMA**, was charged with the offence of defilement contrary to **section 8(1)** and **(2)** of the ***Sexual Offences Act, 2006*** in the subordinate court. The particulars of the charge were that on 22nd September 2015 at Nyamasaria Flyover in Kisumu East District within Kisumu County, he intentionally caused his penis to penetrate the vagina of KAO, a child aged 7 years. He also faced an alternative charge of committing an indecent act with a child contrary to **section 11** of the ***Sexual Offences Act*** based on the same facts. He was convicted and sentence to life imprisonment. He now appeals against the conviction and sentence.

2. In the petition of appeal dated 11th May 2016 the appellant contended that the trial magistrate erred in convicting him on the uncorroborated testimony of the complainant. He averred that the learned magistrate failed to make an adverse inference against the evidence of the doctor and medical report which was inconsistent with the prosecution case. He attacked the sentence as being harsh and excessive in the circumstances.

3. Counsel for the appellant, Mr Omondi, submitted that the key issue in this matter is whether the appellant was identified as the person who defiled the complainant. He pointed out that the medical evidence, more particularly the DNA was negative and did not implicate the appellant. He further submitted that the evidence of visual identification by the complainant amounted to dock identification and was not safe and reliable to support a conviction. Counsel contended that PW 2's testimony taken together with that of other witnesses was inconsistent and contradictory. Counsel urged that the evidence against the appellant was not watertight to justify a conviction.

4. Ms Osoro, learned counsel for the appellant, opposed the appeal. She submitted that the complainant described the assailant by the clothing and haircut given the period he had spent with her. She submitted that the trial court addressed the identification evidence and concluded that the appellant defiled the complainant.

5. As this a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see ***Okeno v Republic*** **[1973] EA 32**).

In order to proceed with this task, it is important recount the evidence that emerged before the trial court.

6. To prove its case under **section 8(1)** of the ***Sexual Offences Act***, the prosecution must show that the appellant did an act that amounted to penetration of a child. *"Penetration"* under **section 2** of the ***Act*** means, *"the partial or complete insertion of the genital organs of a person into the genital organs of another person."*

7. The complaint (PW 2) narrated how she was sexually assaulted. She recalled that on 22nd September 2015 at about 3.00pm, she was playing next to a transformer next to the road in Manyatta when a man on a motorbike called and told her he was taking her to father. She boarded the motorbike and was first taken to a video den where she was told that her mother would be coming. The person then took her to a house and left the motorbike telling her it had run out of fuel. He took her to a bush next to a flyover where he told her to remove her clothes. While holding her by the neck, he threatened her with a knife and he also tied her hands. He continued to threaten her while having sexual intercourse with her. She could not scream as he covered her mouth with a cloth. After he was done, he left telling her that he was going to collect his motorbike. As he did not return, she started walking toward her home. She was rescued by a man who took her and left her at a lady's house nearby. The next morning the man who had rescued her came to pick and take her home. Her mother (PW 3) was at home. She took PW 1 to hospital for treatment. She was admitted for 2 weeks and 3 days. Her blood-stained clothes were retained as evidence.

8. The doctor (PW 1) testified that he attended to PW 2 on 23rd September 2013 as 9.00am. When he examined her, he noted that she had scratch marks on the neck, chest and back. The anus was swollen and her vaginal and anal regions were torn. She had lacerations and bruises on the vaginal region and the hymen was freshly broken. PW 1 handed over to the police her blood and faecal stained dress. He concluded there was penetration. He also confirmed that PW 1 was admitted on that day and discharged on 8th October 2015 after being taken to the theater and repaired.

9. I find and hold that the testimony of PW 2, established defilement. PW 2's testimony was corroborated by the evidence of PW 1 who confirmed that PW 2 sustained such serious injuries to her private parts because of the act of forceful penetration. I now turn to the crux of this appeal, that whether the prosecution proved that the appellant was the assailant.

10. After examining PW 2, PW 1 gave her blood and faecal stained clothes to the investigating officer (PW 5) who placed them in an envelope, prepared an exhibit memo and took them to the Government Chemist. He also went with the appellant to the Government Chemist where his saliva swab was taken. The government analyst, PW 6, received PW 1 clothes and a blood sample from PW 2 and the saliva swab from the appellant. When he conducted the DNA analysis on PW 2's blood, the blood and faecal stained clothes and the appellant's saliva swab, he found that the DNA profile of the accused was not detected in the blood stains on the dress. He opined that that the blood stains showed that the PW 2 was defiled but there was no release of spermatozoa on PW 2's clothes.

11. Although the DNA evidence was exculpatory, I hold, as PW 6 pointed out, the lack of the appellant's blood would only mean he did not bleed or release any spermatozoa on the child's clothes. Thus the evidence left is that of the visual identification.

12. The appellant's case is that the circumstances surrounding the incident were not conducive to positive identification and the evidence of identification was not free from error. I must therefore decide whether the evidence of identification was reliable to found a secure basis for the conviction of the appellant. In so doing, I accept the guidance of the Court of Appeal in ***Wamunga v Republic*** **[1989]**

KLR 424 where it was stated that:

Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification.

13. As regards the description of assailants, the Court of Appeal in the case of ***Simiyu & Another v Republic*** **[2005]1 KLR 192** held that in every case in which there is a question as to the identity of the accused, the fact that the description was given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by person or persons who give the description and purport to identify the accused, and then by the person or persons to whom the description was given. The Court further held that the omission on the part of the complainant to mention the attacker to the police goes to show that the complainant was not sure of the attacker's identity.

14. In this case PW 2 did not know the appellant prior to the incident. She told the court that the assailant beckoned her to go with under false pretence at about 3.00pm while she was playing. She was with him when they visited at least two video dens until 8.00pm when she was sexually assaulted. I therefore find that PW 2 was with assailant for a sufficient long time, stretching from the afternoon to night for her to sufficiently identify him by his clothing and features. PW 3 testified that after PW 2 told her what had happened, she started making inquiries. PW 3 took her where she had been playing when she was lured by the assailant. It was near the motorbike stage and when motorcyclists were informed what had happened, they started interrogating PW 2. She stated the person who picked her up had shaved both sides of his head but at the front part of his head, he had *rastas*. She also said the person was dressed in a black T-shit and grey trouser. Based on the description, they said he was called "Sonko". PW 3 then informed her husband, PW 4, that the child had named Sonko as her assailant.

15. When PW 4 saw PW 2 after she had come out from the operation at about 6.00pm on 23rd September 2015, he asked her about the incident. She told him that she did not know the assailant by she could remember how he was dressed and how he had shaved. On the next day, he proceeded to the motorcycle base to make inquiries about the assailant but found that PW 2 had already been there. He was told to wait for the assailant to see if he would pass by. After receiving information that the assailant was coming, he went and informed the chief who came back with him and some Administration Police officers who arrested the appellant. When he was arrested, he had a shaved box style haircut with *rastas* in the middle which the PW 2 had described. PW 2 also identified that appellant at the police station after he was arrested.

16. In his sworn defence, the appellant admitted that he was a motorbike rider but he denied that he committing the offence as alleged. He confirmed that he was arrested on 24th September 2015 by the Assistant Chief.

17. Can I safely find that the identification of the appellant was free from error" I find that the child gave a description of her assailant to PW 3 and the motorcyclists who located him from the description. As I stated elsewhere, PW 2 had been with him throughout the late afternoon into the night and it would have been difficult for her to forget him since he had a distinctive hairstyle. I therefore reject any suggestion that this was a case of mistaken identity as the child was the appellant for a sufficiently long time to recall his essential features. Her testimony did not require any corroboration under the proviso to **section 124** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** so long as learned magistrate was satisfied she was telling the truth. The trial magistrate expressed herself thus;

I had the opportunity to look at the demeanor of PW 2 who testified on oath, I do find that her evidence was not shaken even in cross-examination, she was candid in her evidence and hence I have no reasons to doubt her evidence.

18. Additionally, I agree with the trial magistrate that the appellant was a stranger to PW 3 and PW 4 and there was no reason for them to implicate him in the offence. I would further add that since the PW 2 was exposed to the appellant at the police station, an identification parade would have been useless in the circumstances.

19. I am satisfied that the appellant was identified as the assailant and the prosecution proved its case against the appellant. I affirm the conviction.

20. I also affirm the sentence as the child was aged 7 years. Under **section 8(2)** of the ***Sexual Offences Act***, defilement of a child below 11 years attracts a life sentence. The sentence is also affirmed.

21. The appeal is dismissed.

DATED and DELIVERED at KISUMU this 20th day of December 2016.

D.S. MAJANJA

JUDGE

Mr Omondi instructed by Omondi, Abande and Company Advocates for the appellant.

Mr Osoro, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.