



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CRIMINAL APPEAL NO.22 OF 2018

GEORGE OCHIENG OTIENO alias OPARO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of Hon. B. R. KIPYEGON (SRM))

in Kericho CMCR. Case No.102 of 2018 delivered on 8/11/2018)

JUDGMENT

1. The Appellant was convicted with the offence of defilement Contrary to Section 8(1) as read with section 8(3) of the Sexual Offences Act (SOA) No.3 of 2006 and he was sentence to life imprisonment.
2. The particulars of the charge were that on 11/6/2018 at [particulars withheld], Kipkelion West Sub-County within Kericho County, the Appellant intentionally and unlawfully cause his penis to penetrate the vagina of JW, a child aged 8 years old and 9 months.
3. The Prosecution called a total of Six 6 witnesses whose evidence in summary was that on the material day PW.1 JMM sent the Complainant to the Posho Mill since she was unwell.
4. At 5 p.m. PW.4 JM the grandfather of the child went home with the child on a Motor Cycle. The child's clothes were dirty and she was crying. She said Oparo had taken her to a maize plantation and defiled her. She said he met her on the path and pulled her to a maize plantation and removed her trouser and placed his nyungu in her.
5. The child was taken to Koru Mission Hospital where she was Examined and treated. PW.1 said when she returned back from Hospital, she found the Accused Person had been arrested. PW. 1 produced the Complainant's birth certificate as an Exhibit.
6. The minor gave evidence as PW. She said Oparo found her going to the Posho Mill and he pulled her into a maize plantation where he removed her trousers and he also removed his trousers and he also removed his trousers and put his "thing" into her "thing" and also tried to strangle her. She said after the incident, she reported to her grandfather (PW.4).
7. PW.4 said the Complainant went to his shop crying with her clothes soiled. He put the child on a Motor Cycle and she went home after calling her parents and telling them the child had a problem.
8. PW.5 KIPYEGON ALEX NGETICH who is a Clinical Officer at Fort Tenna said he Examined the Complainant on 12/6/2018. He said her lower anterior neck was tender. She had lacerations on the left lateral labia minora. Her hymen was firstly born. The Clinical Officer made a conclusive report of penetration. He said no discharge was noted and no spermatozoa.
9. The Appellant said in his defence that on the material day, he was arrested at his house and led to the police station where he was told he had defiled a child. He denied the offence.
10. The Trial Court found the Appellant guilty as charged and convicted him and sentenced him to life imprisonment.
11. The Appellant has now appealed to this Court against both conviction and sentence on the following grounds:-

(i) THAT the Trial Court failed to take note that there was a grudge between him and the Complainant's parents.

(ii) THAT the Judgment lacked mandatory details of fact and law.

(iii) THAT the Trial Court did not consider the Appellant's defence.

12. The parties filed written submissions. The Appellant submitted that the sentence meted by the Trial Court is against Article 50 (2) (g) of the Constitution as it gives the Trial Magistrate with no Judicial discretion to Exercise. He further said the sentence of life imprisonment was harsh and Excessive in the circumstances of the case.

13. The Appellant also submitted that the Court did not administer *voire dire* on the Complainant and also failed to indicate the language used. He said *voire dire* must be conducted on a child less than 14 years and failure to administer it vitiated the proceedings.

14. The Appellant also submitted in writing that the charge was not proved to the required standard and further that the ingredients of defilement were not proved. He said penetration and the age of the child were not proved. He stated that the Trial Court stated the words by "appearance and cognition" after stating "minor of tender 7 years."

15. The Appellant also submitted that his defence was not considered. He said the Court did not take into account the evidence that the Appellant had an issue over a bucket with PW.3's wife and an issue over a fence with PW.3's father.

16. The Respondent opposed the appeal and submitted that there was no evidence that the Accused Person had a grudge with the Complainant's parents and the Appellant did not mention the said issue in his defence. He raised it in cross-examination of the victim's father who denied the allegation.

17. The Respondent also submitted that the Trial Court considered the strong evidence by the victim who gave a clear account of the incident and the same was corroborated by the medical evidence.

18. The Respondent submitted that the Trial Court considered the defence by the Accused Person and noted that the defence amounted to a mere denial.

19. This being a first appeal, the first duty of this Court is to re-evaluate the evidence adduced before the Trial Court and to arrive at my own conclusion whether or not to support the findings of the Trial Court while bearing in mind that the Trial Court had the advantage of seeing the witnesses.

20. The issues for determination in this appeal are as follows:-

(i) Whether lack of *voire dire* vitiated the proceedings.

(ii) Whether the prosecution proved the charge against the Appellant.

(iii) Whether the sentence was Excessive and unlawful.

21. On the issue of failure to administer *voire dire*, I find that the same is not fatal to the prosecution case. *The high court in Wayu Omar Dololo versus Republic, (2014) eKLR* held that: - **"On the issue of *voir dire* examination, it is true that the trial magistrate failed to conduct *voir dire* examination on the complainant who is a child of tender years for purposes of defilement. However, failure to conduct a *voir dire* examination is not fatal to prosecution case when there is in existence other evidence other than that of the complainant alone to show that defilement took place. In *Nyasani s/o Bichana vs. Republic [1958] EA 190* it was held that failure to comply with the requirements of section 19 of the Oaths and Statutory Declarations Act may result in the quashing of a conviction when the other evidence is insufficient by itself to sustain the conviction."**

22. Further, the court of appeal in *Maripett Loonkomok versus Republic, CA MSA Criminal appeal no. 68 of 2015*, stated as follows: - **"It follows from a long line of decisions that *voir dire* examination on children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person. But it is equally true, as this Court recently found that, "In appropriate case where *voir dire* is not conducted, but there is sufficient independent evidence to support the charge... the court may still be able to uphold the conviction." See *Athumani Ali Mwinyi v R Cr.Appeal No.11 of 2015.*"**

23. On the issue as taking her to the Medical Officer confirm that she had been defiled. The Medical Officer's evidence corroborated that by the Complainant (PW.2) and her mother (PW.1) and I find that the prosecution proved penetration. The Court found there was partial penetration.

24. The law defines penetration as follows: - **"the partial or complete insertion of the genital organs of a person into the genital organs of another person."**

25. On identification of the Appellant, the Complainant knew as to whether the prosecution proved the charge of defilement, there are three ingredients which the prosecution must prove as follows:-

(i) Penetration.

(ii) Identification of the Appellant.

(iii) The age of the Complainant.

26. In the current case, the evidence of penetration was proved. The hymen was broken and the labia minora lacerated. The testimony of the Complainant and that of her mother (PW.1) who Examined the Complainant before the Appellant as "Opara". He was a neighbor and the Appellant was able to report what he did to her. The Accused Person was arrested in his house after the Complainant told her mother what he had done to her. The incident happened in broad daylight at 3 p.m. and the child was able to recognize the Appellant.

The Evidence Act Section 124 states that the Court can rely on the testimony of only the victim to convict for reasons to be recorded.

27. The Trial Court said that the Minor "narrated the events in good Swahili with consistent determination and elaborate conscience without any open contradiction, bias or slightest confusion of its assailant"

28. The Trial Court also said the Minor promptly informed the mother (PW.1) and this led to the arrest of the Accused Person whose nick name "Oparo" was known even to the neighbours.

29. On the 3rd element of prove of the age of the Complainant, I find that PW.1 produced the birth certificate which shows that the Complainant was born on 8/9/2009 and therefore on the date of the incident on 11/6/2018, she was 8 years and 9 months.

30. It is not true as the Appellant submitted that the age of the Complainant was not proved. The definition of a child is the one subscribed by the children Act. Section 2 of the Act defines a child as follows: - ***"Child means any human being under the age of eighteen years."***

31. I find that the prosecution proved the age of the victim. All the ingredients of defilement were proved to the required standard.

32. On the issue as to whether the sentence was unlawful and Excessive; the Appellant submitted that the sentence of life imprisonment takes away the Judicial discretion to mete an appropriate sentence. I find that the law is clear that the nature of the sentence depends on the age of the victim. The younger the victim, the more severe the sentence.

33. I find that the sentence herein was commensurate to the age of the victim and the same is lawful.

34. I find that the appeal herein lacks in merit and the same is accordingly dismissed and both the conviction and sentence upheld.

Delivered, dated and signed at Kericho this 20th day of December, 2021.

A. N. ONGERI

JUDGE