



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL APPEAL NO.17 OF 2019

JOHN OUMA OSIENYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence in criminal case No.19 of 2018 of the Principal Magistrate's court at Mbita dated 12th July 2019 – Hon. Japhet Bii, SRM)

JUDGMENT

1. **John Oguma Osienea (appellant)** appeared before the Senior Resident magistrate at Mbita charged with defilement contrary to **Section 8(1)** read with **Section 8(3)** of the **Sexual Offences Act**. In the alternative, he faced a charge of committing an indecent act with a child, contrary to **Section 11(1)** of the **Sexual Offences Act**.

2. It was alleged that on the 11th July 2018 in Gembe West – Mbita, the appellant defiled **DO**, a boy child aged Thirteen(13) years or that he committed an indecent act on the said child. After a full trial, the appellant was convicted on the main count and sentenced to Twenty(20) years imprisonment, but being dissatisfied with the outcome preferred this appeal.

3. The grounds of the appeal are set out in the petition of appeal filed herein on 24th July, 2019 and the supplementary grounds of appeal dated 12th Mach 2020. Due to the current coronavirus (Covid-19) pandemic, the appellant did not appear in court for the hearing of the appeal which was in any event argued by way of written submissions.

4. In that regard the appellant and the respondent filed their responsive submissions which have been given due consideration by this court in light of the grounds of appeal and the opposition thereto. This being a first appeal, this court was required to re-visit the evidence adduced at the trial and draw its own conclusions bearing in mind that the trial court had the benefit of seeing and hearing the witnesses.

5. Having done so and without necessarily reproducing the evidence herein, it is the opinion of this court that with regard to the main offence, there was no particular dispute that it was indeed committed upon this complainant, **DO (PW1)** who was at the time a primary school pupil. He narrated to the court how a cyclist lured him onto his bicycle and took him to a bush where he was defiled against the order of nature.

6. The incident allegedly occurred at about 3.00pm but the offender fled from the scene leaving his bicycle behind after a passerby rushed to the rescue of the complainant on hearing his screams. The passerby, was a fisherman, **Thomas Ooko Onyango (PW3)**. He was attracted by a voice of distress in a bushy or forested area and on enquiring, saw the offender on top of the complainant. The offender also saw him and quickly pulled up his trouser and fled leaving behind his bicycle.

7. The fisherman took the complainant and the bicycle to his home. He then contacted a village elder who in turn contacted the area Chief, **Francis Weke Kasuku (PW5)** who learnt that the complainant had been sodomized and taken to hospital. The recovered bicycle was handed to the Chief. It was the complainant's mother, **AAO (PW4)**, who took him to hospital where he was examined by a Clinical Officer, **Nickson Macharia (PW2)**.

8. The clinical officer therefore completed and signed the necessary P3 form (P.Ex.3) which indicated that the complainant was aged Thirteen (13) years at the time and that he was sexually assaulted by being sodomized. This evidence of the clinical officer coupled with that of the complainant and the Fisherman (PW3) was sufficient and credible enough in establishing the material ingredient of the offence of defilement.

9. What came out as the only issue for determination by the trial court, was the identification of the offender. In that regard, the evidence of the complainant was crucial in as much as it provided direct evidence of identification of the offender. The offence occurred in broad daylight therefore providing favorable conditions for physical or facial identification of an individual. The complainant's evidence clearly

indicated that he was able to see and identify the offender even though he was previously not known to him. He (complainant) previously identified the appellant as the offender.

10. Circumstantially, the bicycle which was left at the scene by the offender as he fled was identified by the Chief (PW5) as belonging to the appellant and this was confirmed by the investigating officer, **PC Priscilla Maina (PW6)**, in the course of her investigations. The link between the appellant and the bicycle was showing indication of his culpability in the offence and indicated an indirect corroboration of the complainant's evidence of identification against him.

11. Therefore the defence raised by the appellant was clearly unsustainable and at most an afterthought in which he was portrayed as a victim of the Chief's imaginary abuse of power. His (appellant's) attempt to raise an alibi and disclaim the bicycle was also an afterthought but was credibly displaced when he was placed at the scene by the complainant and identified as the owner of the abandoned bicycle by the Chief.

12. In sum, the appellant's relevant grounds of appeal in the petition of appeal and in the supplementary grounds of appeal are all devoid of merit.

Consequently, this court is satisfied that the appellant's conviction by the trial court was proper and is hereby affirmed. The resultant sentence was also proper and lawful.

This appeal is therefore dismissed in its entirety

Ordered accordingly.

Delivered and signed this 22nd day of October, 2020

J.R. KARANJAH

JUDGE OF THE HIGH COURT