



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL APPEAL NO.27 OF 2018

JAMES NDEGE NYANGICHA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence in Sexual Offences Act case No.12 of 2016 of the CM's court at Oyugis dated 30.06.2017 – Hon. J. Ndururi, PM)

JUDGMENT

[1] The appellant, **JAMES NDEGE NYANGICHA**, appeared before the Principal Magistrate at Oyugis charged with defilement, contrary to **Section 8 (1)** read with **Section 8 (3)** of the **Sexual Offences Act**, in that he on the 18th April 2016 in Rachuonyo South within Homa Bay County, defiled VAO, a child aged fourteen (14) years.

There was an alternative count of indecent act with the said child contrary to **Section 11 (1)** of the **Sexual Offences Act**.

[2] After trial, the appellant was convicted on the main count and sentenced to twenty (20) years imprisonment.

Being dissatisfied with the conviction and sentence, the appellant preferred this appeal on the basis of the grounds in the petition of appeal filed herein on 5th July 2018 but relied mostly on his amended grounds of appeal dated 14th January 2019.

[3] At the hearing of the appeal, the appellant appeared in person and presented written submissions which he fully relied on in support of his case.

The state/respondent opposed the appeal through the learned Prosecution Counsel, **MR. OLUOCH (S/ADPP)**, who orally submitted that the appellant abducted the complainant and took her to his house where he repeatedly defiled her for two weeks. That, she knew the appellant and was able to see and clearly identify him. That, she managed to escape from the appellant and was later found to be pregnant and having contracted a sexually transmitted disease.

[4] The learned prosecution counsel, further submitted that the appellant's defence was unsustainable and that since this was a charge of defilement and not impregnating the complainant, the DNA report was unnecessary.

That, the trial court considered the defence and found it unmeritable.

Learned prosecution counsel, urged this court to dismiss the appeal.

The appellant did not respond to the respondent's submissions. He stated that he had nothing further to add.

[5] Having considered the appeal and the submissions in respect thereof by both sides, the duty of this court was to re-visit the evidence and arrive at its own conclusions. Of course, bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

In that regard, this court considered the evidence by the prosecution through the complainant (**PW1**), her mother, **AAO (PW2)**, her head teacher at [Particulars withheld] Primary school, **SO (PW3)**, the clinical officer, **SAMUEL JUMA (PW4)** and the investigating officer, **HENRY K. RONO (PW5)**.

[6] Also considered, was the appellant's evidence in defence in which he indicated that he was confronted by police officers in his barbar (kinyozi) shop and questioned about a person he had employed on a casual basis. The police officers took him to Othoro police post where the complainant was brought and denied knowing him.

She allegedly identified him only after she was intimidated and threatened. He insisted on a DNA test but this was not done yet she wanted a confirmation that she was the father of the complainant's unborn child.

[7] As may be deciphered from the evidence, the basic issue which arose for determination by the trial court was whether the complainant was defiled as alleged and if so, whether the appellant was identified as the person responsible for the offence.

In that regard, the trial court found for the prosecution and accordingly convicted the appellant.

[8] In so far as the findings related to the commission of the offence, this court would fully agree with the trial court for the reasons that the occurrence of the offence was not really disputed and was in any event established by the complainant's evidence as supported by that of the clinical officer (PW4) and partly that of her mother (PW2) who indicated that the complainant, had disappeared from home for about two and a half weeks and on resurfacing she indicated that she had been abducted by a motor cycle rider (boda boda) who took her to an unknown place and had sexual intercourse with her within that period.

[9] The complainant stated that after meeting the offender she somehow found herself riding with him on his motor cycle up to a certain house which had no occupant. They entered the house and ate the food therein. He thereafter undressed and defiled her before locking her in one room. She remained in that house for about two weeks during which the offender repeatedly defiled her.

[10] The Clinical Officer (PW4) examined her when she was taken to him. He confirmed that she had been defiled with the result that she not only contracted a sexually transmitted disease but also became pregnant. She later identified the offender after his arrest and affirmed in court that he was the appellant.

[11] On this aspect of identification, the trial court found that the complainant was with the appellant for a period of twenty (20) days which was long enough for her to know him very well. This court agrees with the finding which implied that the identification of the appellant as the offender by the complainant was devoid of mistake or error and did not have to be confirmed by a DNA test as the issue was not that of paternity but defilement.

[12] For all the foregoing reasons this court finds no grounds to interfere with the conviction and sentence of the appellant by the trial court. His grounds of appeal and the submissions in respect thereof are thus overruled and the appeal is hereby dismissed in its entirety.

J.R. KARANJAH

JUDGE

28.02.2019

[Delivered and signed this 28th day of February, 2019].