



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL APPEAL NO.28 OF 2018

NICHOLAS OWINO OTIENOAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence in Sexual Offences Act case No.461 of 2015 of the SRM's court at Mbita dated 30.11.2015 – Hon. Samson Onger, SRM)

JUDGMENT

[1] The appellant, **NICHOLAS OWINO OTIENO**, appeared before the Senior Resident Magistrate at Mbita charged with attempted defilement, contrary to **Section 9 (1) (2)** of the **Sexual Offences act** in that, on the 2nd July 2015 in Mbita within Homa Bay County, intentionally and unlawfully attempted to defile **MAO**, a child aged six (6) years old.

Alternatively, the appellant committed an indecent act with the said child, contrary to **Section 11(1)** of the **Sexual Offences Act**.

[2] After a full trial, the appellant was convicted on the main count and sentenced to fifteen (15) years imprisonment. He was however, dissatisfied with the outcome and therefore lodged this appeal on the basis of the grounds in the petition of appeal filed herein on the 30th July 2018.

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

The state/respondent opposed the appeal through the learned Prosecution Counsel, **MR. OLUOCH (S/ADPP)**.

Having considered the appeal together with the submissions by both sides for and against, the duty of this court was to revisit the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing all the witnesses.

[4] In that regard, consideration was given to the evidence by the prosecution through the complainant (**PW2**), her cousin sister, **JAO (PW1)**, her mother, **VAO (PW3)**, the clinical officer, **DUNCAN ODHIAMBO ALOO (PW4)** and the investigating officer, **SGT. JOHN KILONZO (PW5)**.

Also considered, was the appellant's evidence in defence. He denied the charge and implied that he was implicated by the complainant's mother (**PW3**) who owed him a debt but wanted to buy some fish (omena) from him. He declined to sell the fish to her after which they exchanged words. Later, he was confronted and assaulted by her husband who caused his arrest after failing to give a police officer a sum of Kshs.2000/=.

[5] From the evidence, this court is satisfied that the charge of attempted defilement was proved through the testimony of the complainant (**PW2**) as corroborated by that of her mother (**PW3**) and the clinical officer (**PW4**).

In taking the complainant to a bush and drawing out his phallus and lying on top of her while she was naked, offender clearly demonstrated that he was bent on defiling the complainant but for the sudden appearance of her mother at the scene after being alerted by her cousin (**PW1**).

[6] Indeed, the offender was caught "**Flagrante delicto**" i.e. caught in the act of attempting to defile the complainant. He forced the complainant into a bush, made her take off her clothes and remain naked, drawing out his male organ and lying on top of her seconds before her mother appeared. All these amounted to overt acts in proving the attempt to defile.

[7] The bone of contention was the appellant's involvement in the offence i.e. whether he was positively identified as the offender. He

denied the fact and said that he did not even knew the complainant.

However, evidence by the complainant, her cousin (PW1) and mother (PW3) showed that the offence occurred in broad daylight and that the culprit was the appellant.

The circumstances for identification were favourable and indeed the identification of the appellant by the complainant's mother was by recognition as they had known one another prior to the material date as confirmed by the appellant in his defence.

[8] No doubt, the identification of the appellant as the offender was proper, reliable and credible. His defence was in that regard discredited as to have any value.

It would therefore follow that the appellant's conviction by the trial court was proper and is hereby upheld.

The sentence of fifteen (15) years imprisonment imposed by the trial court was however, rather excessive although lawful considering that **Section 9 (2)** of the **Sexual Offences act** provides for a minimum of ten (10) years imprisonment. It is that minimum sentence which this court now imposes in place of fifteen years imprisonment which is hereby set aside.

[9] Other than the alteration in the sentence, this appeal is otherwise devoid of merit and is dismissed accordingly.

J.R. KARANJAH

JUDGE

28.02.2019

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