



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL APPEAL NO.24 OF 2018

GORDON OCHIENG OYIEKO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence in Sexual Offences Act case No.7 of 2018 of the CM's court at Oyugis dated 4.7.2018 – Hon. J.S. Wesonga, SRM)

JUDGMENT

[1] The appellant, **GORDON OCHIENG OYIEKO**, was charged with defilement, contrary to **Section 8 (1)** as read with **Section 8 (2)** of the **Sexual Offences Act**, in that on the 7th March 2018, at Kokwanyo location, Rachuonyo South - Homa Bay County, he defiled PAO, a child aged seven (7) years.

[2] On appearing before the Senior Resident Magistrate at Oyugis, the appellant denied the charge. He was thereafter tried, convicted and sentenced to life imprisonment. However, being dissatisfied with the conviction and sentence, he filed this appeal on the basis of the grounds in the petition of appeal filed herein on 11th July 2018.

[3] At the hearing of the appeal, the appellant appeared in person and relied on his written submissions in support of the appeal which was opposed by the respondent through the Learned Prosecution Counsel, **MR. OLUOCH (S/ADPP)**.

In his oral submissions, the learned prosecution counsel referred to the evidence of the complainant's grandmother (PW1) and contended that the act of defilement was established and confirmed as much by the witnesses who found the complainant (PW2) in a state of distress and having soiled herself after the act which she attributed to the appellant.

[4] Learned Prosecution Counsel, submitted further that the complainant narrated to the court the circumstances leading to the offence which occurred in broad-daylight and committed by the appellant, a person well known to the complainant.

Learned Prosecution Counsel, contended that the appeal lacked merit and urged this court to dismiss it.

[5] Having considered the appeal in the light of the supporting grounds and submissions by the appellant as well as the respondent, the duty of this court was to re-consider the evidence and arrive at its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

[6] In that regard, the evidence by the complainant (PW2), her grandmother, **PA** (PW1), a clinical officer, **WILLIS OMONDI** (PW3) and the investigating officer, **CPL MAXINE WEKESA** (PW4), was given due consideration against the evidence led by the appellant in his defence in which he denied the offence and implied that he was arrested and charged with the offence after being implicated by the grandmother of the complainant with whom he had a grudge for refusing to pay a debt she owed him.

[7] The trial court, after considering the evidence in its totality, concluded that the complainant was indeed defiled and that the person responsible for the act was the appellant.

In this court's opinion, that conclusion was properly within the law and facts as the commission of the offence was apparently not disputed by the defence and was in any event, established by the complainant's evidence as corroborated by that of her grandmother (PW1) and clinical officer (PW3).

[8] The age of the complainant which was placed at seven (7) years was also not disputed and was indeed confirmed by her grandmother (PW1) who produced her (complainant) later mother's clinical document (**P. Exhibit 6**) showing that the complainant was actually born on the 13th October 2010, meaning that she was about seven years as at the material date of the offence.

[9] It would follow therefore, that the appellant's grounds two (2) and three (3) in relation to the aforementioned factors as well as his submissions on the facts cannot be sustained by this court.

Although the fact of defilement was not really disputed, the appellant indicated in his defence that he was not responsible for the same and was merely linked to it due to a standing grudge between him and the complainant's grandmother (PW1).

[10] Therefore, the main issue for determination by the trial court was whether the appellant was positively identified as the person responsible for defiling the complainant (PW2).

In that regard, the trial court carefully considered the complainant's evidence which clearly implicated the appellant and overruled his defence which was thus reduced into an afterthought.

[11] It was the finding of the trial court that the complainant's evidence with regard to the offence and the appellant's responsibility for the same was credible and worth of belief.

In matters of credibility, a trial court would be in a better position to make accurate findings than an appellate court as it had the advantage of seeing and hearing the witnesses.

[12] The evidence of identification against the appellant was based on the credibility of the complainant. Her testimony that it was the appellant who defiled her did not require corroboration by dint of **Section 124** of the **Evidence Act** and as such, established beyond reasonable doubt that it was actually the appellant who defiled her. He was previously known to her as a relative. She knew him by his name of Gordon and by his nickname "**Boyi**". He was not a stranger to her and that explained why she easily fell into his trap.

[13] The trial court's finding that the appellant was positively

identified by recognition as the person responsible for defiling the complainant was based on sound and credible evidence and is hereby sustained with the result that the appellant's grounds one (1) and four (4) of the appeal are overruled and so are his submissions in that regard.

[14] In sum, this appeal is devoid of merit and is hereby dismissed in its entirety.

J.R. KARANJAH

JUDGE

21.02.2019

[Delivered and signed this 21st day of **February, 2019**].