

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 40 OF 2017

PIUS MAKUSA OPAKWA APPELLANT

VERSUS

REPUBLIC RESPONDENT

[Being an appeal against the conviction and sentence of the Chief Magistrate's Court

at Kisumu (Hon. A. Odawo RM) dated the 4th July 2017 in KISUMU CMCCRC No. 148 of 2017]

JUDGMENT

The appellant was sentenced to life imprisonment for defilement of a child aged 11 years and being aggrieved he filed this appeal against the conviction and sentence. The grounds of appeal are:-

- 1. "THAT the trial court erred in law and in fact to convict me without considering that the circumstances were not favourable for proper identification hence insufficient in law;**
- 2. THAT the trial court erred in its findings by convicting me without considering that I was not accorded a fair trial under article 50(2)j of the constitution;**
- 3. THAT the trial court erred in law and in fact to convict me without considering that the prosecution case was not proved beyond reasonable doubts hence insufficient and unsatisfactory in law.**
- 4. THAT my defence evidence was not given due consideration yet it was capable of entitling for my acquittal."**

As the first appellate court my duty is to re-evaluate the evidence and to come to my own conclusion on the case.

Briefly the prosecution's case was that on 18th February 2017 at about 9PM B A A a child whose age was assessed to be between 10 to 11 years was removing clothes from the hanging line when the appellant who was their neighbour grabbed her and took her to his house. He forcibly removed her under pant and lay on her before putting his penis into her vagina as she described it. Her mother J A (PW2) was away at work on night shift but she had asked her neighbours Mary Auma (PW3) and one Benta to look after the children. According to Mary (PW3) she noticed B talking to the appellant as she was removing clothes from the line and became suspicious and because she wanted to sleep she went and told Benta to look after the children. When she left Benta's house she decided to go check on the children and was surprised to find B missing. When she called out her name B is alleged to have answered from the appellant's house. By then the appellant had come out and run outside. Together with Benta, Mary alerted their other neighbours who resolved that B be taken to hospital. Before that a report was made to the police station. The following day B mother took her to hospital and upon examination the Clinical Officer confirmed there was penetration. The child's mother had already taken the appellant to the police station. He too was taken for examination and was found to have Syphilis. He was subsequently charged with this offence.

When he was put on his defence the appellant denied the charge and stated that at his age (77 years) there was no way he could have committed the act as he was also impotent and hypertensive. He claimed to have been framed.

Having evaluated the evidence by both sides carefully, I am satisfied that the charge of defilement was proved beyond reasonable doubt. Although no corroboration is required in cases such as these here there is enough evidence to corroborate the evidence of the complainant. Firstly there is evidence from her mother as well as Mary (PW3) that the appellant is their neighbour. So I am satisfied that she knew him well. Secondly there is testimony from Mary (PW3) that she saw the appellant speaking to the complainant while she was removing clothes from the line. There is also evidence that when Mary (PW3) called out the child's name she answered from the appellant's house. All this evidence goes to confirm that the child was a truthful witness. I am therefore satisfied that she told the truth of what the appellant did to her and that he was not framed. Indeed the medical evidence tendered confirms that there was penetration. Her age was assessed and it was found she was not more than 11 years old. According to the Doctor she was between 10 to 11 years old. The appellant's defence look at in the light of the evidence of the prosecution's witnesses is weak. I see nothing in the evidence to suggest that the witnesses lied. To the contrary I find them credible and reliable.

In his submissions the appellant alleges that his rights were violated. That is a new ground of appeal for which he did not seek leave to introduce and hence cannot be entertained. Moreover if indeed the police kept him in custody for longer than the stipulated time his recourse is suing for damages. As for Section 200 Criminal Procedure Code the same only applies if the case is heard by more than one Magistrate. Here the case was started and concluded by the same Magistrate and the issue of Section 200 Criminal Procedure Code does not therefore arise.

Accordingly I find no merit in this appeal and it is dismissed and as the sentence imposed was lawful the appellant shall continue serving it.

Signed, dated and delivered at Kisumu this 22nd day of March 2018

E. N. MAINA

JUDGE