



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL APPEAL NO.58 OF 2017

PAUL OCHIENG AYODO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence in Oyugis PM's Court Sexual Offences Act Case No.18'A' of 2016 - Hon. J.R. Ndururi, PM, dated 25th August,2017)

JUDGMENT

[1] The appellant, **PAUL OCHIENG AYODO**, appeared before the Principal Magistrate at Oyugis, charged with defilement, contrary to **Section 8(1)** as read with **Section 8 (3)** of the **Sexual Offences Act**. It was alleged that on the 2nd May 2016, in Rachuonyo East District within Homa Bay County, the appellant defiled, **E A O**, a child aged fifteen (15) years. Alternatively, he committed an indecent act with the same 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. He was dissatisfied with the conviction and sentence and preferred this appeal on the basis of the grounds in his amended petition of appeal filed herein on 30th April 2018.

[3] **MR. NYAUKE**, learned counsel, represented the appellant at the hearing of the appeal while the learned prosecution counsel, **MR. OLUOCH**, represented the Respondent/State.

In his submissions, Mr. Nyauke, relied on the grounds in the petition of appeal and urged the court to consider the trial court record and find that the prosecution case was not proved beyond reasonable doubt. He prayed that the appeal be allowed.

[4] The respondent conceded the appeal for reasons that the matter was reported three months after its occurrence and no reason was given by the complainant as to why she had to wait for long.

That, the complainant made the report when she became pregnant but no DNA test was conducted to confirm that the appellant was the father of her child.

[5] Having considered the appeal and the rival submissions by the parties, the duty of this court was to re-consider the evidence and draw its own conclusions bearing in mind that the trial court had the benefit of seeing and hearing the witnesses.

In that regard, the evidence adduced against the appellant was considered alongside the defence relied by the appellant.

[6] The prosecution called a total of Five (5) witnesses including the complainant, **E A O (PW2)**, A Clinical Officer, **SAMUEL JUMA (PW1)**, an assistant chief, **HESBON ODERA AROGO (PW3)**, the complainant's mother, **N W O (pw4)** and the Investigations Officer, **PC ROSEMARY NDIEMA (PW5)**.

The appellant's defence was a denial and an indication that he was arrested and charged without good cause and for having refused to produce Kshs.100,000/= to the police and Kshs.80,000/= to the chief.

[7] From the evidence, this court is satisfied that it was sufficient enough to establish the ingredients of the charge. The complainant's evidence indicated that she was aged Fifteen (15) years when she became pregnant after having engaged in sexual intercourse with a male person whom she identified as her uncle, the appellant herein.

Being a minor and deemed to be incapable of giving consent, the person responsible for her pregnancy was criminally responsible for the

offence of defilement.

The act was confirmed by the complainant's pregnancy and the medical evidence produced by the Clinical Officer (PW1) in the Form of the P3 Form (**P. Exhibit 1**).

[8] The basic issue for determination was whether the appellant was the person responsible for the offence. He denied the fact but the complainant was very firm that he was the person responsible for her pregnancy and therefore defiling her. In dealing with this issue, the trial court believed the complainant's testimony and held that the appellant was indeed responsible for defiling the complainant.

[9] In so holding, the learned trial magistrate expressed himself as follows:-

“----- The only evidence that is the accused person who committed the act of penetration is that of the child. Under Section 124 of the Evidence Act, a court cannot convict a person solely on the basis of the sole evidence of a child unless that evidence is corroborated by other material evidence implicating the person. The reason for this provision is obvious. A child is someone who is still developing, physically and intellectually.

A child may not have attained sufficient intelligence to fully appreciate circumstances and interpret them correctly. Thus, such evidence would require corroboration by some other evidence implicating the accused person. However, the provision to the said section provides that in sexual offences cases, a court has the discretion to convict an accused person solely on the uncorroborated evidence of a minor.

This proviso was put in place upon the realization that most often, the only evidence available in cases of sexual offences involving children is that of the child. This is because the offences are mostly committed in hidden places. There are however safeguards put in place. Firstly, the court must be satisfied that the victim has told the truth. Secondly, the court must record the reasons for that believe. In effect, a court is required to subject that evidence of such a minor victim to serious scrutiny, satisfy itself that the evidence is believable and record the reasons for finding so, before entering the conviction. -----.

After putting the child's testimony under careful scrutiny, I am satisfied that she told the truth. I find that the defence put up by the accused person did not shake the child's testimony at all. I am therefore satisfied that the accused person did penetrate the child on 02/05/2016. The act was intentional and unlawful.”

[10] This court finds no reason to depart from the foregoing findings of the trial court and must also therefore find that the appellant was the person responsible for defiling the complainant, who was his niece.

The fact that a DNA test was not conducted to confirm that the accused was responsible for the complainant's pregnancy did not water down the prosecution case against him as there was sufficient and credible evidence from the complainant and the Clinical Officer (PW1) establishing beyond reasonable doubt the fact of penetration. It is immaterial whether the penetration results in pregnancy or not. The offence of defilement was complete with the penetration of a male sexual organ to the complainant's female sexual organ.

[11] In any event, the fact of penetration was the issue in this case and not the paternity of the complainant's child. In the circumstances, a DNA test was not necessary.

This court cannot therefore uphold the respondent's concession to the appeal based on the DNA test nor the fact that the complainant took a long period of time to report the incident to the police.

[12] In the end result, it is the finding of this court that the appellant's conviction by the trial court was proper and the sentence imposed on him was lawful.

This appeal is therefore lacking in merit and is hereby dismissed.

J.R. KARANJAH

JUDGE

31.07.2018

[Delivered and signed this 31st day of July, 2018].