



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 9 OF 2018

FREDRICK ONYANGO ANGESO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal against the conviction and sentence of the Senior Principal Magistrate's Court at Maseno (Hon. B.K. Kiptoo RM) dated the 18th October 2017 in Maseno SPMCRC No. 307 of 2016]

JUDGMENT

The appellant, **FREDRICK ONYANGO ANGESO**, was convicted for the offence of **Defilement** Contrary to **Section 8(1)(3)** of the **Sexual Offences Act**. He was then sentenced to imprisonment for a period of 25 years.

1. In his appeal, the appellant submitted that the evidence tendered by the Complainant was not truthful, clear or consistent.
2. As far as the appellant was concerned, the Complainant testified about matters which she was told by her mother. In other words, the Complainant did not testify about facts which had befallen her.
3. Secondly, the trial court is faulted for failing to warn itself of the dangers of relying upon the evidence of a single witness. The appellant submitted that conviction which was founded upon the evidence of a single witness, had some uneasiness about it.
4. The appellant also noted that the first report about the incident was made about one week after the incident.
5. His view was that such a delay was fatal, as it did not contain "the needed connection."
6. In any event, the person who had first noted that the girl had some difficulty, and who was therefore deemed to be an essential witness, failed to testify.
7. The failure to get that person, (Margaret) to testify was described as a miscarriage of justice.
8. I was invited to hold that if the said Margaret had been called to testify, the court could draw an inference that her evidence would have tended to be adverse to the prosecution.
9. The appellant further pointed out that the medical evidence did not support the prosecution case, as the Clinical Officer who had examined the Complainant said that there was no evidence of penetration.
10. As the **Sexual Offences Act** defines the offence of **Defilement** an act which causes penetration with a child, the appellant submitted that if there was no evidence of penetration, the offence was not committed.
11. The appellant pointed out that the Clinical Officer had also testified that the Complainant's hymen was missing.
12. In his considered view, that piece of evidence was a contradiction to the earlier evidence which had indicated the lack of evidence of penetration.
13. Another issue that was raised by the appellant was the absence of Independent Witnesses, and more so eye-witnesses.
14. It is generally known that sexual offences such as defilement or rape are most unlikely to be committed in places where persons who were not involved in them, were likely to see the offence being committed.

15. The absence of eye-witnesses would not be fatal to the prosecution case.
16. More often than not, the evidence of the victim is corroborated by other evidence; and that would be sufficient basis for a conviction.
17. As regards the proof of the victim's age, the prosecution produced the Complainant's Health Card.
18. It was the appellant's contention that the prosecution ought to have produced the Complainant's Birth Certificate. He said that any other document was unacceptable, when the prosecution was required to prove the age of a complainant.
19. The appellant did not cite any statutory provision or authority to back his said submission.
20. In my considered opinion, whilst a Birth Certificate may constitute good evidence, to prove the age of the complainant, it is not the only admissible evidence in that respect.
21. In this case, the Health Card, which shows that the complainant was first seen at the hospital on 14th August 2003, was admissible as evidence to prove her age.
22. The said document appears to have been created in the ordinary course, when the complainant was being accorded medical attention. It is not a document which was specifically created for the purposes of the case.
23. I find that the Health Card was proper and admissible evidence for proving the age of the Complainant.
24. Having re-evaluated the evidence on record, I find that this was a case of recognition. Both the Complainant had known the appellant prior to the incidents which gave rise to the case. He was their neighbour.
25. I also find that the Complainant had clearly told the trial court that she would give evidence about what she had witnessed, as opposed to what her mother had told her to say. She then added, that she would tell the truth.
26. The learned trial magistrate, who had the benefit of observing the demeanour of the complainant, found her to have exhibited confidence and consistency.
27. After re-evaluating the evidence on record, I find no grounds upon which this court can have any doubts about the credibility of the Complainant.
28. That would imply that the appellant and the Complainant had had sex on two occasions.
29. On the other hand, the appellant denied committing the offence.
30. Following the said denial, the trial court had the responsibility of ascertaining whether or not the prosecution had adduced sufficient evidence to lead to a conviction.
31. I find that the trial court applied the correct procedure in law, when it sought to ascertain if the evidence of the minor had been corroborated.
32. The learned trial magistrate also warned himself about the danger of relying only on the evidence of a minor. Ultimately, the trial court came to the conclusion that it was safe to convict the appellant, based on the evidence tendered.
33. This is how the trial court arrived at the conclusion;

“The doctor stated that due to the time that had lapsed,

It was not possible to ascertain penetration. However, he noted that the hymen was missing. All the above taken

In totality, penetration did take place and indeed the offence of defilement was committed....”

34. On the one hand, the complainant, a confident and consistent witness, testified that she had been defiled, but on the other hand the doctor who examined her testified that it was not possible to ascertain penetration.
35. Penetration is the key component of the offence of defilement. Of course, the said penetration may be partial or complete. But without penetration, the offence will not have been committed.
36. Circumstantial evidence in this case points at penetration. But the evidence by the medical witness categorically states that it was not possible to ascertain penetration.
37. In the light of that express evidence, I hold the considered view that the trial court was not right to conclude that penetration did take place. I so hold because that conclusion is a negation of the actual evidence given by the Clinical Officer who had examined the

Complainant.

38. In the result, I find that the conviction was not safe.

39. I therefore, albeit reluctantly, allow the appeal, quash the conviction and set aside the sentence.

40. I order that the appellant be set at liberty forthwith, unless he is otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 27TH DAY OF NOVEMBER 2018

FRED A. OCHIENG

JUDGE