



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT HOMA BAY
CRIMINAL APPEAL NO. 28 OF 2016

BETWEEN

D O A.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence in original Homa Bay CM's Court Criminal Case No.4 of 2016 – Hon. N.W. Kariuki, RM, dated 20th May, 2016)

JUDGMENT

1. **D O A** (the appellant) was convicted on a charge of defilement contrary to **Section 8 (1)** as read with **8 (2)** of the **Sexual Offences Act No.3 of 2006**.
2. The particulars of the charge stated that on 9th February in Homa Bay County, the appellant intentionally caused his penis to penetrate the vagina of **B A O** a child aged 5 years.
3. The appellant denied the charge, and after a trial where 7 witnesses testified on behalf of the prosecution, and the appellant was the only defence witness, he was sentenced to serve life imprisonment.
4. **B A O** was aged 6 years as at the time of giving her testimony and after an examination by the trial magistrate, she was declared a vulnerable witness under **Section 31 Sexual Offences Act**. **PW1 L A** was appointed to act as her intermediary. **B A O** told the court that when she was on her way from school, the appellant chased and caught her. He then removed her clothes, washed her then removed his trousers and:-

“...He took his penis and placed it into my vagina.”

He then warned that he would cut her neck if she told anyone.

5. This incident took place inside a sugar cane plantation and Scovia was present. **B A O** described how the appellant covered her mouth and held her neck and defiled her. When he was through, he washed her using water from a nearby stream, then washed her clothing, and put back his clothes then went away.
6. 7 year old **S A A (PW3)** who was in the company of **B A O** confirmed that while on their way from school, the appellant ambushed them and caught both of them. He washed both of them and warned them not to tell anyone or else he would cut off their heads, and in fact if they dared speak he promised to catch them again.

7. As Scovia stood watching, she saw **B A O** naked, then described the following scenario – **B A O** was standing whilst the appellant squatted. The appellant then –

“...took the penis and put it into B’s vagina. He urinated on B. M removed his trouser. B was making noise but people didn’t come. M ran towards the sugar cane plantation.

...M gave us money Kshs.10.00 to buy mandazi.”

8. PW3 knew the appellant even before and pointed him out in court saying he was Otinge’s brother and he hailed from their village.

9. When **B A O** arrived at home, she announced that she was sick and had been bewitched. The next day while PW1 was giving her a bath, she noticed that the child’s genitalia was enlarged. Upon inquiring what had happened BAO said M had put his penis into her vagina – she narrated the same to her grandmother as well.

10. The child’s mother **P A (PW4)** produced her birth certificate showing her date of birth as 18/06/2009.

11. BAO also described to her how the appellant waylaid her and defiled her.

12. The child’s grandmother **M A (PW5)** confirmed that upon hearing about the incident from **B A O**, she inspected the child who was bleeding from her genitals. She took the child to hospital and **DR. EPHRAIM ONANGA (PW6)** confirmed that an age assessment disclosed **B A O** as estimated to be 5 years. He stated:

“The child was anxious, she walked with the legs apart.... There was a tear on the junction of the labia minora and labia majora. There were tears and ulcerations on the vagina walls. There was blood too.”

13. The Doctor found that there was penetration that caused the tear in the fraenum’s and ulceration in the vaginal wall. The hymen was ruptured.

14. The appellant was examined and found to be HIV positive, as the child was given post exposure prophylaxis.

15. The Doctor confirmed on cross examination that whatever penetrated the child was bigger than her orifice.

16. The investigating officer **PC MAUREEN AGUTI (PW7)** told the court that **B A O** identified the appellant as her assailant. PW7 also visited the scene and observed that the grass was disturbed, and there was a stream next to the scene where the appellant washed **B A O**’s clothes and forced her to wear them while wet.

17. The appellant in his defence said on the material date he was clearing and weeding within one Mama Leah’s compound, then he went to the shops and bought eggs. The next day (much to his shock) people came alleging that he had defiled a child yet he knew nothing about it.

18. The trial magistrate in her judgment found that the birth certificate gave conclusive proof of the child’s age as 6 years. Further that the evidence of the child was about penetration corroborated by that of PW3 (who was an eye witness), PW1 who examined her genitals and to whom **B A O** also narrated her encounter with the appellant plus the treatment notes.

19. Further that the appellant was positively identified by PW2 and PW3 whose evidence was also consistent regarding how the appellant laid an ambush, defiled **B A O** and the threats he made to them to discourage them from revealing what had happened.

20. In his appeal the appellant contested the decision saying that there was no documentary proof of the complainant's age and that the court failed to consider his defence which was strong.

21. At the hearing of the appeal he relied on his written submissions saying there was nothing to prove that he goes by the name M, and this was not even added as an alias in the charge sheet.

22. He also argued that the medical evidence did not suggest that he was the one who penetrated **B A O** and that he was subjected to dock identification.

23. In opposing the appeal, Mr. Oluoch on behalf of the State submitted that this was one of the rare cases where there was an eye witness to the defilement. He also drew the court's attention to the medical evidence which confirmed that there had been penetration, and that there was infact documentary evidence in the form of a birth certificate confirming **B A O**'s age.

24. Indeed a birth certificate was presented which showed that **B A O** was born on 18th June 2009. **DR. EPHRAIM ONANGA** also gave the child's age estimate as 5 years. The argument about the child's age has no leg upon which to stand. In any event, whether she was 5, 6 or 7 years that would still put her in the under 11 age bracket and fit within the offence as charged.

25. The appellant had denied on his defence that the while incident was a frame up by PW5 (**B A O**'s grandmother) whom he claimed had tried to seduce him after she was widowed, for amorous service, but he spurned her moves.

26. He urged the court to believe that this was the reaction of a furious woman whose fleshly advances had been rejected. He also faulted the manner in which he was identified, saying there ought to have been an identification parade.

27. The appellant was identified by PW2 and PW3 not just by name, but by physical appearance, they knew him as a fellow villager and it was not their first time to see him – only that PLW2 did not know his name before. She only got to learn from PW3 on the day of attack that his name was M . I do not know what purpose an identification could have served for someone who was already well known to the witnesses. The encounter was driving the day and was not a fleeing moment.

28. The trial magistrate duly considered and in my view made a rational finding that BAO's evidence found corroboration not just in the evidence of PW3 but also PW1 and the Doctor. The child had been defiled and PW3 witnessed the whole process as she stood by watching.

29. The trial magistrate considered his evidence of an alibi and claims about an existing grudge between her and PW5 and dismissed the same as an afterthought. Indeed his alibi defence was never posed to any prosecution witness during cross examination and appeared as an afterthought. I cannot fault the trial magistrate for the observation she made.

30. As regards the sentence, I am mindful of the provisions under the Act – but of greater significance is that upon being tested, the appellant was found to be HIV positive – only time will tell whether **B A O** by God's grace left unscathed, but the trauma of the encounter was evident – that is why she arrived home and announced that she was sick and had been bewitched. She perceived that something terribly evil and wicked had been done to her. Considering her age – being robbed of her childhood innocence at such a tender age, I cannot even begin to entertain the thought of a lesser sentence. The appellant deserved the sentence that was meted.

31. I hold that the appeal has no merit and is rejected. The conviction was safe and is upheld. The sentence is legal and I confirm it.

Delivered and dated this 30th day of January, 2017 at Homa Bay

H.A. OMONDI

JUDGE