



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT HOMA BAY
CRIMINAL APPEAL NO.6 OF 2017

BETWEEN

DENNIS OMONDI ODONGO..... APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from original conviction and sentence of the SRM's Court at Ndhiwa in criminal Case No.138 of 2016 dated 23.1.2017 – Hon. B.R. Kipyegon, SRM)

JUDGMENT

1. **DENNIS OMONDI ODONGO** (the appellant) was convicted on a charge of defilement contrary to **Section 8 (1) (2)** of the **Sexual Offences Act No.3 of 2006** and sentenced to serve life imprisonment.
2. The case against him was that on 20th May 2016 at [**Particulars Withheld**] area in Ndhiwa, he intentionally and unlawfully caused his penis to penetrate the vagina of **EAO** (a child aged 9 years)*. He denied the charge. (*initials used to protect her identity).
3. **EAO** lived with her parents in **WEST KWABWA** and she knew the appellant as a neighbour who did not live too far from them. In May 2016 while on her way from school in the company of her classmate, **M** and **C C O**, they met the appellant near some cane plantation. The appellant begun chasing them.
4. The children screamed but the appellant got hold of them and threatened to cut their necks if they screamed. He had a panga in his hands, and he then picked a stick from the bush which he used to beat **M** and **C** using a stick after ordering them to lie down. He held **PW1** by the hand then asked **C** and **M** to leave. He led **EAO** into the cane plantation while still holding the panga and ordered her to remove her panty. When she declined, he slapped her on the back of the head, and as she fell on the ground he removed her panty then pulled up her skirt and slept on her.
5. The minor stated:-

“... and slept on me after removing his pant. He pulled his trousers down too and I saw his penis. He then put his penis and put it my vagina. I felt so much pain. He inserted it and pulled it out severally. He had a panga and I never dared to scream.”

6. The appellant then ordered her to leave and she ran home and reported to her parents about the incident. On cross examination, **EAO** stated that the appellant could not insert his penis fully into her vagina. She also confirmed that the appellant and her father had past differences but was adamant that her father brought this matter to court because of the defilement incident and not because of the

differences they had.

7. **S A** (PW3) the minor's mother informed the court that **EAO** was born in the year 2007 and she presented her birth card as **Exhibit 1**.

8. She confirmed that PW1 reported to her that the appellant had sex with her in the cane plantation while on her way from school. PW1 led her to the scene.

9. It was PW3's evidence that the child's clothes were dirty and mud stained. However she did not examine the child's genitalia, preferring to take her to hospital and also reported the incident to the school head teacher.

10. **ALBERT OMONDI LWALA** (PW4) confirmed receiving a report from his deputy about the incident and advised that the child be taken to the nearest hospital. He followed the minor and the parent to hospital and observed that:-

“The girl was scared and frightened, she looked scared and a bit dirty ... she mentioned to me that while heading home with two classmates one Dennis Odongo raped her....”

11. **DR. THADDEUS OWITI** (PW1) of **NDHIWA** Sub District hospital examined the minor and noted that her blouse had a fresh tear under the arm pit region and stained with mud. The brown skirt was also dirty with mud and a button was missing.

12. A physical examination revealed that the hymen was not intact – it was torn, and the vagina showed hypoglycaemia or recent penetration. The Doctor concluded she had been defiled.

13. PW1 also narrated her ordeal to the area Assistant Chief **ROSE NYAOLO** (PW5) who then arrested the appellant.

14. In his sworn defence the appellant stated that he knew nothing about the allegations saying he had differences with PW1's father whose wife lured his wife to get married to her brother. When he raised the issue with PW1's father, the latter threatened to have him jailed.

15. The next thing he knew was being arrested and charged in court yet the child was not even known to him.

16. The trial magistrate noted that the Clinical Health card and Immunization Schedule indicated EAO was born on 10/03/07 and this was not disputed. He also made visual observation that EAO was indeed a child of tender years by appearance, nature and cognition. He held that penetration of the minor was proved from the physical injuries noted by the doctor.

17. Although **EAO** was the only eye witness, the trial magistrate stated:-

“The minor narrated the events with consistent determination and elaborate conscience without any open contradiction or bias against the accused person. She knew the accused person as her village mate. She honestly moved to seek help immediately she was let go. The prosecution witnesses independently corroborated the evidence of the minor in several material facts; that the minor was indeed defiled, beaten, injured and treated due to the actions of Dennis.”

18. The appellant's defence was considered but found not to dent the evidence that the minor had been defiled.

19. The appellant contested these findings on grounds that:-

a) He was not supplied with all the documents prosecution relied on at the trial.

b) *The complainant's age was not proved.*

c) *There was no medical evidence linking him to the complainant.*

d) *The trial magistrate disregarded his defence.*

20. The appellant canvassed his appeal by way of written submissions where he started that this case was a frame up by the complainant's father to settle scores against him and the court ought to have resolved the matter in his favour. He also argued that penetration was not proved as the minor said he did not touch her and did not insert his penis fully into her vagina.

He also faulted the manner in which the exhibits were produced and that the complainant did not identify them.

21. In opposing the appeal, **MR. OLUOCH** on behalf of the State argued that the complainant's mother produced the health record showing the minor's year of birth and placing her age at 9 years when the offence was committed.

22. Whereas no age assessment was conducted, I do not think that is the only manner existing to determine one's age – after all that is also not a precise test but an estimation of age relied on using dental formation.

23. A mother would be best placed to state with precision the date of one's birth – of course taking into account the mother's literacy level and ability to relate events to time and space and integrity. The minor's mother stated without wavering that the child was born in the year 2007. This was the same information contained in the health record used for immunization from infancy. There would be no reason to suspect that she made up the child's age simply so as to fit with the offence. Indeed the trial magistrate also recorded his observation that the minor did appear to be of tender years by “**appearance, nature and cognition.**” I cannot fault that – he had the opportunity to physically see and make a rational assessment of the child. I am satisfied that the trial court had proper basis for finding that the minor was aged 9 years and I have no reason to interfere with that. That limb of the appeal fails.

24. The other issue the appellant raised is that he was not given all the documents prosecution relied on but he did not specify which documents these were. **MR. OLUOCH** however picked out that he was referring to the P3 form which he gleaned from the record on 30/08/2016 when the appellant informed the trial court that he had copies of other statements except the P3 form. The court ordered that he should be supplied with the same, and on 14/09/2016 when the appellant appeared in court, he said he was ready to proceed.

25. I concur with **MR. OLUOCH** that the only inference to be drawn is that the appellant now had all the documents – which is why he said he was ready to proceed and did not raise a complaint.

26. The appellant also argued that penetration was not proved. Definition of penetration under the Sexual Offences act includes partial penetration.

27. Apart from the minor's graphic description of the sexual act – how the appellant inserted his male organ into hers, and would pull it out and put it back several times – gives clarity without doubt that the minor underwent that traumatizing experience; and she stated she felt a lot of pain.

28. Then there is the evidence of the Doctor confirming the hymen was torn and she had injuries around the genitalia – consistent with forceful penetration. The context in which the minor said “**he did not touch me**” must be considered – I understand it to mean he did not caress her – the language used by the minor was Dholuo (which I have the benefit of hearing system since infancy) and the word “**ok omula**” (he did not touch me) cannot be given a restrictive meaning in light of all that the minor said plus the medical findings. That limb of his argument too has no merit.

29. The trial magistrate in fact considered his defence and appropriately dismissed that whatever differences PW1's father had with the appellant would not negate the fact of what PW1 went through. Indeed, the appellant's claim was that PW1's mother hired his wife away from him to get her married to her brother. Yet the minor's mother testified as PW3 and the appellant never specifically raised the issue about his wife with her, and I cannot fault the trial magistrate's observations in rejecting his defence.

30. The upshot is that this appeal lacks merit and is dismissed. The conviction and sentence were proper and are upheld.

Delivered and dated this 21st day of July, 2017 at Homa Bay

H.A. OMONDI

JUDGE