



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO.30 OF 2015

(An appeal from original conviction and sentence of Kisii CM'S C Criminal Case No. 84 of 2014 by Hon. Mugendi Nyaga - Resident Magistrate dated 10th April, 2015)

DENNIS ONSINYO OBWOGE... ..APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant herein, **DENNIS ONSINYO OBWOGE**, was charged with the offence of defilement contrary to **Section 8 (1)** as read with **Section 8 (4) of the Sexual Offences Act**. The particulars of the offence were that between 19th and 23rd January 2013 in Kisii County, he repeatedly, unlawfully and intentionally caused his male genital organ namely penis, to penetrate the genital organ namely a vagina of **MA (name withheld)** a child aged 17 years.
2. The appellant also faced an alternative charge of indecent act with a child contrary to **Section 11 (1) of the Sexual Offences Act** the particulars being that between 19th and 23rd January 2013 in Kisii County, he repeatedly, unlawfully and intentionally committed an indecent act to **MA (name withheld)** a child aged 17 years old by rubbing his penis against her vagina.
3. On count 2, the appellant was charged with the offence of obtaining money by false pretenses contrary to **Section 313 of the Penal Code**, the particulars being that on 20th January 2013 in Kisii County with the intent to defraud, he obtained Kshs. 3,000/= from OO on the pretext that his niece namely **MA (name withheld)** was admitted at Njoro and the said amount of money was required to buy blood for transfusion a fact he knew to be untrue.
4. The appellant denied both charges after which a trial was conducted in which the prosecution called a total of 6 witnesses and at the close of the prosecution's case, the trial court found that a prima facie case had been established against the appellant thereby requiring him to tender his defence and at the close of the trial, the appellant was found guilty and was convicted on the main count of defilement and the 2nd count of obtaining money by false pretence. The appellant was subsequently sentenced to 15 years imprisonment on the count 1 and 3 months imprisonment on count 2 with a rider that both sentences were to run concurrently.
5. Aggrieved by both the conviction and sentence, the appellant filed the instant appeal on 21st April 2015 wherein he pleads with this court to consider reducing his sentence on account of his ill health, family commitments and lack of knowledge of the procedure in criminal cases.

6. When the appeal came up for hearing on 25th May 2015, parties agreed to canvass it by way of written submissions which the appellant subsequently filed while the state opted to tender oral submissions in response to the appellant's written submissions.
7. The appellant's submissions were a replica of his grounds of appeal in the sense that they mainly focused on his mitigation and the reason why the court should sympathize with him and reduce his prison term of 15 years.
8. Mr. Otieno, learned counsel for the state on his part, submitted that the sentence of 15 years imposed on the appellant was lawful and not excessive as it was the mandatory minimum sentence provided for under **Section 8 (1) and (4) of the Sexual Offences Act**.
9. As was stated in the celebrated case of **Okeno vs. Republic (1982-88) KLR 1136**, the duty of the first appellate is to re-evaluate and re-analyze the whole evidence tendered before the lower court afresh with a view to arriving at its own independent findings but while bearing in mind the fact that it neither heard nor saw the witnesses testify.
10. I have perused the lower court record wherein the prosecution witnesses tendered evidence as follows:
 11. The complainant's testimony was that she was born on 4th May 1995 and was, at the material time, a high school student. She stated that she met the appellant in Kisii Town on 14th January 2013 while at a computer college where she had gone to attend computer lessons and that thereafter, while in Kisii town on the evening of 19th January 2013, she once again met the appellant who requested her to assist him with her mobile phone so that he could make a call as he alleged that his phone had run out of power. No sooner had the complainant given the appellant her phone than the appellant disappeared with it and upon realizing this, the complainant contacted him using a stranger's phone after which she decided to go back home as she was not able to physically trace the appellant. Quite unfortunately or fortunately, while on her way home, the complainant met the appellant near a petrol station within Kisii Town where he offered her a soda to take while she waits for him to collect his mobile phone which he alleged was charging in a nearby shop.
 12. The complainant stated that the soda that the appellant offered her had no seal as it was already opened and upon drinking it, she immediately started experiencing dizziness after which she lost consciousness only to regain her senses on the following day being 20th January, 2013 when she found herself half-naked and in a strange bed with the appellant by her side. She added that she realized that the appellant had defiled her and broken her virginity as she felt a lot of pain in her private parts and saw used condoms next to the bed where she lay. She narrated how the appellant threatened to kill her when she asked him where they were and what had transpired but that he later told her that they were in Nakuru Town even though she later overheard him talking to someone on phone and informing the caller that the 'patient' was getting better and that she would go home the following day.
 13. The complainant testified that contrary to the appellant's claim that they were in Nakuru Town, she on 21st January 2013 realized that they were actually in Suneka Town within Kisii County and it is at this point that she decided to find her way home so as to inform her mother of what had transpired. On reaching home, her mother (PW2) informed her that she had received a call from one 'Doctor' Dennis who had informed her that the complainant had been involved in an accident while on her way to Nakuru. PW1 informed PW2 that she had been defiled by the appellant who was the same person who had made fake calls to her pretending to be the doctor at Njoro. PW2 then took the complainant to hospital for treatment.
 14. On the same day, the complainant, in the company of a police officer and PW5 managed to trace the appellant's home where he was arrested with the assistance of the appellant's area assistant chief.
 15. PW2 was ABA (*name withheld*), the complainant's mother. She testified that on 19th January 2013, she received a call from her sister in law, with whom the complainant was staying at the time, who

informed her that PW1 had not returned home from college. PW2 stated that on the following day she received a call from a man who introduced himself as DENNIS and that the said Dennis informed her that he was a doctor working at Njoro Mission hospital where the complainant had been admitted following a grisly road accident in which three people had lost their lives. The said Dennis informed PW2 to urgently send to him Kshs. 2,500/= so as to facilitate the purchasing of blood that was required for transfusion on PW1 in order to save her life.

16. PW5 was OOS the complainant's uncle. His testimony was that he sent Kshs. 3,000/= to the said Dennis after which he, accompanied by PW2, decided to make a trip to Njoro where PW1 was reportedly admitted following the alleged accident only for them to reach Nakuru and discover that they had been duped by their caller (Dennis) who had not only switched his phone off but had also withdrawn the Kshs. 3000/= from Kisii. The duo then travelled back to Kisii where they reported the case to the police who embarked on a mission to trace the appellant (Dennis).

17. PW3 DANIEL NYAMWENO was the clinical officer, then stationed at Kisii level 5 hospital. His testimony was that he examined, treated PW1 following her defilement and found that the complainant's hymen was freshly torn. He produced the P3 form and treatment notes as exhibits 2 and 3 respectively.

18. PW4 was Corporal Samson Waboba. He received the report by PW5 regarding the complainant's disappearance and with the assistance of Safaricom Ltd, the mobile telephone service provider, traced the appellant using the phone number that he had used to contact PW2. With the assistance from the local administration, PW4 was able to arrest the appellant whose telephone details were traced to Gacuba Location, Rigena sub location in Kisii North District. PW1 identified the appellant at the time of his arrest.

19. PW5, the complainant's uncle who lived with her at the time of the incident testified that he on 19th January 2013 received information regarding the complainant's disappearance and that on 20th January 2013, PW2 called him and told him that she had been called by a doctor from Njoro with news that PW1 had been admitted at Njoro Hospital following a road traffic accident. He stated that PW2 also told him that the doctor had asked for the sum of Kshs. 3000/= for the complainant's blood transfusion which money he sent telephone number 0724***** which was registered in the appellant's name.

20. PW5 added that he, in the company of PW2, then immediately made a trip to Njoro where PW1 was allegedly hospitalized ostensibly to visit her only for their journey to abort when on reaching Nakuru, they realized that they had been duped by the caller who had, at the time, already withdrawn the money sent to him by m-pesa at Kisii and not Njoro where he had alleged he was. PW5 identified an m-pesa account statement number [Particulars Withheld] in respect to phone number 0724***** registered in his name.

21. PW6 PC BENARD IRUMBI of the Directorate of Criminal Investigations at Kisii confirmed having received a missing person's report from PW5. His testimony was that he traced the appellant using the appellant's records held with the Safaricom Company. He produced an m-pesa statement in respect to the money that was sent to the appellant by PW5 as exhibit 4. He also produced the appellant's phone and sim card as exhibit 5.

22. When placed on his defence, the appellant gave an unsworn statement to the effect that he was busy repairing motor cycles at a local market when he was arrested by people who claimed that he had cut nearby trees.

Analysis and determination

23. I have carefully perused the record of appeal and considered the evidence tendered at the trial by both the prosecution and the appellant. This is a case of defilement where the main issues for determination are:

a) Whether the ingredients of the offence of defilement were proved.

b) Whether the sentence meted out against the appellant was lawful.

24. The critical ingredients to be proved in an offence of defilement are:

a) The age of the complainant.

b) Penetration and

c) Identification of the perpetrator.

25. In the case of JOSEPH KIETI SEET -VS- REPUBLIC [2014] e KLR, H.C. AT MACHAKOS, CRIMINAL APPEAL NO. 91 OF 2011, the learned Mutende, J. held as follows:

It is trite law that the age of a victim can be determined by medical evidence and other cogent evidence. In the case of Francis Omuroni -Versus- Uganda, Court of Appeal Criminal Appeal No. 2 of 2000. It was held thus:

“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense”

26. In the instant case, the complainant was reported to be 17 years old. The complainant's birth certificate, which was produced by PW2 as Pexhibit 1, showed that she was born on 4th May 1995. The offence in question is reported to have been committed on 19th and 20th January 2013. A simple calculation of the age of the complainant shows that as at the time she was defiled, she was 17 years and 8 months old. This means that she was still a child within the meaning of the children Act which at Section 2 defines a child as any human being under the age of 18 years. It is therefore my finding that the age of the complainant was proved to the required standards.

27. Turning to the issue of penetration, I find that there was sufficient evidence to show that the complainant was defiled. PW1 had the following to say about her sexual assault:

“When I regained consciousness I was feeling pain and I was tired. Dennis had sex with me. I realized after regaining consciousness. There were used condoms where we were. I had pain in my private parts. He broke my virginity.”

28. PW3, the clinical who examined the complainant following her ordeal stated, in part, as follows on his results on the examination of the complainant's genitalia:

“Her hymen was newly torn. There was no blood or discharge.”

29. In view of the above evidence, which I find to be cogent and consistent, I am satisfied that penetration was proved beyond a shadow of doubt.

30. Turning to the last ingredient of defilement which is the identification of the appellant, I am satisfied that the appellant was positively identified by the complainant who knew him very well as she had met him only few days prior to the date of her abduction and assault. The appellant was known to the complainant and this is why she had the confidence to lend him her mobile phone when he alleged that his own phone had run out of power and needed to be charged. PW1 testified that the appellant gave her soda that was laced with a substance that made her dizzy and that when she regained her consciousness the following day, she found the appellant right next to her on a bed where she lay naked save for a blouse.

31. The complainant also identified the appellant to the police at the time of his arrest and further identified him in court during the hearing. I have no doubt in my mind that the appellant was placed at the

scene of the sexual assault where he made numerous calls to the family of the complainant in his quest to extort money from them under the pretext that he was a doctor treating the complainant following an alleged road accident.

32. It is my finding that the prosecution established its case against the appellant on both counts of defilement and obtaining money by false pretenses beyond any reasonable doubt. PW5 was able to prove through documentary evidence in the form of an m-pesa statement, that he forwarded the sum of Kshs. 3000/= to the appellant when he called PW2 asking for money under the pretext that it was urgently required to purchase blood for transfusion to save the complainant's life.

33. On sentence, **Section 8 (1) and (4) of the Sexual Offences Act** stipulates that:

“8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.”

34. The above provision is couched in mandatory terms which means that upon conviction, the trial court has no discretion on sentencing as 15 years imprisonment is the minimum sentence permitted by law. In the instant case, therefore, I find that the sentence passed on the appellant was justified and lawful and I uphold it.

35. I further find that the prosecution presented consistent, cogent and compelling evidence on how the appellant lured the complainant into a sexual assault ordeal by giving her a soda that he had laced with an unknown substance that made her unconsciousness before sexually assaulting her only for her to regain her consciousness the following day.

36. In his petition of appeal and submissions on appeal, the appellant pleaded for leniency in an attempt to mitigate for his crime. My humble view however, is that this is not one of those cases that a court can exercise its discretion of leniency even assuming that the court had discretion to mete out any other sentence apart from the minimum mandatory sentence I have referred to hereinabove. I say so because the appellant preyed on the innocence of the complainant with the boldness and precision of a seasoned and unrepentant pedophile, who not only administered an unknown drug/substance on his victim to render her unconscious before sexually assaulting her for an unknown period of time, but he also had the temerity to torment the complainant's family by not only relaying to them the utterly shocking but false information that their kin (PW1) had been involved in a grisly accident in which 3 people lost their lives, but also had the nerve to extort money from them under the guise that he was a doctor treating the complainant.

37. The appellant's evil and devious scheme did not stop at the sexual assault and fake news as he proceeded to extort money from his already distraught victim's family before sending them on a wild goose chase to Njoro where he claimed that he was treating the complainant following the “accident.”

38. When going through the proceedings in this appeal, one is tempted to think that the blood-curdling testimony of PW1 and her relatives only fit the bill of the script of the most chilling horror movie straight out of Hollywood, but quite unfortunately this was a real life situation experienced by real people whose only saving grace was that they lived to tell the tale and were able to bring the perpetrator of the heinous crimes to book.

39. My further view on sentence therefore is that taking into account the totality of the circumstances of this case and the aggravated nature of the offences committed by the appellant, he was lucky to get away with the very light, minimum sentence of 15 years imprisonment considering the fact that the police could have opted to prefer other serious offences such as abduction and endangering the complainant's life against him.

40. In conclusion, I find that the instant appeal is not merited and I accordingly dismiss it.

Dated, signed and delivered in open court this 21st day of September, 2017

HON. W. A. OKWANY

JUDGE

In the presence of:

Miss Mbelete for the State

Appellant in person

Omwoyo court clerk