



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO.121 OF 2015

(Arising from Bungoma CMCR No.1527 of 2014)

ROBERT OMERI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. This is an appeal arising from the Judgement of J. Kingori Chief Magistrate Bungoma in Bungoma CMCC No.1527 of 2014 that was delivered on 8th July, 2015.
2. In the said Case the appellant Robert Omeri was faced with a charge of defilement contrary to Section 8(1) as read with 8(2) of the Sexual Offences Act. He was also faced with an alternative Count of Indecent Act with a child contrary to Section 11(1) of the said Act.
3. The matter proceeded to hearing as the appellant had pleaded not guilty and at the close of the Case the Court found the Appellant guilty of the main Count and sentenced him to life imprisonment. It is against the above background and being aggrieved by the judgement that the Appellant appealed to this Court seeking to quash the conviction and set aside the sentence, or in the alternative the sentence be reviewed and for an alternative punishment.
4. The Appellant's grounds of appeal are that;
 - The trial Court convicted him despite the fact that there was no evidence of spermatozoa.*
 - The Court did not consider the evidence of the doctor who found that the hymen was not intact.*
 - P3 form showed that PW1 was not penetrated.*
 - The appellant was not examined to prove the act.*
5. The Case for the Prosecution was that between the 1st and the 6th of June, 2014 at [particulars withheld] in Teso the Appellant three times lured the victim a child of 9 years, gave her gifts and defiled her. The child was warned not to tell her mother which she abided. However in the process of washing clothes her mother noted stains on 2 panties and on questioning the victim she disclosed the 3 incidences. The child was taken to hospital and on examination the Clinical Officer confirmed defilement.
6. On being placed on his defence the appellant denied the offence and cited differences with the victim's

mother who owed him and his brothers money and therefore framed him.

The defence witnesses confirmed the evidence of the appellant in terms of money owed but did not speak to the allegations of defilement.

7. This being the 1st appellate Court it has to consider the evidence afresh in order to arrive at its own independent opinion bearing in mind that the trial Court had an opportunity to hear and see the witnesses first hand. See **Okeno Vs R. (1972) E.A.**

8. Having considered the evidence afresh and all submissions by the appellant and the State I have formed the opinion that there are three issues for consideration;

a. Whether the Complainant was a minor

b. Whether or not she was defiled

c. Whether there is evidence linking the Appellant to the offence

9. At the hearing the victim PW1 gave her age as 9 years, her mother PW2 confirmed the same. Though no birth Certificate was produced the Clinical Officer indicates in the P3 form that he conducted an age assessment and arrived at the conclusion that the victim was 9 years. The Appellant did not dispute the age assessment either. On its part the trial Court formed the opinion that the victim was below eleven years. Consequently I find and hold that indeed the victim was a child of 9 years at the time of the offence.

10. As in normal situations in offences of this nature there is hardly an eye witness. In this instance no one witness the occurrence of the offence. The victim informed her mother when her mother came across the soiled panties, she repeated the same information to the investigating Officer and the Court. This is a girl of nine whom the trial Court found intelligent enough to take oath. In her testimony in Court she was categorical and did not waiver even in cross examination and this was part of her testimony

“...Accused took me to bed. He forced me to enter the house. After entering the house he pushed me to the bed. I lay on bed then he removed my pant. He then pushed down his trouser, removed his penis and inserted it into my virgina...”

The victim gave two other incidences.

The mother PW2 found soiled panties and questioned the victim. On his part PW3 stated, that the age of the injury was 10 days, the victim had foul smell, the hymen was not intact, both labias were bruised, the cervix was swollen, no spermatozoa seen, she was infected, there were pus cells in the urine, she formed the opinion that the victim had been defiled.

11. From the above analysis of PW3 and the evidence of PW1 & PW2 I have no doubt that PW1 was indeed a victim of defilement and therefore what is left is whether there is any evidence linking the offence to the appellant.

12. As noted in the preceeding paragraphs there was no eye witness. The Court then must consider the existing Law against the background of the evidence at hand. As was observed by the trial Court Section 124 of the Evidence Act partly provides as follows;

“...where in a Criminal Case involving a Sexual Offence the only evidence is that of an alleged victim of the offence, the Court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings the Court is satisfied that the victim is telling the truth.”

13. As noted earlier the witness is intelligent and consistent in her evidence. This Court too believes her

testimony and finds her truthful. The defendant had 3 other brothers, she did not pick on any other person, she did not waiver in her testimony either. She was categorical in pointing at the appellant.

14. I, equally like the trial Court, find the defence a sham. No questions were put to PW2 by the Appellant at all, it is definite that the defence was an afterthought.

15. The Clinical Officer did not find spermatozoa on the victim, this perse cannot rule out defilement as other clear signs were noted. Lack of hymen; bruises on the labia, swollen cervix etc.

16. As for an alternative sentence, this is not possible should this Court find the Appellant guilty as the only available sentence for the offence is life imprisonment.

17. Having considered all the above, I am in agreement with the trial Court that the Prosecution did prove its case against the Appellant and I hereby find him guilty of the offence.

18. In the circumstances therefore the Appeal is dismissed.

DATED and DELIVERED at BUNGOMA this 21st day of September, 2017

ALI-ARONI

JUDGE