



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 22 OF 2017

PETER OMONDI OHUMA..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Appeal against Conviction and Sentence imposed in Sexual Criminal Case Number 4 of 2017 in Tamu Senior Resident Magistrate's Court by Hon. P.K.Rugut (SRM) on 21st March 2017)

JUDGMENT

The Trial

1. The Appellant herein **Peter Omondi Ohuma** has filed this appeal against sentence and conviction on a charge of defilement contrary to section 8(1) as read with section 8 (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge are that

On 11.2.17 at [particulars withheld] estate, Koru Town in Muhoroni sub-county within Kisumu County intentionally caused your genital organ namely penis to penetrate the genital organ namely vagina of V.A a girl aged 8 years

2. The prosecution called a total of five (5) witnesses in support of its case. Complainant told court that she was 7 years and in class 1 at [particulars withheld] Primary School. She recalled that on the material date, she was playing with Baby. That appellant who lives near her home called Baby and sent her to buy Samosa and while she was away, appellant took complainant to his house, removed his clothes and undressed her, slept on her and did bad manners to her. That she felt pain in her vagina. That when Baby returned, she screamed. PW2, J A aka Baby, a minor said appellant sent her to samosa and when she returned found that appellant had left. That she peeped through the window of appellant's house and saw him naked, lying on complainant doing bad manners to her. PW3, F A, the complainant's mother told court that complainant was born on 28.11.08 as shown on her baptism card and her immunization card PEXH. 2. She recalled that on the material date, she left her children including the complainant at home. That she returned at about 7.30 pm and was informed that complainant had been defiled and had been taken to hospital. That complainant told her that she was defiled by the appellant who was their neighbor. PW4, Victor Omondi Ajonyo a clinical officer examined complainant on 12.2.17 and found her with lacerations on the vaginal orifice. He produced complainant's P3 form as PEXH. 1. It shows that complainant was 3 years old and her hymen was broken. PW6 PC David Maire investigated this case and charged the appellant. He produced complainant's immunization card PEXH. 2.

3. At the close of the prosecution case, the appellant was ruled to have a case to answer and was placed on his defence. He gave an unsworn defence in which he denied the charges. He said he was arrested and was later charged with an offence he did not commit.

4. In a judgment delivered on 21.3.17, the appellant was convicted and sentenced to serve life imprisonment.

The appeal

5. Aggrieved by this decision, the appellant lodged the instant appeal. In his amended grounds of Appeal filed on 17th October, 2017, the appellant set out 6 grounds of appeal to wit:-

1. That he did not plead guilty to the charges

2. That the learned trial magistrate erred in law and in fact in convicting him on basis of insufficient medical grounds

3. That the learned trial magistrate erred in law and in fact by finding that the prosecution proved its case beyond reasonable doubt

4. That the learned trial magistrate erred in law and in fact by failing to consider the defence by the appellant and failing to give reasons why

5. That the learned trial magistrate erred in law and in fact in failure to consider that the age of the complainant was not conclusive

6. That the charge sheet was defective and contrary to section 214 of the Criminal Procedure Code

6. When the appeal came up for hearing on 17th October, 2017, the appellant wholly relied on the amended grounds of Appeal and written submission. Mr. Muia learned Counsel for the state opposed the appeal and submitted that the trial was conducted in Swahili and Dholuo languages which the appellant understands. He also submitted that complainant's evidence was corroborated by an eye witness PW2 and by medical evidence which proved penetration. He additionally submitted that appellant's age was proved by her mother who said she was born on 28.11.08 and by the immunization card PEXH. 2.

6. This being a court of first appeal, I am expected to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I neither saw nor heard any of the witnesses and have to give due allowance.

I am guided by the Court of Appeal's decision in the case of **Issac Ng'ang'a Alias Peter Ng'ang'a Kahiga V Republic Criminal Appeal No. 272 of 2005** which held as follows:-

"in the same way, a court hearing a first appeal (i.e. a first appellate court) also has duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same.

7. There is now a myriad of case law on this, but the well-known case of **Okeno v Republic ... (1972) EA 32** will suffice. In this case, the predecessor of the Court of Appeal stated:-

The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses (See Peters Vs. Sunday Post, (1958) EA 424)'

8. The trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and this court is in dealing with this appeal obligated to give allowance for that.

Analysis and Determination

9. Section 8 of the Sexual Offences Act defines defilement as follows:-

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

10. Penetration on the other hand is defined in section 2 of the Sexual Offences Act as follows-

“Penetration’ means the partial or complete insertion of the genital organs of a person into the genital organs of another person”.

This makes it clear that even partial penetration constitutes the offence of defilement. The clinical officer noted lacerations on the labia minora and on the vaginal orifice. This evidence from the clinical officer corroborates in all material respects the complainant’s evidence that she had been defiled.

10. On the question of whether the prosecution case was proved to the required standard, the court observed that it was convinced that the complainant was telling the truth. Further to the foregoing, complainant’s evidence was corroborated by PW2, though a minor, who said she peeped through the window and saw appellant who was naked lying on the complainant. From the foregoing; I find that penetration was proved.

11. From the foregoing; I have no doubt that penetration was proved and appellant who was a neighbor to the complainant and PW2 was identified as the defiler. The evidence on record shows that the prosecution case was proved beyond any reasonable doubt.

12. In cases of defilement, it is important to establish the age of victim as the exact age of the complaint for purposes of computing the applicable penal provision under the Sexual Offences Act. Complainant’s mother testified that complainant was born on 28.11.08 as shown on her immunization card PEXH. 2 and was therefore 7 months and 4 months when she testified in March 2007. As observed in ***J.W.A. v. Republic (2014) eKLR***, the penalty for various offences under the Sexual Offences Act, 2006, is determined by the age of the complainant. Section 8 of the Sexual Offences Act under which the appellant is charged states as follows;-

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

From the foregoing; I find that evidence on record showing the child to have been 7 months and 4 months and not 8 years as stated in the charge sheet has not caused the appellant any prejudice since complainant fell in the eleven or less years bracket envisaged by Section 8(2) of the Sexual Offences Act and the penalty would still have been the same.

13. The appellant in his defence merely denied the offence and stated that he did not know why he was arrested. Although the trial magistrate did not specifically address herself to the defence in her judgment, she noted that the prosecution case was proved beyond any reasonable doubt. I find that the defence was a mere denial and it could not withstand the overwhelmingly corroborated prosecution case.

Decision

14. Appellant was sentenced to imprisonment for life. The sentence imposed on the appellant is the one provided for under Section 8(2) of the Sexual Offences Act and I find no fault in the decision of the trial court. The upshot of this is that the appeal is dismissed and the sentence imposed on the appellant is upheld. It is so ordered.

DATED AND DELIVERED THIS 19th DAY OF October 2017

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant -

Appellant -

For the State -