



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 90 OF 2015

JAMES ODUOR ONDIEK APPELLANT

VERSUS

PROSECUTION REPUBLIC

[Being an appeal from the conviction and sentence of the Senior Resident Magistrate's Court at Tamu

(Hon. M.C. Nyigei RM) dated the 23rd October 2014 in Tamu SRMCCRC No. 108 of 2014]

JUDGMENT

The appellant was charged with defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offence Act and in the alternative Indecent Act contrary to section 11(1) of the Sexual Offences Act.

The particulars of the main charge were that on 23rd February 2014 at [particulars withheld] sub-location in Kisumu County he intentionally and unlawfully caused his penis to penetrate the vagina of P A A a child aged 14 years.

In the alternative charge it was alleged that on 23rd February 2014 at the [particulars withheld] sub-location, Kisumu County he intentionally committed an indecent Act with P A A a child aged 14 years by touching her genital organ, namely vagina.

He was, after the trial, found guilty and convicted on the main charge and sentenced to 20 years imprisonment. Being aggrieved he appealed to this Court.

Briefly the facts of the case were that on the material day at about 7PM the complainant, aged 14 years and a class 5 pupil at St. [particulars withheld] Academy in [particulars withheld] was taking her shoe to a cobbler when she met the appellant behind a Church. He stopped her and while pleading for mercy gave her Kshs.50/= to buy anything she wished. Once she had taken the money he asked to sit down which she did. He then removed her underpant and told her to lie down which again she did. He then removed his clothes and lay on top of her and inserted his penis into her vagina. It was then that E A, also a fourteen year old, who was going to the shop, spotted them and threw a stone at them. The appellant got off the complainant and rose. E A (PW2) had recognized them as she knew them well and the appellant was her uncle. She ran and told the appellant's wife what she had seen. According to the complainant, the appellant told her to run home. The appellant's wife had already gone to the scene and a scuffle had ensued between the couple. The complainant's father heard the commotion and asked the complainant what had happened. She did not tell him as the appellant had warned her that if she disclosed it to anyone she would be arrested. It was not until far much later that the complainant opened

up to Roselyne Atieno (PW5) a teacher at their school that her father became aware of the incident.

On 26th February 2014 she was taken to Ahero Sub-District Hospital for examination and treatment. The appellant was taken to Chemelil police post where he was charged.

A baptismal card showing the complainant's date of birth as 13th May 2000 was produced in evidence as proof of age (EXBP.1). Also produced was a P3 form and outpatient record (EXBP.2).

In his defence the appellant narrated how on the material day his cow strayed into the home of the complainant's father and allegedly damaged property and injured a child, and how the complainant's father demanded 3500/= as compensation. When he did not pay the complainant's father warned him never to go near his home. Later that evening the complainant's father confronted him at his home and he ran away. He however later twisted the case and that is how he was apprehended by member of the public and charged with this offence. He contended that he knew nothing about the incident. His petition of appeal lists three grounds:-

- 1. That the honourable court do consider his mitigation and allow his prayer of a fine as an alternative to custodial sentence or reduce the sentence to a lesser one.**
- 2. That the honourable court do consider the circumstances related to this case as stated in his defence since it was a framed case against him because of his failure to pay PW3, the amount he demanded from him (Kshs.3500/=).**
- 3. That may the honourable court do consider that since his conviction, he joined training in prison industries to get more skills so that when he will be released as per that humble request of reduction of the sentence, it will enable him be a good citizen ready to work and earn good money.**

At the hearing of this appeal he appeared in person and relied on his brief written submissions in which he stated that the sentence meted out to him was rather harsh; that the whole ordeal arose from a domestic dispute which led to him being maliciously framed for an offence he did not commit. He urged the court to consider reducing the sentence as he was the sole breadwinner for his siblings. In opposing the appeal learned counsel argued that during trial, the appellant had an opportunity to cross examine PW3 in regard to the issue of being framed but he did not and raising the issue on appeal amounted to a subversion of justice. She submitted that the sentence meted out to the appellant was the minimum sentence and the trial magistrate did not err in imposing the sentence. She urged the court to dismiss the appeal.

As the first appellate court I have reconsidered and evaluated the evidence of course bearing in mind that I did not have the benefit of seeing the witnesses testify.

The complainant in this case is undoubtedly a child who at the material time was fourteen years old. The baptismal card tendered in evidence bespoke of this. The evidence of sexual contact with the appellant was corroborated by the appellant's own niece (PW20). This witness narrated how she was passing near the scene when she saw the appellant who she referred to as her uncle lying on the complainant. She threw a stone at them but it did not hit any of them. She then went and told her aunt what she had seen. The complainant herself stated that as the appellant was lying on her a stone was thrown at him and that later the appellant's wife went to the scene and a confrontation ensued with the appellant holding his wife by the throat. This corroborated the evidence of PW2 and my finding is that the two witnesses were truthful and the appellant's unsworn statement that he was framed because the complainant's father wanted to be compensated for damage and injuries caused by a cow cannot hold.

He cross-examined his own niece who stood her ground and even described what he wore on that day. There is evidence that the complainant's father was kept ignorant about the matter until she opened up to her teachers. The medical evidence confirmed the defilement though not in explicit terms. This could not be a fabrication. The charge against him was proved beyond reasonable doubt. The sentence imposed was the minimum provided under the law and was not therefore harsh as alleged by the appellant. The

appeal is dismissed and the conviction and sentence are upheld.

Signed, dated and delivered at Kisumu this ...21st.....day of April ... 2016

E. N. MAINA

JUDGE

In the presence of:-

Wakio for the state

Appellant in person

CC: Felix Magutu