



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT HOMA BAY
CRIMINAL APPEAL NO. 11 OF 2016

BETWEEN

REAGAN OTIENO OKELLO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being appeal from original conviction and sentence of SRM's Court Oyugis in Oyugis Criminal Case No.21 of 2015 dated 7th April 2016 – Hon. J.O. Nandi, SRM)

JUDGMENT

1. **REAGAN OTIENO OKELLO** (the Appellant) was convicted on a charge of defilement contrary to **Section 8 (1)** as read with **8 (3)** of the **Sexual Offences Act**, and sentenced to serve 20 years imprisonment. The particulars of the charge were that on 7th September 2015 at Konyango sub location in Rachuonyo South District, he caused his penis to penetrate the vagina of S.A.O. a child aged 13 years.
2. The appellant had denied the charge. S.A.O. (PW2) told the trial court that on 7th September 2015 at 7.00 p.m. she had been sent to pick a lamp at Mama Atieno's home, and as she was going home, she was called by ISAIAH and KEVIN, and the latter pulled her into their house. He held her hand and took her to the bedroom, removed both his and her panty and had sex with her. ISAIAH remained in the sitting room. Her sister M A arrived and found them on the bed. She pulled S.A.O. outside and S.A.O. started going home. Then she heard someone walking behind her, and realized it was REAGAN. He held her hand and told her that if she went home, she would be beaten again and told her to go to his house – she refused.
3. The appellant pulled her and took her to his brother's house which was not far, and he locked the door.
4. It was 8.00 p.m. – the appellant brought a lamp in the house, removed her pants and had sex with her for the whole night. She started bleeding the next day. She produced her baptismal certificate to support her claim of being 13 years old.
5. In the morning, the appellant took her to a house near a certain school and defiled her again – she was injured in her genitalia and the blood stained pant she had worn was produced as exhibit.
6. They slept inside that house, and next day he took her to his sister's home where she slept.

7. The appellant then gave her money to travel to Kisumu where there was a funeral, and that's where she met her brother named B and her sister. She told them she had been with the appellant. She was taken to Agoro Health centre and later the appellant was arrested and charged.

8. M A O (PW3) an elder sister to S.A.O. confirmed that she had sent S.A.O. to a neighbour to collect a lamp which was charging at her home. S.A.O. took too long, so PW3 went to look for her. She found ISIAH inside a nearby house whose door was open, and upon inquiring on the whereabouts of S.A.O., she learnt that the latter had been seen going towards a different direction. Using the light from her phone, PW3 went to the bedroom and found S.A.O. whom she took outside and gave her a beating.

9. The appellant who was nearby had a stick – PW3 requested him for the stick but he declined to give her and S.A.O. ran away and did not return home even the next day. On Wednesday PW3 travelled to Kisumu for a funeral and learnt from a certain girl that S.A.O. was at her home. On being questioned, S.A.O. refused to disclose where she had been so she informed her husband (J O O – PW1) and PW1 told her what S.A.O. had told him, so she took S.A.O. to hospital. She then stated:-

“PW2 later told me that accused defiled her.”

On cross examination she clarified as follows:-

“I did not see you defiling her.”

10. CPL EVALINT SABUGA (PW4) received a report from J O on 9th September 2015 at 5.00 p.m. that S.A.O. had been missing from home since 7th September 2015.

11. Later on S.A.O. was spotted in Kisumu and she eventually told PW1 that the appellant had defiled her. When she questioned S.A.O., the girl said she had been defiled by KEVIN and later the appellant took her to his house and defiled her the whole night and the next day.

12. DR. PETER OGOLLA (PW5) examined S.A.O. and concluded that there was evidence of penetration.

13. In his unsworn defence, the appellant stated that while at home on the material date at about 7.00 p.m., he heard noises and rushed to the place where he found many people – and M A was calling S.A.O. while claiming that KEVIN and ISIAH had defiled S.A.O. inside her co-wife's house. M requested him for a rod which he had, so as to use it to assault S.A.O. but he declined. He then left and went home.

14. On 9th September 2015, while at home. A village elder approached him, wanting to know where S.A.O. was. He said he had last seen her being assaulted by M. He lamented that KEVIN and ISIAH were the ones found with S.A.O. and he is just being framed up.

15. The trial magistrate held that from S.A.O.'s evidence and the baptismal card produced, there was proof that she was a child aged 13 years. He also considered the evidence concerning S.A.O.'s trysts with KEVIN and how they were caught in the act by M, as well as S.A.O.'s evidence about night long sex with the appellant. This coupled with the findings by DR. PETER OGOLLA persuaded the trial magistrate that there had been evidence of penetration, consistent with what S.A.O. claimed.

16. As to who committed the offence, the trial magistrate held that the appellant was at the scene – confirmed by PW3 and himself, and that he spent a night and a day having sex with S.A.O. and there could be no case of mistaken identity as the sexual assault also took place when there was a lamp at night and day time and so opportunity for identification was favourable.

17. The trial magistrate resolved that although the evidence was of a single witness, he was satisfied she was telling the truth because the evidence firmly placed the appellant at the scene.

18. The appellant contested the trial magistrate's findings on grounds that the medical evidence was not

conclusive as to who among the “**Sexual partners**” mentioned was responsible for the injuries described by the Doctor. Further that there was doubt as to who actually defiled S.A.O.

19. The trial magistrate was also faulted for holding that S.A.O. was a minor as there was inconsistency concerning her age and no proper age assessment was done.

20. At the hearing of the appeal, MR. JURA, submitted on behalf of the appellant that none of the prosecution witnesses linked the appellant to the offence, except for the minor. He argued that S.A.O. was a girl of questionable morals who was caught enjoying sex with KEVIN and wondered why KEVIN AND ISAIAH were not charged.

21. Counsel submitted that the trial magistrate should not have relied on the sole evidence of S.A.O. because of her questionable character, and since she had been beaten for having sex with KEVIN, she could easily drop any other name first so as to satisfy her own interests.

22. In opposing this appeal, MR. OLUOCH submitted on behalf of the State that the trial magistrate fully complied with the law as provided under **Section 124** of the **Evidence Act** which allows a trial court to convict in the evidence of a complainant so long as the trial magistrate records reasons for believing the evidence.

23. **Section 124** of the **Evidence Act** provides as follows:-

“..... Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim, 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 alleged victim is telling the truth.”

24. I have perused the trial court’s record and confirm that at page 23 paragraph 1 of the judgment the trial magistrate indicated why he believed S.A.O.’s evidence – he cannot therefore be faulted on the basis of corroboration.

25. As regards S.A.O.’s age, the only inconsistency I detect is that PW3 said she was 14 years while S.A.O. said she was 13 years and produced her baptismal card to support.

26. Of course the best way to establish age would have been an age assessment (which by the way is not fool-proof, as it is an assessment – but whether she was 13 years or 14 years under **Section 8 (1)** of the **Sexual Offences Act** as read with **8 (3)** thereof provides as follows:-

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

8(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen is liable upon conviction to imprisonment for a term of not less than 20 years.”

27. The bottom line is that S.A.O. was under 18 years and deemed to be incapable of consenting to sexual relations. Further the appellant never raised the defence available under **Section 8(5)** that he believed she was over 18 years. Whether 13 years or 14 years the sentence is the same and no prejudice was occasioned.

28. With the greatest of respect to MR. JURA, he is way off at a tangent to suggest that because S.A.O. was found having sex with KEVIN, then she ought to be treated as one who was enjoying sex with various men, and her ill character should not be used to penalize the appellant.

29. Of course from the evidence, it did emerge that some other person did have sex with S.A.O., before the subsequent indulgences; but that does not sanitize or legitimize any subsequent intercourse – indeed whether it was penetration by one person or several different persons does not absolve the one mentioned

in the line up.

30. Defilement is a crime punishable by law, whether the appellant was the 1st defiler or even the 10th defiler.

31. I am satisfied that the trial magistrate duly considered the evidence, and weighed the legal provisions concerning evidence of a single witness – and a child at that, and satisfied the requirements of **Section 124** of the **Evidence Act**

32. The trial magistrate also took into account the opportunity available to the appellant, and the conditions which enabled S.A.O. to positively identify the appellant. She did not try to cover up her **“questionable”** conduct and readily admitted in court to having sex with one KEVIN as was confirmed by PW3.

33. The upshot is that the conviction was safe and I uphold it. The sentence was legal and I confirm the same.

34. The appeal is dismissed in its entirety.

Delivered and dated this 18th day of August, 2016 at Homa Bay.

H.A. OMONDI

JUDGE.