



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA: 69 OF 2014

AMOS OMONDI..... APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From original conviction and sentence in Criminal Case number 559 of 2013 of the Principal Magistrate`s court at Maseno – Hon. A.R. Githinji-Ag SPM)

JUDGEMENT

Amos Omondi Ojwang, the Appellant, was convicted on a charge of defilement contrary to **Section 8(1) (3)** of the **Sexual Offences Act** and sentenced to twenty one(21) years imprisonment, and being aggrieved he brought this appeal against the conviction and sentence.

In the petition of appeal he raises grounds that the sentence is manifestly harsh and excessive as to amount to a misdirection; that the trial magistrate erred in failing to appreciate the hearsay and after thought evidence; that the case was not investigated; the medical evidence and the P3 Form produced was totally defective.

His supplementary grounds filed with the leave of the court are that the trial court erred in convicting him on a defective charge in that **Section 8(1) (3)** does not exist; that the trial court failed to notice that there were two P3 forms which is unlawful; that the court did not conduct a voire dire examination before taking the evidence of the minor complainant and that her actual age was never established as no birth certificate was availed.

The court heard submissions from both sides. The appellant was unrepresented while Miss Wakio appeared for the state.

Briefly the facts of the case were that on 15th June, 2013 **E A O**, the complainant, who was then 14 years old, was at home with her younger siblings **J** and **P** who were in class 4 and Nursery respectively. The appellant who had inherited the complainant`s sister sent one **V** to get him cigarettes after which he pulled and dragged her towards the bananas where he forcefully undressed her and penetrated her vagina with his penis. She could not scream as he was strangling her but when her sister (**PW2**) arrived the young boys told her that the appellant had pulled their sister towards the bananas. **PW2** went there and found the appellant in the act. She screamed and the appellant ran away. She dressed the complainant and took her to Maseno police station where they made a report. After that they went to Chulaimbo District Hospital where Moses Jones (**PW3**), a clinical officer examined her. He concluded that there was forced penetrative sex and that the complainant was 14 years(see handwritten proceedings). The appellant was apprehended by members of the public on 16th June and handed over to the police. He was subsequently charged with this offence.

In his defence the appellant testified that on 10th June, 2013 a neighbour by the name George Ouko(PW3) requested that they meet at Maseno police station and thinking he was being offered a job he went there only to be arrested and told he would be informed of the offence later. He was detained until 18th June when he was charged in court. He contended that he was not arrested because of defilement but to avenge PW2 whose sister he had befriended. She had allegedly cautioned him to stop the friendship. He contended that the charges were fabricated.

As the first appellate court, I have reconsidered and evaluated the evidence before the lower court so as to reach my own conclusion. I have also considered the submissions made before me at the hearing of this appeal. The complainant vividly narrated how the appellant dragged her from the place she was sitting with her siblings and took her to some bananas where he defiled her. Although the provisions of **Section 124 of the Evidence Act** absolve her evidence from the requirement for corroboration there. Was corroboration from her sister(PW2) and the clinical officer(PW3). PW2 found the appellant on top of the complainant and he only got off her when she screamed. Given that the clinical officer (PW3) confirmed that the complainant had been defiled the evidence of PW2 cannot be borne of a grudge as the appellant alleges. PW3 is an independent witness whose evidence was objective. Indeed the appellant does not allege that there existed a grudge between him and the clinical officer.

Section 19 of the Oaths and Statutory Declarations Act requires voir dire examinations in respect of children of tender years. **Section 2 of the Children`s Act** now defines a child of tender years as a child under the age of ten years and by that definition the complainant was exempted from the requirement for a voir dire examination.

The court before receiving the evidence of the complainant noted that she was 14 years old. The clinical officer (PW3) also testified that she was 14 years and the investigation officer (PW4) produced a document which, though not a birth notification as it was alleged to be, indicated that the complainant was born on 28th December, 1999. I have no reason to doubt that she was 14 years old. As held recently **Stephen Otieno Wambi V.R. Court of Appeal (Ksm) Appeal No. 289 of 2010** the non-production of a birth certificate or other form of proof of age is not fatal as “ **actual age need not be proved. What is important is that the court believes apparent age which is proved**”. From the record the appellant was accorded a fair trial in the court below. He was allowed to cross examine the witnesses and when his turn came he testified on oath and was duly informed of his right to call witnesses.

Although the drafter of the charge could have done a better job as the charge should have read “... contrary to **Section 8(1)** as read with **Section 8 (3)** my finding is that the defect in the charge is one curable by **Section 382** of the Criminal Procedure Code. The appellant suffered no prejudice by the short cut taken in framing the charge.

Regarding the P3 Form the appellant submitted that the one issued to him was not signed by the clinical officer. However, the one on record and which is what was tendered as an exhibit is duly signed, dated and rubber stamped. Moreover, even were we to disregard it there is still evidence to prove that the appellant committed this offence. In his oral submissions he complained that he was not subjected to a medical examination. However, that too is not fatal because as was held by the court of Appeal in **Geoffrey Kioji V. Republic Court of Appeal (Nyeri) Crim/App No. 270 of 2010:-**

“ Where available medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however, hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person”

The sentence imposed was lawful.

Accordingly, I find no merit in this appeal and it is dismissed. The conviction and the sentence imposed by the lower court are upheld.

E.N. MAINA

JUDGE

Dated, Signed and Delivered this 16th day Of April, 2015

In the presence of:-

.....for the appellant

..... for the state

Moses Okumu- court clerk