



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 107 OF 2012

CHARLES OWITI OYUGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No. 514 of 2011 in the Principal Magistrate's at Siaya)

J U D G M E N T

1). The appellant was charged with the offence of Defilement contrary to section 8 (1) (3) of the Sexual Offences Act No. 3 of 2006.

The particulars were that on diverse dates between 8th June 2011 and 31st July 2011 in [particulars withheld] Sub location in Kisumu District within Kisumu County intentionally caused his penis to penetrate the vagina of T A O a child aged 15 years.

2). The appellant was convicted and sentenced to 20 years imprisonment. In his amended petition of appeal, the appellant regrets the offence and that he was remorseful and a changed man. Before coming to a proper conclusion of this matter it is necessary to summarise the facts of this case.

3). **PW1 T A O**, who by the time of the incident was aged 15 years was a form 2 student at [particulars withheld] secondary school. On the 26-5-2011 she decided not to go to school but instead went to visit his friend one J who was in Kisumu. This J was also a friend to one W who was well known to PW1. Upon reaching Kisumu, she met J who apparently left her at the stage, I suppose bus stage, and went to his work and did not come back. The complainant then went to her friend's home, one C, where she stayed for 3 days. The complainant told the court that she went to a function at Nyalenda but got lost as she was unable to trace her way home. She said that she met a boy who agreed to take her to his sisters home, namely B, C, M and M. Later the appellant and M came and suggested that the accused should marry her. She accepted and went to stay with him till the time of her arrest.

4). She further narrated that all the time she was with the appellant they had both protected and unprotected sex. Subsequently, on 31-7-2011 at around 8 pm the police came and arrested both of them and were taken for treatment at Yala sub-district hospital for examination.

5). **PW2 M A O**, is the complainant's mother. She stated that after tracing the complainant for along time, they managed to trace her at Kisumu through the assistance of Dan and Vincent. They reported to Mutumbu AP camp who referred them to Central police at Kisumu. With the assistance of the said police and in the presence of **PW4 J O W**, the complainant's father, they arrested both of them at the appellant's home.

6). PW3 the clinical officer performed examination on both the complainant and the appellant. She formed an opinion that there was possibility of defilement though 72 hours had lapsed. The hymen was torn.

7). When put on his defence, the appellant did not deny that he was found with the complainant. In his unsworn defence he said that the complainant had agreed to be married by him and that as far as he was concerned she was his wife. He further said that he found the complainant at the bar where he works and where many women do frequent. He said that he decided to marry so as to avoid prostitution.

8). I have carefully perused the proceedings as well as heard the parties submissions. The state did support the conviction and the sentence. This court pursuant to the findings in the case of **Okeno -VS- Republic [1972] EA 32** is enjoined to reevaluate the evidence afresh and come up with a fresh and independent findings.

9). There is evidence to suggest that the complainant was defiled. The appellant does not deny that he was found with the appellant. The appellant however in his defence raised very pertinent issues which I think is worth considering.

10). The appellant stated that as far as he was concerned the complainant was his wife. Although the same was unsworn, and therefore the prosecution did not have the benefit of cross examination, it is nevertheless a relevant piece of evidence in line with the provisions of section 211 of the CPC.

11). My understanding of this defence is that the appellant was citing the provisions of section 8 (5) and (6) of the Sexual Offences Act which provides as hereunder:

“(5) it is a defence to a charge under this section if:-

- a. **it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and**
- b. **the accused reasonably believed that the child was over the age of eighteen years.**

(6) the belief referred to in sub section 5 (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant”.

12). My understanding further of the above portion of the law is that one ought to show that despite what he believed to be the age of the girl he reasonably believed that she was of marriageable age, namely above 18 years. The steps to be taken I presume, does not require one to be mathematically accurate or scientific for that matter, but such steps that a reasonable man at Kondele or Manyatta shall believe that the girl living in the house of a man is of marriageable age and that they are living as husband and wife and not man and minor.

13). Having regard to the facts herein, I do not find the unsworn evidence of the appellant unreasonable. It is not clear how the complainant met M, her friend who was to introduce her to the appellant later. From the complainant's evidence, I can easily conclude that J was her boyfriend and the reason why she left school and travelled to Kisumu. Further, before meeting the appellant it appears that she had other escapades with M and her sisters before 8-6-2011.

14). Even further to this, she conceded that she went to the appellant's grandmother's home who persuaded her to go to school but she declined. She even had told the appellant that she was no longer in school. On cross examination she conceded that she had agreed to be married by the appellant and that is why she conceded to having sexual intercourse all the time with the appellant and never complained.

15). I do find the unsworn defence by the appellant clear and straightforward. If at all the complainant had issues with the appellant I do not think that staying with the appellant for over one month would have been in reality without any complainant. I believe that, though it may not always be the case, a form 2

student, is capable of raising a complaint even to the nearest colleague like her 4 friends who included M.

16). There is no evidence to suggest that the complainant attempted to reach her parents or at all. Were it not the action of Vincent and Dan the complainant perhaps would still have been with the appellant.

17). Taking into the totality the facts and circumstances of this case I am not persuaded that the appellant's defence was not plausible. As indicated above, although there is no direct steps taken by the appellant to ascertain the age of the complainant, the obtaining circumstances clearly indicated that the appellant believed that the complainant was of marriageable age. The appellant in no way attempted to hide the complainant from the public view or being associated with her. Neither did she take any meaningful steps to extricate herself.

18). In **Frank Ochieng Otieno -VS-Republic, Crimina Appeal No. 363 of 2011 [Ur] Kisumu**, the complainant in that case deceived the appellant that she was over 18 years and thus marriageable age. They then spent some time with the appellant in which they had consensual sex. In allowing the appeal the court had this to say:

“The totality of this evidence, in our view suggested that the appellant could easily have believed the complainant's statement that she was over eighteen years. We cannot appreciate, why given that evidence, the trial magistrate found the appellant's statement unreasonable and unbelievable. We also cannot appreciate what steps the appellant could have taken to ascertain that the complainant was over eighteen years when the complainant herself had said so and had conducted herself like one aged over 18 years”.

19). This appeal is meritorious and despite the appellant's abandoning his earlier petition, the same is allowed. The appellant is hereby set free unless lawfully held.

Dated, signed and delivered at Kisumu this 25th day of May, 2015.

H.K. CHEMITEI

JUDGE