



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 90 OF 2014

I M M.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No. 170 of 2014 in the Senior Resident Magistrate's at Tamu)

J U D G M E N T

1). The appellant was charged with the offence of Defilement contrary to section 8 (1) (2) of the Sexual Offences Act No. 3 of 2006.

The particulars were that on diverse dates between 1st January, 2014 and 2nd April, 2014 at [particulars withheld] in Muhoroni District within Kisumu County, intentionally caused his penis to penetrate the vagina of S A O , a child aged 11 years.

2). The alternative charge was Indecent Act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006.

The particulars were that on the diverse dates between 1st January, 2014 and 2nd April, 2014 at [particulars withheld] in Muhoroni District within Kisumu County, intentionally touched the vagina of S A O a child aged 11 years with his penis.

3). The appellant after undergoing full trial was convicted and sentenced to life imprisonment hence this appeal. The appellant's appeal is premised on several grounds, namely:

- **That the prosecution failed to charge one Francis Okoth whom the complainant mentioned.**
- **No exhibit produced as pieces of evidence to support his conviction.**
- **He was never served with the necessary witness statements.**

4). The facts of the case in summary were as follows. The complainant who was aged 10 ½ years was a standard 4 student at [particulars withheld] Primary School. She testified that while coming from school the appellant lured her into his house where he proceeded to defile her two times. During the third time he defiled her at a sugarcane farm. In the three occasions he would give her some money which amounted to Kshs. 30/=. The last time he did at the sugarcane farm she bled and she used her panty to clean herself. The other occasions the appellant defiled her in his house. She went ahead to testify that she was afraid to tell her mother as the appellant had threatened to strangle her if she tells anybody.

5). **PW2 C A O**, the complainant's mother said that on 17th April, 2014 her employer asked her whether it was true that her daughter had been infected with

HIV AIDS as per the rumours going round. She answered that she did not know and thereafter inquired from the complainant. She took PW1 to Muhoroni hospital where she tested HIV positive. She told her mother that one O had sex with her when she went to collect firewood as well as the appellant. After reporting the matter at Muhoroni Police Post, she was given a P3 form and the appellant was thereafter arrested.

6). PW3 Cpl. Muli Ngumbao, was the investigating officer. After receiving information from PW2 on 18-4-2014 he carried out the investigation and from what he gathered from PW1 he concluded that it was the appellant who had defiled and infected the minor. He infact escorted him to the hospital where his HIV positive status was ascertained.

7). PW4 Robert Omutsula, the clinical officer produced the P3 forms both of PW1 and the appellant. He confirmed that there was bruising and lacerations at labia and at the 5 O'clock. He confirmed that both the complainant and the appellant were HIV positive.

8). When put on his defence the appellant gave unsworn evidence denying the charge. He testified that on 18-4-2014 he was working in the farm with his wife when police came and arrested him. He said that the complainant did not know the dates when she was defiled and that nobody saw him defiling the minor. He generally denied the charge.

9). In arriving at the conclusion of this appeal, this court ought to analyse afresh the facts and the law taking into consideration that it did not have the benefit of seeing the witnesses. The state opposed the appeal arguing that there was

overwhelming evidence against the appellant as found by the trial court.

10). The substantive issue to determine herein is whether the evidence of the minor was believable. The age of the minor was ascertained as 10 years but the testimony of the police as found in the charge sheet placed her at 11 years. I do not think this is a substantive issue since from the portion of the law, namely section 8 (1) (2) of the sexual Offences Act No. 3 of 2006, the same talks of 11 years. The baptismal card produced showed that she was born in 2003 therefore placing her at around 11 years.

11). The other thing that is worth considering is whether the minor knew the appellant. From the details of her evidence, I have no doubt that she knew him as “Fundi”. The appellant has not denied that he was a cobbler. Infact she gave graphic details of the appellant's house. For example, she said in her evidence in chief:

“He told me to follow him as he walked to his house. His house is on the upper side of where he repairs shoes. There was no one in the house. The house is made of iron sheets in the wall and roof and has a mud floor. It is one room and curtain separates it. There is a bed on one side.....”.

12). In my opinion the minor clearly described the appellant's house and by extension the three times she was defiled. The upshot of my findings is that I am convinced that the appellant defiled the minor on three occasions.

13). It is true that the minor does not or may not recall the dates and month but

that does not take away the fact that her evidence is not believable. I am further buttressed by the provisions of section 124 of the Evidence Act where it is clearly stipulated under the proviso that:

“.....provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence 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”.

14). From the above analysis, I do believe that the minor spoke the truth. Although one Francis Okoth was not charged too, I find that the appellant equally defiled the minor. It is therefore not entirely true that the appellant was carrying the sins of Francis Okoth, but he was responsible for his own.

15). Based on the above findings, I shall proceed to dismiss this appeal. There was as found above sufficient evidence especially from the minor that it was the appellant who defiled her on three different occasions. I believe that the aim was not only to gain his sexual satisfaction but to infect the minor with the HIV virus. The appeal is otherwise dismissed.

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

H.K. CHEMITEI

JUDGE