REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 23 OF 2015

SAMWEL ONYANGO OCHIENG ..... APPELLANT

VERSUS

REPUBLIC …................................ RESPONDENT

(Being an appeal from the conviction and sentence of the Principal Magistrate's Court at Bondo

(Hon. M. M. Nafula SRM) dated the 2nd February 2015 in Bondo PMCCR No. 1130 of 2014)

JUDGMENT

The appellant was charged, found guilty and convicted and sentenced to 15 years imprisonment on a charge of defilement contrary to section 8(1)(4) of the Sexual Offences Act. The particulars were that on 20th October 2014 at about 1500 hours at [particulars withheld], in Rarieda District within Siaya County he intentionally caused his penis to penetrate the vagina of I A a child aged 17 years.

The brief facts of the case were that on the material day and time the complainant, who was born on 29/9/1997 as per a birth certificate produced by her father (PW2), was on her way home where she had run away from the previous day after disputing with her parents. She met the appellant who said he would take her to his home but instead took her to a bush where he forcibly had carnal knowledge of her. A good samaritan (PW3) happened to be passing by and when he found her on the road crying asked her what had happened. When she told him the appellant had defiled her and taken her clothes he reported the matter to the police. The police then called her father and she was then taken to [particulars withheld] Health Center where upon being examined it was confirmed that she had been defiled. It was however not until 8th December 2014 that the appellant was arrested and charged.

In his defence he narrated how on 8th December 2014 he was arrested after being asked by some boys to accompany them to the police station. He stated that he did not know the complainant and that one of the police officers at Ndori Patrol Base told him that he would be imprisoned for life.

The appeal is premised on the following grounds:-

1. **That the trial magistrate erred in law and fact when convicting the appellant to serve 15 years imprisonment without considering that this was a case of defilement but the medical officer did not test the appellant to prove his innocence.**

2. **That is manifestly harsh and excessive.**

3. **That he is a first offender and remorseful, he begs for leniency.**

4. **That he prays for a non-custodial sentence or a reduction of the same so he may engage in positive development or our great nation.**

At the hearing the appellant relied on written submissions in which just in summary he seems to be saying that his conviction went against the weight of evidence. Although in the petition of appeal he largely takes faults with the sentence and states that it was excessive he does not raise this issue in his submissions.

The appeal was opposed with Miss Wakio, Learned Prosecution Counsel submitting that the prosecution had proved its case against the appellant beyond reasonable doubt.

As I have stated the appellant's petition is at variance with his written submissions and it was not clear whether he was abandoning the grounds in his petition. He also seems to have introduced new grounds of appeal which he can only do with the leave of the Court but which leave he did not obtain. I say seems in view of ground 1 of his petition in which he faults the trial Court yet the medical officer did not test him to prove his innocence. The petition is drafted by the appellant and this Court must of necessity and in the interest of justice excuse the drafting.

As the first appellate Court I have, as I am required to do, reconsidered and evaluated the evidence adduced so as to arrive at my own conclusion. I have done so bearing in mind that I did not have the benefit of seeing the witnesses give evidence.

A birth certificate was produced that confirmed that the complainant was a child of seventeen years having been born on 29th September 1997. Under the law she was incapable of consenting to sexual intercourse. She gave evidence that she was returning home after running away from home the previous day, when she met the accused person. He promised to take her to his home but on the way he took her to a bush where he forcibly had carnal knowledge of her. The fact that she had left her home the previous day was confirmed by her father (PW2). Although under Section 124 of the Evidence Act corroboration was not necessary, her evidence was corroborated by PW3 who found her crying on the road and also by the clinical officer who examined her the next day. The evidence of these three witnesses in my view confirms that she was telling the truth. Her evidence was credible and truthful and I believe her. Again Section 124 of The Evidence Act provides that the evidence of the victim of a Sexual Offence is enough provided the Court believes her. The submission that the appellant was himself not examined by the doctor lies in the face of this provision.

As for the sentence fifteen years is the minimum provided for this offence and the submission that it is harsh and excessive has no merit. In any event whereas the trial Magistrate considered that he was a first offender there was nothing much she could do in the way of the sentence.

This appeal is found to have no merit and is dismissed.

Signed, dated and delivered this..21st day of July,2015

E. N. MAINA

JUDGE

In the presence of:-

Mr. Ruto for the state

The appellant in person

CC: Odipo