



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

HIGH COURT CRIMINAL APPEAL NO. 6 OF 2015

(CORAM: J. A. MAKAU – J.)

FREDRICK OTIENO ONYANGO APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal against both the conviction and the sentence in Criminal Case No. 349 of 2014 in Ukwala Law Court before Hon. R. M. OANDA – AG. P.M.)

JUDGMENT

1. The Appellant **FREDRICK OTIENO ONYANGO** was charged with an offence of defilement contrary to Section 8 (1) (3) of The Sexual Offences Act No. 3 of 2006. The particulars of the offence are that on diverse dates between 16th and 22nd day of June, 2014 at *[particulars withheld]* village, Sigomere sub-location in Ugunja District within Siaya County, intentionally caused his penis to penetrate the vagina of **M A M** a child aged 15 years. He faced an alternative charge of Committing an Indecent Act with a Child Contrary to Section 11 (1) of The Sexual Offences Act, No. 3 of 2006. The particulars of the alternative charge are that on diverse dates between 16th and 22nd day of June, 2014 at *[particulars withheld]* village, Sigomere sub-location in Ugunja District within Siaya County, intentionally touched the vagina of **M A M** a child aged 15 years.
2. The Appellant was convicted of the main count and sentenced to serve 20 years imprisonment.
3. The Appellant being aggrieved by the conviction and sentence preferred this appeal. He relied on the amended ground of Appeal filed in this Court at the time of the hearing of the Appeal.

The amended ground of appeal are as follows:-

- a) That I pleaded not guilty to the charges however would like to base my arguments on mitigating factors for leniency.***
- b) May this honourable Court allow me to amend my earlier lodged petition of appeal with mitigating factors for leniency.***
- c) That may the Hon. Court have leniency on me and reduce the long term sentence to a more lenient sentence such as a non-custodian one to enable me cater for my family members who***

had adversely suffered in my absence. I was the sole bread winner and a caretaker of four orphans who were siblings of my late brother who together with his wife lost their lives in a fatal road accident.

d) That since my uncertainty, my health has markedly deteriorated due to severe illness such as currently I am suffering from acute ulcers and if kept for long in prison may be fatal to my life.

e) That since my arrest and incarceration in the prison custody I have undergone vocational training an spiritual transformation hence reformed, rehabilitation and ready to abide by the rules and laws established by the society if granted the opportunity.

f) That, these mitigation factors are true to my knowledge, information

4. The Appellant prays that the conviction be quashed and the sentence be set aside and he be set at liberty.
5. The appellant in support of his appeal relied on the amended ground of appeal. He urged that PW1 testified that she did not know him and that the sentence of 20 years was harsh and excessive in view of his mitigating factors.
6. The appeal was opposed by M/s. Odumba, Learned State Counsel, who submitted that the complainant was a minor aged 15 years and that the appellant was properly identified by PW1 and PW2 as they stayed with the Appellant at his house for 1 week till 23.6.2014. She further urged the medical report showed that there was penetration and that the prosecution proved their case beyond reasonable doubt. On the sentence the State Counsel submitted that the appellant was given the minimum sentence within the provisions of the law and as such it was not excessive.
7. This being first Appellate Court, I have submitted the entire evidence adduced before the trial Court to a fresh evaluation and analysis and will draw my own conclusions. I am alive of the fact that I neither saw nor heard any of the witnesses and so cannot comment on their demeanor. I am in this regard guided on the duties of a first Appellate Court by the Court of Appeal decision of case of **KIILU & ANOTHER V. REPUBLIC (2015) 1 KLR 174** where the Court of Appeal held thus:-

“an appellant in a 1st appeal is entitled to expect the whole evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision in the evidence. The 1st appellate Court must itself weigh conflicting evidence and draw its own conclusions.”

8. The prosecution's case was briefly as follows:- on 15th June 2014 **M A (PW1)** met the Appellant at Sigomere Market who told her to accompany him to a disco at Ngunya. The next day PW1 and Linet (PW2) were asked by the Appellant to pass through his place then PW1, PW2 and the appellant spend the night at the Appellant's house. PW1 had sex with the Appellant. PW1 left for her home the following day and on arrival she was chased away by her father. PW1 and PW2 went back to Sigomere and once again met the Appellant and he invited them at his place. PW1 and PW2 stayed at Appellant's house for 5 days as he was a boyfriend of Linet (PW2). On 23.6.2014 the Appellant was drunk and become violent to PW1 and PW2 who left his house and slept in the kitchen. PW1 and PW2 were later arrested by Police and taken to Sigomere Health Centre. They were examined and P.3 form filled. PW1 testified that she was talking of the accused in dock. That she came to know him on 15th June, 2014. She testified she had sex with the appellant twice.

9. **PW2 L A O** testified that she was 15 years old and that on 15th June 2014, she left home for Sigomere with PW1 when they met the Appellant who asked them to accompany him to Disco. That they went to Ngunya and the following day they passed through the Appellant's place who asked them to sleep there and they agreed. That the Appellant had sex with both PW1 and PW2. That the following day appellant had sex with PW1. That they left for home on Tuesday,

but both were chased by their parents. They returned to Appellant's place where they stayed hiding upto 23.6.2014. That during their stay at Appellant's place PW1 and PW2 used to have sex with the appellant. On 23.6.2014 the Appellant chased PW1 and PW2 away and they went to sleep with the Appellant's sister from where they were taken to Sigomere Health Centre. PW2 (testified she had known the Appellant before as they used to meet at discos.

10. **PW3 M G U** testified that his daughter **A** disappeared on 13.6.2014. She looked for her but was later informed by the Appellant's mother she was with the appellant. She reported to police and went with the Police to Appellant's home where they found PW1 and PW2. They also found the Appellant who was too drunk. They took PW1 and PW2 to Police Station and later to the hospital. That from the appellant's place they recovered PW1's and PW2's clothes.

11. **PW4 V A M** testified that on 14th June, 2004 her daughter (PW1) disappeared for 2 weeks and reported to clan elder as she searched for her. PW3's mother later told her that the two girls had been seen somewhere. That on 24.6.2014 she got information from a Police Officer. PW4 went to Police Station and found PW1 and PW2 there. The two girls were therefore taken to hospital and P.3. Form issued to PW1.

12. **PW5 No. 89073 P.C. Reuben Khaemba** testified that O.C.S. Mandated him to investigate of a missing child reported by M U (PW3) who had gone missing since 13.6.2014. PW4 also disclosed to PW5 that PW1 and PW2 were hidden by the appellant at his place as his wives. On the night of 23.6.2014 accompanied by Sgt Hamisi, APC Mwangi together with PW4 they proceeded to appellant's place and found PW1 and PW2 in the kitchen. They took them to where the appellant was sleeping. They found the appellant too drunk, took clothes belonging to PW1 and PW2 as exhibits from the house of the appellant, PW1 and PW2 were taken to Police Station and next Day to the Hospital. PW5 recorded PW1 and PW2 statements who informed him they had sexual intercourse with the appellant. He then charged the appellant with defilement of PW1 but due to the age bracket of one of his victim he preferred not to file a charge through PW2. PW5 produced the assorted clothes he had collected as exhibit P. 2, a copy of birth certificate of PW1 as exhibit P.3.PW5, identified the accused in Court.

13. **PW6 Joel Atenya Sumba** a clinical officer, Sigomere Health Center, testified that on 24th June, 2014, **M O M** (PW1) went to the health centre at 3.30 p.m. Claiming to have sexually been assaulted by a person known to her on the night of 19th June, 2014 at night at his home. PW6 testified PW1 is aged 15 years. On examination the vagina was wide open and a labia wall was not intact. That there was a white foul smelling discharge, PW6 filled P.3. Form. She testified the O.C. was open indicative of penetration .

14. That at the end of trial, the appellant was found to have a case to answer and was put on his defence with the appellant opting to give a sworn defence and opting to call no witness.

15. The Appellant **Fredrick Otieno Onyango (DW1)** testified that on 20.6.2014 he went to his place of work and in the evening he went to the market to look for breakfast arriving home at 8.00 a.m. and took supper. That at mid-night Police Officers knocked his door and asked him about certain girls who he had not seen on that day. That they searched the house and asked him to go and sleep. That after 30 minutes they returned and asked him about the ladies and asked him to accompany them to police station. That at the police station he was placed at cells and following day brought to Court and charged with the offence and he denied having any knowledge of this matter.

16. Having carefully considered the ground of appeal in the amended ground of appeal, the entire evidence adduced in the trial Court and submissions by the State Counsel and the appellant, there is no doubt that between 15th and 23rd June 2014, PW1, PW2 and appellant were together at a disco and later at the appellant's place of residence. PW1's evidence is that she came to know the appellant on 15th June 2014, when she was in company of PW2, a girl friend of the appellant. PW1 testified that she went to disco with the appellant in company of PW2. That they later passed through the appellant's place of residence where they spent the night with the appellant and had sex. That PW1

and PW2 stayed with the appellant for 5 days and appellant had sex with PW1 twice. PW1's evidence was corroborated by PW2 as regards staying with the appellant and having sex with him. The same was corroborated by PW6. PW1 on cross-examinations confirmed PW2 was a girl friend of the appellant and that he slept with PW1 by force. PW2 testified during cross-examinations that she had known the appellant for a long time and that he used to be her boyfriend. PW3 testified that they went with Police and found PW1 and PW2 at the appellant's place of residence from where they collected PW1's and PW2's clothes and that the appellant was at his house when police went there. PW5 testified that they found PW1 and PW2 at appellant's home.

17. PW1 had not known the appellant before but PW2 did. The period of one week when the appellant stayed with PW1 and PW2, had sex with them, shared meals and conversation with them, they had close intimacy during such period, I am therefore satisfied PW1 was able to identify the appellant. PW2 knew him before. In view of the above I have no doubt that the appellant was positively identified and/or recognized by PW1 and PW2. PW1's evidence is corroborated by PW2, PW3, PW4, PW5 and PW6. PW1 and PW2 were arrested by Police from the appellant's home. The complainant's clothes and those of PW2 were recovered from the appellant's house. The evidence directly links the appellant as the perpetrator of the act of defilement of PW1. The appellant in his defence and during cross-examinations did not deny having been with the complainant between 15th and 23rd June, 2014. He did not challenge PW1 and PW2 evidence by way of cross-examinations of having not had sex with them and I therefore find and hold that it is the appellant who went to disco with PW1 and PW2 on material date. That it was the appellant who had kept the two girls (PW1 and PW2). That PW1 and PW2 were at his place between 15th June and 23rd June 2014, from where they were rescued by police officers. I therefore find that appellant was properly recognized by PW1, and PW2.

18. Was PW1 defiled by the appellant? The evidence on record is that PW1 was at the time of commission of the offence aged 15 years as per the Birth certificate produced as exhibit. PW5 produced PW1's birth certificate exhibit 3 which confirms she was born on 20.09.1999.

Under Section 2 of the Children's Act a child is defined as follows:-

“A child' means any human being under the age of eighteen years.”

The complainant herein (PW1) at the time of commission of the offence was 15 years and as per definition herein above she was a child. PW1 and PW2 testified that the appellant had sex with PW1. PW6 testified partly as follows:-

“Officer found She is about 15 years. On examination, the vagina was wide open and labia wall was not intact ----- O.C. was open indicative of the penetration.”

19. **Section 2 (1) of The Sexual Offences Act** defines “penetration” as follows:-

“Penetration” means the partial or complete insertion of genital organs of a person into the genitals organs of another person”

In view of the evidence of PW1, PW2 and PW6 I am satisfied that the genital organs of the appellant had complete penetration into the genital organs of PW1, a minor aged 15 years. I therefore find that the appellant defiled PW1.

20. Whether the appellant's defence was considered? **Section 169 of the Criminal Procedure Code** Provides a guide on how a well structured judgment should be. It should be written in the language of the Court containing the point or points for determination, the decision thereon and the reasons for such decision and it has to be dated and signed. In the instant case, the Court did summarize the evidence and analyzed the evidence in detail before proceeding to making the decision. I find the judgment was in accordance with **Section 169 CPC**. This Court has on its part examined all the evidence adduced in the trial Court, analyzed it and considered the points for

determination giving its own reasons for its decision though the appellant did not raise any ground challenging the conviction in his amended grounds of appeal notwithstanding in his oral submission he had indicated that he was opposed to the conviction. The appellant has not in anyway been prejudiced by the re-evaluation of the evidence by this Court.

21. The appellant's defence was considered. The trial Court dismissed the same as a mere denial. I note the appellant did not challenge the prosecution witness's evidence. He did not answer the allegations that he had defiled the complainant between 16th June and 23rd June 2014 at his house when she was in company of PW2. He did not deny that he was well known before the incident by PW2 who was with PW1 at the time PW1 was defiled by him in presence of PW2 in the same room. I have considered the appellant's defence and though an accused person has no obligation to prove his innocence, I find his defence to be an afterthought as it was not raised during cross-examination at the prosecution's case stage nor was it put to any of prosecution's witness.

22. As for sentence, the appellant was facing a charge of defilement under **Section 8 (1) (3) of the Sexual Offences Act** which provides:-

“A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years”

Under the said Section the minimum sentence provided for is 20 years. The said Section is couched in such a manner that the Court's hand's are tied as the sentence to be imposed is the **minimum mandatory period of 20 years:-**

(the underlining is mine to emphasize the minimum sentence.)

In view of the foregoing I uphold the sentence of 20 years. I therefore uphold the conviction and confirm the sentence. The appeal lacks merits and is dismissed.

DATED AND DELIVERED AT SIAYA THIS 29TH DAY OF OCTOBER, 2015.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT THIS 29TH DAY OF OCTOBER, 2015.

In the presence of:

M/s. Odumba State Counsel – present

Appellant – Present

Court Clerk – Kevin O. Akwany

J. A. MAKAU

JUDGE