



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO.101 OF 2014

WYCLIFFE OTIENO OGITHO.....APPELLANT

VERSUS

REPUBLICRESPONDENT

**[Appeal from Original Conviction and Sentence from NYANDO SPM'S Court: D. CHEPKWONY
– SPM**

in Criminal Case No.1195 of 2012.]

J U D G M E N T

1. The appellant was charged with the offence of Defilement Contrary to Section 8(1)(2)(c) of the Sexual Offences Act No.3/2006.
2. The particulars were that on the 14th day of December 2012 at Nyangoma Location in Muhoroni District within Nyanza Province intentionally and unlawfully caused his penis to penetrate the vagina of P O aged 9 years.
3. The appellant was convicted and sentenced to life imprisonment hence this appeal. The facts as presented by the prosecution were as follows:
4. PW1 the complainant on the material day was collecting firewood with her friend F who was aged 4½ years old. The appellant was herding cattle at the same area. He then gave the two children food, namely ugali, meat and vegetables. After they finished eating he sent F away and remained with the complainant.
5. The complainant told the court that the appellant then carried her on his shoulders to a nearby sugarcane plantation where he proceeded to defile her. Thereafter she went home but did not tell her mother for fear of being punished. Subsequently her mother asked her after she had gotten information and the complainant confirmed.
6. She was then taken to the appellant's home by her mother where she positively identified the appellant. Later the matter was reported at Awasi Police station. The minor was then taken for medical examination and a P3 form filed. The conclusion was that there was loss of hymen meaning that penetration had occurred.
7. **PW2 M A O** is the mother to the complainant. She got information on 20.12.2012 from one L who

is her step-daughter-in-law. She then went to the appellant's homestead where they found him. The appellant according to her confirmed the incident. She took the complainant to the hospital as well as the police station to report the incident. She also confirmed that she was born on 23.1.13 and was therefore aged 10 years.

8. **PW3 PC(W) CAROLINE MUTAI** re-arrested the appellant on 20.12.2012 and she issued the complainant with the P3 form. She also organised for the transfer of the appellant to Chemelil police post for further investigation.

9. **PW4 P.C. KEFA KASAINI** escorted the appellant from Awasi Police Station to Chemelil Police Station. He preferred the charges against the appellant after recording statement from the witnesses.

10. **PW5 NICODEMUS MBUGE** the clinical officer at Ahero sub-district hospital produced the P3 form. He said that he examined the complainant after 10 days. He concluded that the hymen had been broken which was a sign of penetration.

12. When put on his defence, the appellant gave sworn evidence denying the offence. He said that on 14.12.2012 at 8 a.m, he was resting while taking soda with one DAVID OJWANG ALUODO. Some lady came with a child together with armed police officers and arrested him. He did not know why he was arrested but was then taken to Awasi police station and later Chemelil police station and detained for 3 days. He denied ever meeting the complainant.

13. The appellant's petition of appeal is composed of basically 3 grounds namely:

1. **Whether Section 8(1)(2) provides for life imprisonment**
2. **whether it was necessary to subject the appellant to medical examination.**
3. **What was the age of the complainant and whether the same was proved.**

14. The appellant has equally filed home made lengthy written submission which I have perused. The state on its part opposed the appeal arguing that there was sufficient evidence to convict the appellant.

On the first issue of whether the provision of section 8(1)(3) were breached the answer is no Sub-Section 2 thereof provides that if the offence is proved then the penalty provided is life imprisonment.

15. But was the evidence as presented by the prosecution water-tight? The only eye witness to the incident is the minor alone. Her friend Faith was not called to testify. The other appellant's complaint is that Linet, the witness whom the complainant told was not called to shed light on the same. In light of the lack of a 3rd party could the complainant's evidence sustain the charge?

Section 124 of the Evidence Act Cap 80 states as follows:

“notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution the proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him;

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 for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

16. The test in this instant case is whether PW1 was telling the truth. From the narrations he gave to the trial court, the complainant though aged 10 years was clear on what she was telling the court. She vividly described how she was taken to the sugarcane plantation by the appellant where he then removed her panty. She went on to state:

“I am the one who stated removing and then I feared.

He then finally removed it from me.”

17. She then described how the appellant removed his trousers half way and pushed her on his laps and proceeded to defile her.

18. On cross-examination she confirmed that she did not tell her mother that day. She said:

“I feared to tell my mother about it on the first day because I feared she would beat me. I feared she would beat me because we had sinned. You were wearing a shirt and a jeans trouser on this day. I agreed to do this with you reluctantly because,my heart did not want.”

19. Even then during the cross-examination she clearly told that court that the appellant was not a stranger to her. I do find the sum total of the complainant's evidence as well as cross-examination believable. My finding is further buttressed by the cross-examination of the appellant by the prosecution where he said:

“It is true I asked P if she was not happy

about what I did to her. I asked her this because

I did not know her.”

20. Clearly the appellant would not have claimed that he did not know the complainant at all.

21. The P3 form clearly demonstrate that there was penetration. Although the findings were conducted after 10 days, there is nothing to suggest that the complainant had not been sexually defiled.

22. Was the failure to call L fatal to the prosecution case as argued by the appellant? I do not think so. The only nexus between Land the complainant was that she informed PW2 the complainant's mother concerning the indecent. That incident when investigated by PW2 was found to be true. I do not, respectfully, think that her failure to testify caused any harm to the prosecution or would have aided the appellant's case.

23. The other strong issue raised by the appellant is the age of the complainant. According to him the same was not proved. The prosecution produced a baptismal card Exhibit P1 which showed that she was born on 23.2.2003. The mother also testified to this. Was this sufficient?

24. Ordinarily the age of the victim ought to be proved for any sexual offences to be established. The birth certificate is usually the standard document in law. However the production of such document as baptismal card or clinic cards have now been accepted as corroborating documents in establishing the age of a minor in sexual offences.

25. The Court of Appeal sitting at Kisumu in **ROBERT OLE GWENI VRS REPUBLIC CRIMINAL APPEAL NO.329 OF 2011** (UR) recognised the production of baptismal card as proof that verified the complainant's age. In any case the court takes judicial notice that the complainant was a standard 2 pupil at [Particulars withheld] Primary School, a fact not contested. In the premises the apparent age of the complainant was around 10 years.

26. Consequently I do not find the appeal meritorious. The trial court correctly had the appellant's age assessed when he claimed that he was 17 years. The appeal is otherwise dismissed.

Dated, signed and delivered this 16th day of December, 2015

H. K. CHEMITEI

JUDGE