



ORIGINAL

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 84 OF 2012

CHARLES ENOSE MAKOKHA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[From original conviction and sentence in the Principal Magistrate's Court at Homa Bay Criminal Case No. 91 of 2011 Before Hon. N.N. Njagi]

J U D G M E N T

Introduction

1). The appellant was charged with the offence of Defilement contrary to section 8 (1) as read with 8 (4) of the Sexual Offences Act No. 3 of 2006.

The particulars are that on the night of 12th and 13th December 2010 at [particulars withheld] camp in Mbita district in Homa Bay willfully and intentionally caused the penetration of your genital organs into the genital organs of **N A O** a child aged 17 years.

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

The particulars are that on the night of 12th December 2010 at [particulars withheld] camp in Mbita district in Homa Bay county willfully and intentionally caused the penetration of your genital organs into genital organs of **N A O** a child aged 17 years.

3). Equally, he was charged with the offence of attempted rape contrary to section 4 of the Sexual Offences Act No. 3 of 2006.

The particulars are that on the night of 12th and 13th December 2010 at [particulars withheld] camp in Mbita district in Homa Bay county intentionally and willfully attempted to cause his penis to penetrate the vagina of **C A O** without her consent.

The appellant was acquitted on the second charge but was convicted on the first count and sentenced to 15 years imprisonment thus this appeal.

Facts

4). **PW1, N A O** on the material night was on her way from a church vigil heading home. She was accompanied by **PW2, C A O** as well as **PW3, B O L** . On their way they were stopped by the appellant who asked them for their identity cards. They were all taken to the DO's camp and detained in separate rooms after they were unable to produce the identification documents.

5). PW1 told the court that she was taken by the appellant to his room where he proceeded to forcefully defile her twice that night. In the morning at 6 a.m the appellant gave the complainant a broom to clean the compound and thereafter released her.

Upon being released she found PW2 her sister and PW3 the cousin whom she explained to them what transpired during the night. She was taken to Seme police post where she was given a P3 form and thereafter taken to Seme health centre. She later recorded her statement at Mbita police station.

6). PW2 told the court that she was taken to another house where the appellant attempted to defile her but he did not succeed. He only touched her breast but was unable to remove her clothes.

7). PW3 told the court that he saw the appellant took his sister away on that particular night. He said that there was sufficient moonlight. In the morning he was told to fetch water for the appellant.

8). **PW4, Stephen Oyare** produced the P3 form which according to his findings shows that there was sexual intercourse as there was tear and laceration.

PW6, CPC Fredrick Ojwang who was the investigating officer told the court that he received a report that there were some girls who had been detained at the chief's camp. He went to the scene and found them in the said camp. After carrying out his investigations he formed an opinion that indeed the appellant had committed the offences.

9). When put on his defence the appellant gave sworn evidence. He did not deny arresting the complainants. He said that he locked them in the cells and went to sleep. In the morning he released them after learning that they were from a church meeting. He denied that he defiled the complainant.

Issues for Analysis and Determination

10). This court is enjoined to analyse the issues afresh with a view of arriving at afresh and an independent finding. The appellant has filed 5 ground of appeal. The substance of the said grounds are that the court relied on insufficient and contradictory evidence at arriving at its decision. He argues that the court shifted the burden of proof to the appellant.

11). This court finds that what is not in dispute to that the complainants as well as PW3 were arrested that night by the appellant. The reason for the arrest and confinement was because they did not have any identification documents. Further, the three were on their way from a church function.

12). The question is where were they confined? The appellant told the court that they were confined in separate cells till the following morning. He said that he was with a fellow police officer whom he did not identify or call to testify.

13). PW1 however during cross examination by the appellant appeared categorical about the scene. He told the court that she was interrogated by the appellant **“in a house which was on the left side of your house”**.

She further told the court that the appellant pulled her towards his house which was dark and had no windows. When she came out in the morning there were officers standing in the compound.

14). PW3 told the court that: **“I saw the accused taking my sister away. He took them to his house. I saw him take the sisters of mine to his house. I could see the accused well. There was clear light from the moonlight..... I saw the accused dragging my sister. The accused was forcing my sister to**

walk. I could hear the noises from the house of the accused as if there was a struggle”.

15). Going by the pieces of evidence as adduced by the witnesses I find that the appellant confined PW1 in his house that night. The accused did not adduce any evidence suggesting that the complainant was confined in a separate cell or house. PW2 and PW3 clearly demonstrated that they saw the accused took PW1 to his house.

The next question is why did he take her to his home? Why not confine her to neutral cell or at least with PW2?

16). The appellant told the court that he did not have any occurrence book. If this was so then he should have at least called his colleague with whom he said that they arrested the suspects together or at least any of the officers who were present in the compound and saw them that night or in the morning.

17). Did he therefore defile the complainant? PW1 gave graphic description of what transpired. The only difference is that during her evidence in chief she did not mention that the appellant used a condom but the same came out during cross examination.

18). PW4 did not find any traces of spermatozoa but found that the vagina was moist and there was tear and laceration hence concluding that there was sexual activity. Although the approximate age of the injury is not indicated it however appears that it was done on 13-12-2010 which was within the time as indicated in the charge sheet.

19). From the evidence on record as well as P3 form I do not hesitate to find that the complainant was actually defiled and the only probable person who did this was the appellant. I find that the prosecution was able to establish their case right from the arrest of the complainant to being released the following morning and being taken to hospital as well as the arrest of the appellant. All these events took less than 12 hours and I do not buy at all the appellant's defence. Neither do I see malice on the part of the prosecution and its witnesses. There was no attempt by the appellant to demonstrate that he confined the girls in separate cells apart from his house.

20). The appellant has argued that there was no evidence that the complainant was aged 17 years and that it was necessary to have established her age. This did not appear to be an issue during trial. The witness told the court that she was born in 1993 and in fact she had broken her virginity

The appellant if indeed was keen on pursuing this matter then he ought to have taken it at the trial stage but not at this level. The P3 form gave an estimate age as 17 years an issue again not disputed by the appellant.

21). As to whether defilement was done is an issue of fact which as alluded above has been determined. The probability of the appellant using a condom was not disputed. Although the condom was not produced, the fact that no spermatozoa was found, leads to an irresistible conclusion of condom use.

I do find that indeed this case inched on both direct and circumstantial evidence. There was no explanation of why PW1 was confined in the appellant's house in such ungodly hours without the appellant having an intention of defiling her.

22). The appellant has raised an issue that the charge sheet was defective. I do not find this line of argument plausible. There is nothing to demonstrate this.

Further, the appellant contends that section 211 (1) of the Criminal Procedure Code was not complied with. Again I do reject this argument as it is clearly demonstrated that the appellant gave unsworn evidence and was duly cross examined.

23). In the premises I do not find this appeal meritorious. The acquittal of the appellant on the second charge was proper and sound as the evidence presented was too weak. However, the first charge was well

proven both directly and circumstantially. The appeal is otherwise dismissed.

Dated, signed and delivered at Kisumu this 20th day of January, 2014.

**H.K.
JUDGE**

CHEMITEI

HKC/va