



ORIGINAL

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 1 OF 2012

CHARLES ODUOR OMBOGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[From original conviction and sentence in the Senior Resident Magistrate's Court at Ukwala Criminal Case No. 424 of 2010 Before Hon. E.K. Mwasia]

J U D G M E N T

Introduction

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

The particulars are that on the 18th day of September 2010 at [particulars withheld] Primary School in Ruwe Sublocation in Ugenya district within Nyanza province intentionally caused your penis to penetrate the vagina of **C K W** a child aged 14 years.

2). The appellant was equally charged with the offence of committing 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 18th day of September 2010 in Ugenya district within Nyanza province intentionally touched the breast of **C K W** a child aged 14 years.

The appellant was convicted on the alternative charge and sentenced to serve 15 years imprisonment hence this appeal.

Facts

3). The complainant who was a student at [particulars withheld] primary school told the court that on the material day she had gone to school where the appellant was a teacher. It was a Saturday. The appellant then called her to take a text book to him where he was under a tree. He then sent him to the office to take some exam papers. In the process the appellant followed her to the office where he touched

her breast. This angered the complainant and she left for home immediately.

4). She further told the court that she found her father at home. **PW2, F W M** and narrated the ordeal to him. The said PW2 went to look for the head teacher **PW3, V A O** and explained to him what the appellant had done to the complainant.

5). Apparently, the appellant did not turn up and this prompted the witness to report the offence at Sigomere police station. However, on 13-10-2010 **PW4, APC Rembe Osikuku** saw the appellant at Musanda market where he arrested him. He then handed him over to **PC Titus Kwemoi, PW5** who investigated the incident and preferred charges against the appellant.

6). According to PW5 part of the reason why he preferred the charge against the appellant was because after the incident he disappeared without the permission of PW3 the school head teacher.

7). **PW6, Howard Okongo** the clinical officer produced the P3 form which showed that there was no sexual assault against the complainant. He found that the complainant was emotionally stressed.

8). When put on his defence, the appellant denied the charge. He gave chronology of the events and stated that the complainant refused to be disciplined and went home. He told the court that he left for Eldoret thereafter but later came home. He blamed bad blood between him and the school administration.

9). His witness **B O** who was aged 15 years and a pupil at the same school told the court that the complainant refused to be disciplined after failing to finish her work. She refused to kneel down but went home.

Analysis and Determination

10). The appellant has filed several grounds of appeal in both the main petition and the supplementary petition. The issue to be determined herein is whether the prosecution proved its case beyond reasonable doubt.

As earlier indicated the main charge was not established against the appellant and infact based on the evidence available before bringing the case against the appellant, especially the clinical officer's report contained in the P3 form there was no basis absolutely for that charge to have been preferred in the first place.

11). In respect to the alternative charge the court found that the appellant had touched the complainant's breasts. This evidence is only derived from a single witness, that is PW2. The rest of the witnesses gave hearsay evidence.

But what were the circumstances obtaining at the scene? On cross examination by the appellant, PW1 told the court that “**the office is in an open place in which one can see**”. What then is the probability of the appellant touching the complainant's breast with a view of raping her as found by the trial court?

12). This is a moot question. Where were the other students? The witness PW1 as well as DW2 confirmed that there were other students in the school. Is it then conceivable that the appellant who apparently was the only teacher at school at that time with both standard 7 and 8 students proceed to touch the breast of the complainant without taking into consideration that the rest of the students could see him? I do not think so.

13). Equally, the head teacher told the court that she called the school head girl who told him that he had called PW1. The school head girl nor any other student were not called to give evidence in support of the events that took place within the school. I find that failure to call any of the pupils and only concentrated on adults who were not present at school and who apparently especially PW2 and PW3 had differences with the appellant was fatal for the prosecution case.

14). This case being as serious as it is, cannot be proved by the evidence of a single witness yet there were other witnesses including PW1's classmates who were not called to testify.

This court further finds that the trial court dwelt on generalities and assumptions. The trial court failed to appreciate the convincing evidence by the appellant and his witnesses who appeared credible. I do not find any evidence to show that DW2 had been coached at all. Neither is there sufficient evidence that the appellant intended to rape PW1 especially in such clear open circumstances as clearly put by PW1.

15). Consequently, I shall allow this appeal. The case was poorly investigated or even if it did there were other factors especially the relationship between the appellant and PW2 and PW3 as well as the entire school administration. The appellant is therefore set free unless lawfully held.

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

**H.K.
JUDGE**

CHEMITEI