



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
CRIMINAL APPEAL NO. 141 OF 2013
PAUL OMONDI OTIENO.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

J U D G M E N T

Introduction

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

The particulars were that on the 29th day of June 2012 at [particulars withheld] village in Central Sakwa location in Bondo within Siaya County intentionally caused his penis to penetrate the vagina of S A O a child aged 15 years. The appellant was also charged with the alternative count of Committing an Indecent Act with a child contrary to section 11 (II) of the Sexual Offences Act No. 2 of 2006.

The particulars are that on the 29th day of June 2012 at [particulars withheld] village in Central Sakwa location within Bondo in Siaya County touched the vagina of S A O, a child aged 15 years using his penis.

After a full trial the appellant was convicted and sentenced to 25 years imprisonment hence this appeal.

Facts

The complainant had been sent by her mother PW1 to a posho mill on the material day. The complainant had been accompanied by another child PW2 who was aged 8 years. When they arrived home the complainant was crying. On examination her mother saw her skirt which had blood stains and was torn and she also had bruises on her hands. The following day she took her to Ouya dispensary. A report was made to Bondo police station where she was also issued with a P3 form. The police later managed to arrest the appellant.

The complainant who was said to be mentally retarded also testified and told the court that the appellant did “bad things” to her. PW4 confirmed to the court that they had been sent to the posho mill and on their way back they met the appellant who greeted them but refused to let go the complainant.

Dr. Oginga PW5, produced the P3 form which showed the nature of the injuries suffered by the complainant. He told the court that there was evidence of penetration and blood clot.

When put on his defence the appellant denied the offence but explained to the court how he was arrested and assaulted by the complainant's father as well as the police.

This being the first appeal this court is enjoined to reevaluate the evidence afresh with a view of arriving at a fresh and independent finding taking caution that this court did not have the benefit of seeing the complainant as well as the witnesses. See Okeno -VS- Republic [1972] EA 32 The appellant has mounted 4 grounds of appeal which can be summarised as follows:

1. **the trial court failed to ascertain the age of the complainant.**
2. **the appellant was denied the opportunity to cross examine the complainant.**
3. **what was the mental state of the appellant.**

For purposes of determining the issues herein it is first important to ascertain whether the complainant as well as the witnesses knew each other. From the evidence on record, there is no doubt that they knew each other. The complainant on cross examination told the court that he knew the appellant's name. This was confirmed by PW4. The other relevant issue is the time of the alleged incident. The same occurred at around 6 p.m. None of the witnesses and in particular the appellant contested this fact. The issue of identification, I find, was well settled.

Was the appellant rightfully suspected? Was the complainant mental state of such nature that she would not identify the assailant? On the contrary both PW2 and PW4 rightfully identified the assailant. The appellant in his defence did not explain where he was at that particular time so as to counteract what the children were saying. I find that although the complainant and PW4 were of retarded mental station and of minor age respectively, they were able to identify the assailant positively.

What then was the age of the complainant? The appellant has argued that the birth certificate ought to have been exhibited to demonstrate this. Whereas this may be true, I find that the immunization card was sufficient in this regard. The card shows the details of the child and other official requirements.

Equally, the card was never contested during trial and this leads me to believe that this line of argument by the appellant is an afterthought. Even for argument sake there is no doubt that the evidence of PW1 was believable.

As of her mental status all the prosecution witnesses attest to this. The P3 form filled at the hospital show as much. The court did observe during trial this position. Consequently, I find that although there was no direct psychiatric report, the evidence so far adduced during trial sufficiently proved that the complainant had mental retardation. The mother testified that she was infact supposed to have been taken to Maranda Special School only that she lacked the money to do so.

This court does not buy the argument that the appellant was not granted the opportunity to cross examine the complainant or the witness. The court records clearly attest to this.

For the foregoing reasons I do find this appeal unmeritorious. The appellant clearly defiled the complainant by taking advantage of her mental status and her age. The same is therefore dismissed.

Dated, signed and delivered at Kisumu this 31st day of July, 2014.

**H.K.
JUDGE**

CHEMITEI