



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 12 OF 2014

DANIEL OTIENO ORENYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No. 854 of 2013 in the Principal Magistrate's court at Bondo)

J U D G M E N T

- 1). The appellant was charged with the offence of Defilement contrary to section 8 (1) as read with section 4 of the Sexual Offences Act No. 3 of 2006. The particulars are that on the 21st day of September 2013 at [particulars withheld] sub location in Rarieda District within Siaya County, intentionally caused his penis to penetrate the vagina of D A O a child aged 17 years.
- 2). The prosecution called a total of 5 witnesses. The appellant was convicted and sentenced to 15 years imprisonment hence this appeal.
- 3). Briefly the facts are that the complainant PW1 who is an orphan aged 17 years told the trial court that on the material day at 7 p.m while cooking for her grandfather, the appellant came to her place and requested her to accompany him to his house where he was to give her a bedsheet. She complied but when she reached his house, she was locked in and the appellant went away upto 9 p.m. When he came back he forcefully had sexual intercourse with her three times that night. The complainant then left to her home at 5 p.m, I presume the following day.
- 4). Subsequently on 23-9-2013 at 8 am the appellant came to her home demanding that he be given by the complainant a skirt, jacket and a blouse which she had come with from the appellants place. A scuffle ensued and the appellant wanted to fight the complainant. PW2 arrested the appellant in the process.
- 5). After explaining what had taken place the matter was referred to the chief where he initiated the process of arresting the appellant. Meanwhile the complainant was taken to Madiany District hospital where she was examined and treated. The P3 form was filled by PW3 Vanice Moraa Obare, who concluded that there was sexual penetration and that there was bleeding in the vagina.
- 6). In his sworn defence the appellant denied the charge. He said that he was simply arrested by three men and taken to the Assistant Chief's office where he was accused of defiling the complainant.
- 7). The appellant's grounds of appeal faults the evidence of PW1 and the fact that essential witness were not called. This court is enjoined to evaluate the evidence afresh with a view of reaching an independent finding. See **Okeno -VS- Republic [1972 EA 32.**

8). What runs across the entire evidence is the fact that the parties herein do identify and recognise each other. The age of the complainant is not really challenged. Although in her evidence she said that she was born on [particulars withheld] 1996 the birth certificate reads [particulars withheld]1996. I do not think that this in any way alters the issue in dispute.

9). Was the evidence as presented by the prosecution sufficient to warrant conviction? The account by the complainant I do not think is really disputable. At 17 years one can safely conclude that though still a minor she was in a position to comprehend what was taking place. However I do find that there are issues which are not very clear.

10). One of the key issue is what happened between 7 p.m and 9 p.m. Did she raise any alarm, now that she had been locked in the house? Even more intriguing, why did she stay from 7 p.m to 5 p.m the following day.

11). Equally, why did she stay with the appellant's clothes for about 3 days without explaining to anybody what she was doing with them. In her evidence she said that she was given a jacket, skirt and blouse. PW2 however said that on 23-9-3-13 when they were struggling he did not see them struggling over clothes. He went on to say:

“Jeremiah Oguta came and saw D and Daniel struggling with each other over some clothes. I did not see the two struggling with clothes. I later saw Daniel running away and entered the house of John. I arrested the accused with a blouse, jacket and skirt”.

12). These clothes were never produced. Even more intriguing is that PW5 spoke of a “lesso” brought as an exhibit.

Further although the prosecution has the discretion to call witnesses to support their case, I do find that failure to call P A M the complainant's grandfather was fatal. He was to shed light on whether or not the appellant came to pick the complainant that evening from home. This would have connected the disappearance of the minor till the following day.

13). The P3 form in my opinion was not conclusive. Although there were no visible injuries, the clinical officer did not explain the source of bleeding. Was the bleeding as a result of sexual penetration that occurred 3 days ago? Was it because of her periods? There was definitely need for further clarification.

14). Even more interesting were the comments made in the P3 form which indicated that both the appellant and the complainant had been dating from May 2013 to 20-9-2013. Although the same does not necessarily go into great benefit in proving the case against the appellant, but then it tends the credibility of the minor's evidence. Section 124 of the Evidence Act Chapter 80 Laws of Kenya provides that:

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

15). The qualification here is for the court to believe the evidence of the complainant. Apparently for the reasons stated above I do not think that the evidence by the complainant was sufficient to have convicted the appellant. There were glaring missing links which I find that the complainant and her witnesses were economical with the truth. The nature of the charge facing the appellant was serious. It was incumbent upon the prosecution to seal every loophole. It was not the business of the appellant to exonerate himself as it were.

I think I have said enough to show that this appeal ought to succeed. The same is allowed. The appellant be released unless lawfully held.

Dated, signed and delivered at Kisumu this 27th day of November, 2014.

**H.K.
JUDGE**

CHEMITEI