



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 93 OF 2012

ROBERT SILA ONYANGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[From original conviction and sentence in Principal Magistrate's Court at Siaya Criminal Case No. 247 of 2011]

J U D G M E N T

The appellant was charged with the offence of Defilement contrary to section 8 (1) (4) of the Sexual Offences Act No. 23 of 2006.

The particulars were that on diverse dates between the month of August and December, 2010 at Komenya Kowala sub location in Siaya District within Nyanza Province intentionally caused his penis to penetrate the vagina of N.A.O a child aged 16 years.

He was equally charged with the alternative count of committing an Indecent Act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006.

The particulars were that on diverse dates between the month of August and Decement 2010 at Komenya Kowalo sub location in Siaya District within Nyanza Province unlawfully and intentionally touched the vagina of N.A.O a child aged 16 years with his penis.

The appellant after going through a full trial was convicted and sentenced to 15 years imprisonment hence this appeal.

The brief facts are that the complainant PW1 told the trial court that the appellant on a date she could not recall but was December I suppose 2010 did forcefully have sexual intercourse in his house. After the incident she did not tell anybody but she later became pregnant. The complainant was apparently deaf.

The complainant told the court she told her younger brother and another girl. Later she became sick and her stomach was swollen. She was taken to hospital 4 months later and found to be expectant.

PW told the court that after the schools were closed during the April holiday she received information that the minor was expectant. PW4 the school teacher questioned the child her mother and they found her to be expectant. She told them that it was the appellant who was responsible.

The appellant was later arrested by the assistant chief and taken to the police station. The evidence of PW6 the clinical officer clearly points out that the minor was expectant.

Put on his defence the appellant denied the charge and argued that he had been fixed by the girl. The appellant in his appeal has raised 5 grounds which are fundamental. Both sides have raised serious submissions in opposing and supporting the appeal. This court has the cardinal duty of reevaluating the evidence afresh and coming up with a fresh decision.

What needs to be asked is whether it was the appellant who defiled the minor. The question of whether she was defiled or not was well settled by the pregnancy which she carried. There was no any other eye witness to the incident. PW2 did not help much but only went ahead to confirm that she saw the appellant and the minor. She further told the court that the minor told her that she had a boyfriend but she did not tell her whether it was the appellant or any other person. The other prosecution witness simply came after the facts.

Since there was no eye witness to the defilement it is therefore the minor's word against the appellant. Section 124 of the Evidence Act Chapter 80 Laws of Kenya cushions the minor to the extent that the court will always convict if she is believed to be saying the truth.

I have heard the parties herein as well as read the entire proceedings. From the outset I do not find the evidence of the complainant very convincing. There are several glaring gaps which I think if the trial court considered it may perhaps not have arrived at the decision it reached.

First of all there is contradiction as to the scene of the incident. The minor states that the incident took place at the house of her grandmother. She goes ahead and states that it took place at the house of the complainant. Which is which? Of the three times the appellant had sex with the minor. Where was it? Was it three times in either of the homes at ago or in different occasions?

Secondly and of more fundamental is the identification of the appellant. In her evidence in chief the minor told the court that she did not know the appellant. Yet she later told PW2 and her younger brother that it was the appellant. Surely, this was a neighbour who lived 200 meters from her home. Is it possible that she did not know the appellant's name?

She further told the court that she bled a lot. Why did she not tell anybody including her grandmother or her teachers. Why wait till 4 months later that she notified them when she was pregnant and could not hide from anybody.

The other issue raised by the appellant is the absence of the exhibits produced. Though this was never addressed by the parties save in the grounds of appeal I do find this fundamental. I have perused through the file and I am not able to locate the same. That therefore brings the challenge of knowing the age of the complainant.

Further and more crucial is the question of DNA which was well captured by the appellant in his submission. It was fundamentally crucial to undertake the DNA test of the appellant, the minor and the child so as to determine the veracity of the evidence so far relied on by the parties herein. This was crucial because in the absence of any credible eye witness the scientific proof would have given the court a clear picture on whether or not the appellant was truthful or the minor believable. There was no reason for the prosecution to hurry now that the minor was already expectant and only weeks away from delivery.

I think I have said much to suggest that based on the evidence of the minor alone, I do not think that she is entirely believable. There were no exhibit produced in any event to corroborate her evidence.

The upshot of this is that the benefit of doubt ought to be exercised in favour of the appellant which I shall do. The appeal is allowed and the appellant is hereby set free unless lawfully held.

Dated, signed and delivered at Kisumu this 9th day of December, 2014.

H.K. CHEMITEI

JUDGE