



REPUBLIC OF KENYA

High Court at Kisumu

Criminal Appeal 163 of 2010

FREDRICK OMONDI KWACHAPPELLANT

VERSUS

REPUBLICRESPONDENT

From original conviction and sentence in Criminal Case number 541 of 2008 of the Principal Magistrate's Court at Kisumu – Mr. K. Muneeni Esq)

JUDGMENT

The appellant was charged with the offence of defilement contrary to Section 8 (2) of the Sexual Offence Act No. 3 of 2006.

The particulars are that on the 30th day of May 2006 at Kisumu District within Nyanza province caused penetration to LAO a child aged 11(eleven) years.

After the retrial the appellant was convicted and sentence to life imprisonment. He has filed this appeal citing several grounds which include

the fact that the age of the complainant was never ascertained, the doctors evidence contradicted the charge sheet; that the statutes obtaining then were contradictory and that the sentence was excessive.

At the hearing of this appeal the state conceded to the same basically on the grounds that there was no known law under which the charge was brought as the Act No. 3 of 2006 did not exist and thus the appeal be allowed on this ground.

The brief facts of this case are that on 30th May 2006 the complainant was waiting for her mother who had the keys to their house. The appellant dragged her forcefully to an abandoned houses and defiled her. Some two passerbys came and rescued her in the process. The appellant belt up and pretended to be reading something on the wall.

The two persons arrested the appellant and took him to the Chief's office. The appellant in the process of being apprehended was injured by the members of the public who went to the scene. PW2 Wycliffe Akello Ochieng rescued the child after being alerted by one Charles Owino Oyugi. They found the appellant lying on top of the child and defiling her.

PW3 Boniface Obayi the clinical officer examined the child on 31st May 2008 and concluded that she had been sexually assaulted. There was penetration.

PW4 was the the police officer who received the complain and took the suspect (Appellant) as well as the complainant to the hospital.

When he was put on his defence the appellant said that on the material day while at a car wash near Kanyakwar some two young men were following him. They accosted him and started beating him. He said that he had first passed the complainant on the way. She was crying. He denied having committed the offence.

This court is enjoined to evaluate the evidence afresh with a view of arriving at an independent conclusion. What I find not contested as such is the fact that the complainant was defiled on the material day. The same is supported by the evidence of PW2 as well as PW3 the clinical officer.

The offence took place at day time and there was no confusion as to who committed the offence. The appellant was found at the act by PW2 and another. Why would the said witnesses target the appellant a person whom they did not know if indeed he was not involved?

At the same time I do not find any connection or relationship between the child and PW2 at all. The appellant has confirmed that he had passed the child a short while and that she was crying.

To my mind the fact that the appellant saw the child during the incident makes me reach an irresistible conclusion that indeed the appellant must have had connection with the offence.

Turning now to the issue raised in the amended petition of appeal and supported by the respondent, namely that the charge was defective to the extent that at the time the offence was committed that is 30th May 2006 the Sexual Offence Act did not exist.

Whereas this was true, the said Act came into operation on 21st July 2006. The offence was committed on 30th May 2006. The appellant was however charged on 28th November 2008 about 4 (four) months or thereabouts after the Act came into force.

I respectfully therefore disagree with the respondent as well as the appellants. By the time the appellant was charged the Act was in force. It would have been different if the Act had not come into force as such offence was not known in law. I do therefore hold that the charge sheet as presented was correct for all intent and purposes.

The other issue raised by the appellant was the age of the minor. He argued that there was no evidence that was led to suggest that the complaint was eleven (11) years old.

I have carefully perused the evidence on record and the only available evidence is the minors testimony in court as well as the P3 form which estimates the same to be eleven (11) years old.

I agree with the appellant that there was need to have corroborated this evidence so as to ascertain the age of the complainant. But does this negate the fact that she was defiled? As earlier own observed the evidence on record clearly demonstrate that the complainant was defiled and all evidence points irresistibly to the appellant.

However this age factor needs to be examined in light of the sentencing. Section 8 (3) of the Sexual Offences Act No. 3 of 2006 states:-

“A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty (20) years”

Sub Section 2 state:-

“A person who commits an offence of defilement with a child aged eleven (11) years or less shall upon conviction be sentenced to imprisonment for life”

The appellant was sentence under Section 8 (2) thereof, that is imprisonment for life.

However with the absence of any documentary evidence for example a birth certificate or baptismal card or any other known record it is difficult to ascertain with accuracy the age of the complainant.

In the premises and taking into consideration the discretion of this court and the latitude granted by the law I shall take the view that the complainant at the time of the incident was aged between twelve (11) and fifteen years old.

For the above reason I shall dismiss the appeal and order that the appellant shall serve a jail sentence for a period of twenty (20) years pursuant to the provisions of Section 8 (3) of the Sexual Offence Act No. 3 of 2006. This period shall run from 26th October 2010 when he was convicted and sentence by the lower court.

Orders accordingly.

Dated, signed and delivered at Kisumu this 21st of January 2013

H. K. CHEMITEI
JUDGE

In the presence of:

.....**for State**

.....**Appellants in person**

HKC/aao