



REPUBLIC OF KENYA

High Court at Kisumu

Criminal Appeal 176 of 2007

CHARLES ODHIAMBO MSANGO.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in Criminal Case number 735 of 2007 of the Principal Magistrate's Court at Siaya – M/s D. A. A. KAYILA)

JUDGMENT

The appellant has appealed on the following grounds:-

1. **That the learned principle magistrate erred in law and fact in convicting me as there was no eye witness.**
2. **The learned principal magistrate erred in law and fact in convicting me as I was medically examined after two days as well as the complainant fact that could not ascertain spermatozoa.**
3. **The learned principle magistrate erred in law and fact in admitting the evidence as the complainant did not raise alarm nor did she appear in court to testify.**
4. **The learned principal magistrate erred in law and fact in basing conviction on circumstantial evidence as the same was not conclusive to prove me guilty.**
5. **The learned principle magistrate erred in law and fact in relying on self serving evidence of prosecution witness.**
6. **The sentence imposed on me by the trial magistrate is harsh and manifestly excessive in the circumstances of this case.**

When this matter came up for hearing before the court of appeal the said court on 13th September 2011 referred this matter with direction that the only issue that this court was to determine was on sentence.

The appellant did however raise the above grounds but pursuant to the above directives I shall confine myself to the element of sentence.

The appellant was charged with the offence of defilement contrary to Section 8 (3) as read with Section 8 (2) of the Sexual Offence 2006.

The particulars are that on the 16th day of October 2007 at Siaya District within Nyanza Province had carnal knowledge of **D.A.M** a girl of the age of eleven (11) years without her consent.

He was equally charged with the offence of Indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.

The appellant according to the facts read out went to the complainant home at around 10:00 p.m, on 16th October 2007 where she was having dinner with her family. She went with the complainant allegedly to take her to her grandmother's home. They did not come back till the following day. The complainant's mother did question her after she realized that she was in great pain. The complainant confirmed that the appellant had forcefully had sex with her.

The complainant was taken to Siaya District Hospital by police from Ndera Patrol Base. The P3 form was filled.

On his plea the appellant was convicted. In mitigation he said:-

“I pray for court's leniency. I am a first offender. I pray to be pardoned. My wife deserted me”.

The substance of the appellant's oral argument in court is that the P3 form was not stamped by the doctor who filled it. I have perused the same and I do find that it was filled by a certain doctor but not stamped.

On the face of it this was a wrong. It is necessary always to authenticate such primary documents to avoid any doubt.

However this does not in anyway aid the appellant case. His own admission of the facts shows that he understood the charges that were facing him.

The trial court sentence him to a custodial term of twenty (20) years. The maximum period is life imprisonment. The State did not wish to pray for the enhancement of the period.

Taking into totality the entire proceedings and the admission of the facts as well as the reasoning of the trial court I do not find any fault on the sentencing .

The appellant willfully took away the complainant from her mother with full and planned knowledge of defiling her. He did not take her to her grandmother but instead to his house where he defiled her overnight.

The period of twenty (20) years is sufficient in the circumstances, as the same is not excessive as the maximum period given is life imprisonment. The appeal is otherwise dismissed.

Dated, signed and delivered at Kisumu this 26th day of March 2013.

**H.K. CHEMITEI
JUDGE**

In the presence of:

.....for state

.....for the appellant.

HKC/aa0