



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 1 OF 2013

JAMES OUMA ONYANGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

On 11-6-2012 the appellant herein was charged with the offence of Defilement contrary to section 8 (1) (3) of the Sexual Offences Act No. 3 of 2006.

The particulars are that on the 29th day of May 2012 in [particulars withheld] in Bondo district within Siaya county intentionally caused his penis to penetrate the vagina of **P J A** a child aged 13 years.

He was also charged with an 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 are that on the 29th day of May 2010 at [particulars withheld] in Bondo district within Siaya county touched the vagina of **PJ A** a child aged 13 years using his penis.

The appellant was convicted and sentenced to 20 years imprisonment hence this appeal which has six (6) grounds. The sum total of the said petition is that the trial court relied on hearsay evidence; it failed to appreciate the medical evidence presented and that it solely relied on the evidence of a single witness.

The summary of the case is that **PW1 P J A** on 27-5-2012 at around 7.30 p.m ran away from home for fear that her mother was going to discipline her for she had sold her charcoal and to a customer who did not pay for the same. In the process of running she came across the appellant who promised to shelter her from her mother's wrath. The complainant took her to his house where he stayed with two young boys.

During her stay in the appellant's house for a period of five (5) days the appellant defiled her sexually. She said that she could not complain or scream as the appellant had threatened to take her to her mother.

Subsequently, a boda boda rider while accompanied by the boys rescued the complainant. She was taken home and later to Bondo District hospital where she was treated. She further went to the police where a P3 form was issued to her.

PW2 E A R the complainant's mother confirmed the complainant's story. She actually gave her the charcoal to sell but she was not paid by the customer. In the process of looking for the said customer the complainant disappeared and efforts to trace her were futile.

On 2-6-2013 a boda boda rider came to her place of work and informed her that he had seen her daughter at [particulars withheld]. He sent him to collect the complainant and take her to the police station. PW1 told her where she had been but she did not tell her that she had been defiled but PW2 later discovered. She was taken to the hospital by the investigating officer.

PW3 Edwin Omae is the Clinical Officer who examined the complainant on 3-6-2012. The approximate age of the incident was two weeks. His findings were that the hymen was torn, foul smelling discharge from the vagina.

PW4 P.C. James Lendama told the court that PW1 came to police station on 2-6-2013 in need of care and protection. He escorted her to Bondo District Hospital where she was treated and discharged. He investigated the matter and charged the accused with the offence of defilement.

When put on his defence the applicant gave unsworn testimony. He denied the charge but confirmed that the complainant was indeed in his house.

This court is required in this first appeal to analyse the evidence afresh with a view to arriving at a fresh and independent finding. What is not in dispute and is admitted by the appellant is the fact that he knew the complainant and that he took her to his house.

I also do not doubt that the complainant stayed in the appellant's house for a number of days. But was she defiled and if so by who? It is evident that there were two young boys who stayed together with the appellant. There is no indication that they defiled the complainant. They were allegedly 6 and 12 years respectfully.

The medical documents showed that there was sexual assault against the complainant. Though it took some time to get her to the hospital but evidence showed some infection which according to the clinical officer is always a sign of sexual intercourse.

Apparently there is no evidence to show that the complainant went elsewhere after she was rescued from the appellant's house. She was taken to the police and later to the hospital. My finding therefore is that the appellant was all along with the complainant until she was rescued from his house.

The other intrigue is why detain her for five days? Even if she feared being disciplined by her mother why as an adult not take her home the following day and perhaps plead her case? I think the appellant by all means had an ulterior motive namely to sexually defile the complainant which he did. He used fear, threats and intimidation namely that should she go home her mother was likely to punish her. In effect he acted as her "saviour".

In the premises I do find this appeal unmeritorious. The appellant took advantage of the minor. He did not offer any plausible reason why he detained her for that long period.

There is sufficient evidence of sexual assault. The trial court justifiably convicted and sentence the appellant. I do dismiss the appeal.

Dated, signed and delivered at Kisumu this 25th day of November, 2013.

**H.K.
JUDGE**

CHEMITEI