



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEAL NO. 53 OF 2013

*(Appeal arising from original conviction and sentencing of the principal Magistrate Court Bondo CR 290-12 - Hon. P.W. Mutua - Principal Magistrate )*

PHILLIP AWANDA OYOLA .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

**J U D G M E N T**

**INTRODUCTION**

This is an appeal from the judgment of the Principal Magistrate Court at Bondo dated 18/4/2013 by which the appellant was convicted and sentenced to 15 years imprisonment. The appeal challenges the said conviction and prays for the same to be set aside. The issue for determination is whether the prosecution proved the offence beyond reasonable doubt. The court is of the view that the offence was proved as required.

**BACKGROUND**

The appellant was charged with defilement contrary to Section 8(4) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that the appellant caused his penis to penetrate the vagina of J J A a child aged 17 years between 15th and 20th April 2012 [particulars withheld] Bondo district in Siaya County. The appellant denied the charges and the prosecution called 6 witnesses to support the charge.

**PROSECUTION CASE**

J J A (PW1) gave a sworn statement after a *voive dire* examination by the trial magistrate. On 15/4/2012 she gave in to persistent pressure from E O (appellant's sister) to visit the appellant in Bondo. E O gave ksh.100/ fare and she spoke with the appellant to meet PW1 at Ndori. After meeting at Ndori PW1 and the appellant went to the latter's house at Bondo where she was locked up and defiled for 4 days. During the said period, the appellant used to leave her alone in the house and return at night.

The appellant refused to let the PW1 to return to school and removed the battery of her mother's phone which PW1 had carried thereby preventing her from calling her mother. The PW1 was not in school uniform when she went to visit the appellant.

E C N A (PW2) is the mother of the PW1. She confirmed that the PW1 was 17 years and a pupil [particulars withheld] School . She produced immunization card to prove that PW1 was a minor. She stated that the PW1 disappeared on 15/4/2012 but she was later found in E A (appellant"s sister) house. On cross examination PW2 denied that the PW1 had a phone.

D O A (PW3) is the brother of PW1. He stated that PW1 was 17 years on the material date. He stated that appellant wanted to marry PW1. With the help of village elder he visited the appellant and the appellant took them to a certain house where PW1 was locked in.

J O O (PW4) is the village elder who arrested the appellant and took him to Bondo police station from where he told him where to find the PW1 at Alego. PW4 followed the direction given by the appellant and found the PW1 at Alego. On finding PW1, PW4 told her to leave her clothes and then went to Bondo Police station.

PC James Lendamu (PW5) was attached to Bondo Police Station on 20/4/2012 when the appellant and PW1 were brought to the station. He later took both PW1 and the appellant to hospital after establishing from the immunization card that the PW1 was minor. He produced the immunization card as exhibit P.1.

Harun Chebona (PW6) is the clinical officer who examined the PW1. He found the PW1's genitalia without any physical injury except that she tested positive for syphilis. PW6 also produced P3 prepared by his colleague in respect of the appellant. According to the treatment records produced the appellant had a normal genitalia but tested positive for syphilis.

From the foregoing evidence the trial court found that the appellant had a case to answer and put his to defence.

### **DEFENCE CASE**

The appellant (DW1) gave a sworn defence denying the offence charged. He stated that on 14/4/2012 he visited a friend at Alego and found (PW1) and after she stated that she was not in school he seduced her. She even agreed to visit his house the following day for which he gave her (PW1) fare to meet him at Ndori. She eventually visited the appellant and stayed with him for 3 days until PW1 received a call quarreling her why she was not in school. He told her to go to Alego. On 20/4/2012 he was arrested and taken to Bondo police station from where he told them that PW1 was in Alego from where she was found. He admitted that he had carnal knowledge with the PW1 during their marriage.

On cross examination the appellant confirmed that the PW1 agreed to marry him and she came to his home. He further stated that he did not know that the PW1 was a student until her parents called looking for her. After close of the hearing the trial magistrate found the appellant guilty and sentenced him to 15 years. The appellant was dissatisfied with the conviction and brought this appeal.

### **GROUND OF APPEAL**

1. THAT the learned magistrate erred in both law and facts when he convicted based on the sole evidence of PW1 which was not cogent to sustain conviction.
2. THAT the learned trial magistrate erred in both law and facts by not observing that the charge sheet was defective.
3. THAT the learned trial magistrate erred in law and in facts when failed to include forensic examination as well as age assessment report which was vital to establish this case.
4. THAT the learned trial magistrate erred in law and facts when he failed to comply with the provisions of Section 324 as read with Section 329 CPC not achieved.

### **APPELLANT'S CASE**

The appellant filed written submissions by which he urged that the PW1 appeared mature and did

not disclose that she was underage. She also never disclosed to him that she was a student and the appellant blamed her for contributing to the offence. The appellant further blamed the trial court for failing to assist him call E A to disprove the allegation that she gave the PW1 ksh.100 for fare.

### **RESPONDENTS CASE**

Mr. Magoma learned counsel for the state opposed the appeal. He argued that the offence was proved beyond doubt before the impugned conviction. He submitted that there as evidence to prove that the PW1 was a minor, that she was infected with syphilis and that the appellant took witnesses to the place where the PW1 was locked in a house.

### **ANALYSIS AND DETERMINATION**

The offence of defilement under Section 8(i) is committed when a person commits an act which causes penetration with a child. The court agrees with the learned state counsel and the trial court that there was sufficient evidence to prove that the PW1 was a minor and also to prove penetration against the appellant. The immunization card produced by the prosecution showed that the Pw1 was a few days to reach 18 years when the defilement was committed. The sworn defence by the appellant on the other hand confirmed that the appellant had carnal knowledge with the PW1. In addition the P3 form and treatment notes produced by the prosecution sowed that the PW1 and the appellate tested positive for syphilis.

In view of the foregoing the trial court found that the offence of defilement had been committed and dismissed the appellant's defence that he believed that the PW1 was over 18 years. The fact that the PW1 deceived the appellant that she was not schooling did not mean that she was aged 18 years and as such the appellant ought to have diligently ascertained her age before “marrying” her.

### **DISPOSITION**

In view of the foregoing the appeal is dismissed and the conviction and sentence affirmed.

**Signed dated and delivered this 21<sup>st</sup> day of November 2013**

**ONESMUS MAKAU**

**JUDGE**