



No.302

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
CRIMINAL APPEAL NO. 262 OF 2010

BETWEEN

FRANK OCHIENG OTIENO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal arising from the original conviction and sentence in Migori SRM's Criminal Case No. 631 of 2010

by Kibet Sambu, SRM on 24th June, 2011)

JUDGMENT

1. The appellant herein, Frank Ochieng Otieno was charged with defilement contrary to **section 8 (1) 3** (sic) of the Sexual Offences Act No.3 of 2006. It was alleged that on diverse dates between 3rd and 7th August 2010 in Migori District within Nyanza Province intentionally and unlawfully caused his penis to penetrate the vagina of R.A.O a female child aged 16 years.
2. In the alternative, he was charged with committing an indecent act with a child contrary to **section 11 (1) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that on diverse dates between 3rd and 7th August 2010 at in Migori District within Nyanza Province, intentionally committed an indecent act with a child namely R.A.O aged 16 years by touching her genital organs.
3. The appellant pleaded not guilty thereby necessitating the prosecution to call 5 witnesses. The appellant also testified by giving an unsworn statement in which he readily admitted having met the girl victim who had allegedly been looking for a man to marry her. The appellant stated that since he was also

looking for someone to marry, he accepted the victim's request and he started courting her. Before they finally made up their minds to get married, they were both arrested over the matter. The appellant also stated that the victim had informed him during their short period of courtship that she was over 18 years old.

4. After carefully considering all the evidence that was placed before him, including medical evidence touching on the age of both the appellant and the victim, the trial court was satisfied that the prosecution had proved its case against the appellant on the main count beyond any reasonable doubt and proceeded to convict the appellant accordingly. The appellant was sentenced to serve fifteen (15) years imprisonment.

5. Being aggrieved by both conviction and sentence, the appellant has come to this court seeking an order quashing the conviction and setting aside the sentence. In his petition of appeal filed in court on 29th December 2010, the appellant complains that:-

- **There was no evidence adduced by the prosecution connecting him with the offence.**
- **Since the appellant and the victim had been friends for sometime what transpired between them did not amount to defilement.**
- **The doctor's evidence clearly indicated that the victim had been having sex before.**
- **The sentence of fifteen (15) years imprisonment was overly harsh and excessive.**

6. Briefly the facts of this case, according to the evidence of the five (5) prosecution witnesses are that the victim who was born in 1994 was a Form I student at S[...] Secondary School.

After schools closed on the 27th July 2010 the victim went to her home but on the 30th July 2010, she proceeded to her uncle's home, one E.A, PW2, where she stayed until 2nd August 2010 when she met the appellant and the two agreed that she would visit the appellant on the following day which was 3rd August 2010. The victim kept the promise by going to the appellant's home on 3rd August 2010 where she stayed until 5th August 2010 before the two left for Sirare for a treat by the appellant. The two stayed at Sirare until 7th August 2010. The pairs' stay at Sirare was cut short when the appellant ran out of money and they were forced to return to Migori.

7. The victim stated that throughout her stay with the appellant, they had sex every night and without the use of condoms and against her wish. When she eventually went to her auntie's place at A[...], information as to what had happened to the victim reached her mother and on the 10th August 2010, she and the appellant were arrested by police officers in company of her mother, A.O.O, PW4. PW4 confirmed that the victim was her daughter and that she was aged sixteen (16) years, having been born in the month of June 1994. PW4 also confirmed that she had made arrangements for the victim to stay with E.A, who was a brother to PW4.

8. PW2, Er.A confirmed that the victim had disappeared from his home on 3rd August 2010. When the victim could not be found immediately, PW2 reported the matter to Migori police station on 7th August 2010. On the same 7th August 2010, the appellant was arrested while attending a funeral in the neighbourhood where PW2 lived. PW3, J.O, testified that he saw the appellant and the victim walking together at around 10.00 a.m. on 3rd August 2010 as the two walked towards W[...]Secondary School.

9. After both the appellant and the victim were arrested they were taken to Migori police station by the area Assistant Chief. The appellant was received by PW6 No.68792 Police Constable Abdul Wario of Migori police station. PC Wario carried out investigations into the matter but the appellant denied committing the offence. Both the appellant and the victim were taken for age assessment at Migori

District Hospital at which it was confirmed that the victim was below 18 years.

10. The medical and age assessment tests were done by Dr. Gregory Ganda, PW5. The victim was examined by Dr. Ganda on 11th August 2010, following her arrest on 10th August 2010. Dr. Ganda stated that though the victims vulva and vagina were normal, her hymen was broken, though the breakage was not a fresh one. By the time of the examination, there was no evidence of spermatozoa in the victim's vagina. Dr. Ganda admitted that due to the lapse of time between the alleged offence and the time of medical examination, he could not ascertain that the victim had been defiled as alleged. Dr. Ganda also said that it appeared as if the victim had had sexual intercourse prior to the alleged incident. The P3 form on the victim was produced as **P. Exhibit 1** while the age assessment report on the victim was produced as **P. Exhibit 2**. The letter from S[...]Secondary School, which confirmed that the victim was a student thereat was produced as **P. Exhibit 3**. The victim's Birth Certificate No.[...] was produced as **P. Exhibit 4**.

11. In his unsworn statement, the appellant told the court that he was a student at Kenya Wildlife Service Institute in Naivasha. He averred that he met the victim who was looking for a man to marry her and he accepted to marry her. That the victim told her she was above eighteen (18) years and that she needed someone to marry her. While the two were still in the process of talking and courting, they were arrested.

12. The above is the evidence from which the facts of the case have also come out. This is a first appeal, and because it is a first appeal, this court is under a duty to reconsider and evaluate the evidence afresh with a view to reaching my own conclusion in the matter. The only caution I must exercise in this regard is that I do not have the opportunity of seeing and hearing the witnesses in the same way that the trial court had. See generally Okeno –vs- Republic [1972] EA 32 and Pandya –vs- R [1957] EA 336.

13. I have now carefully reconsidered and evaluated the evidence afresh. I have also weighed and considered the judgment of the trial court and the relevant provisions of the law and from the above three (3) issues arise for determination that is to say:-

(a) Did the prosecution adduce sufficient evidence in support of the charge of defilement against the appellant?

(b) Was the victim a child as provided under the law?

(c) If the answers to (a) and (b) above are in the affirmative, was the sentence that was meted out against the appellant excessive in the circumstances?

14. It is not in dispute that the appellant and the victim in this case hailed from the same village. It is not in dispute that on the 2nd August 2010, both the appellant and the victim met and agreed that the victim would visit the appellant at the appellant's house on the following day. It is also not in dispute that the appellant and the victim met on 3rd August 2010 as earlier agreed and were seen by PW3, Jim Outi, walking together at around 10.00 a.m. Although the appellant denied it, there is evidence that the appellant and the victim spent four (4) nights together, two at the appellant's home and two at Isebania centre in a lodging and on all those nights, the appellant and the victim had sex with abandon.

15. The medical evidence shows that the victim was a child within the meaning of the Childrens' Act, No. 8 of 2001. Section 2 of the said Act defines "**child**" to mean "**any human being under the age of eighteen years**". According to Dr. Gregory Ganda, PW5, a gynecologist at Migori District Hospital, the victim was 17 years old. According to PW4, A.O.O, the victim who was her biological child was born on 19th June 1994 – see **P. Exhibit 4**.

16. In light of all the above, I am satisfied that the prosecution's case against the appellant was proved beyond any reasonable doubt. From the appellant's testimony, he had found someone who was looking for a man to marry her and since he was also looking for someone to marry, he accepted to "**marry**" her. I however do not accept the appellant's contention that he was still courting her and had not made up his mind to marry her. The evidence is clear that he took the victim to his home and defiled her there for

two nights and then decided to take the victim for a treat . Infact if the appellant had not run out of money, they would not have been found out for a long time, but as luck would have it, the appellant ran out of money and they had to leave Sirare.

17. As for the sentence, **section 8 (4)** of the **Sexual Offences Act** sets the mandatory term of imprisonment at fifteen years for the offence of defilement with a child aged between sixteen and eighteen years. In the instant case, the appellant was sentenced to the mandatory term of fifteen years as by law provided. In the case of **Diego –vs- Republic [1985] KLR 621**, it was held that an appellate judge should not interfere with the discretion by a trial court as to sentence except in such cases where it appears that in assessing the sentence, the judge or magistrate acted on some wrong principle or has imposed a sentence which is manifestly inadequate or manifestly excessive. Also see **Dismas –vs- Republic [1984] KLR 634** and **Kimaru –vs- Republic [1983] KLR 388**. In the instant case, the trial court passed the sentence as by law provided, and accordingly this court sees no reason for interfering with the finding.

18. The upshot of what I have said above is that this appeal lacks merit. The same is accordingly dismissed.

19. It is so ordered.

Dated and delivered at Kisii this 20th day of January, 2012

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Present in person for Appellant

Mr. Gitonga (present) for Respondent

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.