



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KSIUMU
CRIMINAL APPEAL NO. 108 OF 2011

JESSE ONYIMBO OCHIENGAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in Criminal Case number 353 of 2011 of the Senior Resident Magistrate's Court at Bondo – Mr. S. O. Temu Esq.)

JUDGMENT

J.O.O the appellant herein was charged with the offence of defilement contrary to Section 8 (1) (3) of the Sexual Offences Act Number 3 of 2006. The particulars of the offence are that on diverse dates in May 2011 in Bondo District within Nyanza Province intentionally and unlawfully caused his penis to penetrate the vagina of **P.A.O** a juvenile aged fifteen (15) years.

He was also charged with committing an indecent Act with a child contrary to Section 11 (1) of the Sexual Offences Act Number 3 of 2006.

The particulars of the offence are that on diverse dates between 13 and 20th May 2011 at Mageta location in Bondo District within Nyanza Province intentionally and unlawfully touched the private parts namely the vagina of P.A.O a juvenile aged fifteen (15) years with his penis.

The appellant was found guilty and sentence to fifteen (15) years imprisonment. He then filed this appeal with three (3) grounds namely:-

- 1. That I am remorseful and repentant, hence pray for consideration to be given a second chance.**
- 2. That I am an orphan with young children to take care of.**
- 3. That my children have none to take charge of their subsistence needs.**

The complainant is aged fifteen (15) years and in standard six (6) went to a funeral on 13th May 2011. She said that she went to a disco with other girls. She met the appellant who took her to his house and had sexual intercourse with her. He later locked her in his house for two (2) days. Later he took her to his grandmother. She stayed there for two weeks till her parents and others came to her rescue. She was

taken to Mageta Patrol Base and later to Wakawaka hospital where she was given a P3 form by the police which was filled at Got Agulu hospital. She vehemently denied that she had agreed to have sex with the appellant and that she was detained against her will.

PW2 is the complainant father. He described how when he arrived home on 13th May 2011 his daughter was missing. He was told that she had gone for a funeral. He later traced and found her at the appellants house.

PW3 Sammy Okumu is the clinical officer who filled the P3 form. His conclusion was that her hymen was torn and as a result of penetration. She was HIV negative.

PW4 is the police officer who carried out the investigation and charged the appellant with the aforesated offences.

In his unsworn evidence the appellant conceded that indeed he spent time with the complainant. He admitted having sexual intercourse with her.

The appellant's grandmother DW2 confirmed this position. She saw the girl but didn't know her age. She said that the appellant told her that the girl was her friend.

I have carefully read through the entire proceedings and the grounds of appeal advance by the appellant. I have equally listened to his oral submission in court. One thing that runs through this case is that the appellant had sexual intercourse with the complainant for several days. The estimated age of the minor was fifteen (15) years. The learned trial magistrate put it at sixteen (16) years.

The prosecution therefore establishment the ingredients of Section 8 (1) of the Sexual Offences Act namely that the complainant was a child and that there was a penetration. The trial Magistrate after determining that the age of the child felt between fifteen – sixteen years opted for Section 8 (4) of the Sexual Offences Act and not Section 8 (3). In my opinion there was no miscarriage of justice. The age of the complainant was not ascertainable as there were no documentary evidence and thus if the age exceeded fifteen (15) years then Section 8 (4) was proper.

As earlier own alluded the appellants in this appeal is basically mitigating. I don't think there is much option left for this court to do. The law is very clear. The complainant is a minor. The appellant although the age was not given is an adult. He had an upper hand against the complainant. The act of detaining her in his house and using her as a sexual object is abhorred. There is no reason to belief that the appellant did not know that the complainant was a minor. In her evidence she said that when the appellants goes away during the day she would play with other children. Surely, this was a child. A wife cannot do this. Consequently, I shall dismiss this appeal and order that the appellant shall serve fully the sentence imposed upon him.

Order accordingly.

Dated, signed and delivered at Kisumu this 5th of March 2012

H. K. CHEMITEI
JUDGE

In the presence of:

.....for State

.....Appellant in person

HKC/aa0