



JACKTONE OCHIENG OKWETO.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

(Being an appeal from the conviction and sentence of the Senior Resident Magistrate's Court at Homabay,

Hon. J. Ongondo (Resident Magistrate) in Criminal Case No. 1123 of 2009 dated 18th March, 2010)

The appellant, **Jacktone Ochieng** was charged with the offence of defilement contrary to section 8(1) as read with section 8 (3) of **Sexual Offences Act, 2006**. As per the particulars of the charge, he was said to have committed the offence on the 17th day of July, 2009 at {*particulars withheld*} in Suba District within Nyanza province. The complainant one **L. A.** was aged 15 years. The appellant faced an alternative charge of committing an indecent act with a child contrary to section 11 (a) of the **Sexual Offences Act, 2006**.

The brief summary of the case is that on 17th July, 2009 around 5.00pm a neighbour named **Mama S.** alias **Nyaroo** sent her daughter, one **L.** to ask the complainant to go to her house. The complainant obliged and on arrival, the said **Mama S.** asked her to speak to the appellant. She refused turned to go back to her home. The appellant followed her out, grabbed her on the way and defiled her. On learning of the incident, the complainant's mother (PW2) reported the matter to the area chief, the children's officer and to Mbita Police Station.

The complainant was examined at Suba District Hospital by one **Philip Sigei**, clinical officer (PW3). He found that the complainant had a broken hymen and soft vaginal tissue consistent with recent penetration. It was PW4's (volunteer children's officer) testimony that there were attempts by the appellant to compromise the appellant's mother so that she does not press charges against him by offering her Kshs.10,000/=. The appellant was charged and convicted. The Resident Magistrate's court Homabay sentenced him to life imprisonment.

The appellant has now appealed against both conviction and sentence. The grounds of appeal as far as can be gleaned from his home made petition and written submissions are that he was charged instead of one **Omumbo** who was named by the complainant; that there were no eye witnesses; and, that the charges were instigated by the complainant's family who had a long standing dispute with his family over land; and, that the trial court relied on hearsay evidence.

The appeal was opposed by the state through learned counsel **Mr. Mutai**. He submitted that the conviction was safe. The complainant knew the appellant and the medical evidence confirmed that the complainant had been defiled.

Sitting as a first appellant court, I am under duty to re-evaluate the evidence afresh with a view to reaching an independent decision, bearing in mind that I do not have the benefit of seeing and hearing

witnesses. See **Pandya –vs Republic (1957) EA 336. See also Okeno –vs- Republic (1972) E.A 32.**

The prosecution case turned on the evidence of the complainant, PW1. PW1 told the court how she was lured to a neighbour’s house (**Mama S.**) where the appellant was. She described vividly how the appellant followed her out, set upon her on the way home and forced her to have sexual intercourse with him. The court was satisfied after a *voire dire* examination that the complainant was able to give an unsworn statement. The complainant knew the appellant by his popular name **Omwambo**. He was not a stranger to her.

PW2, the complainant’s mother testified that when she learnt what had happened to her daughter, she went and confronted the neighbour **Mama S.** and the appellant. She also reported the incident to the clan elder, the chief and the paralegal children officer. The medical report (P3) was filled by PW3, Clinical Officer at Suba District Hospital on 29th July, 2009. He observed that the hymen was broken and that there was tenderness on the vaginal area. In his testimony he stated that there was evidence of penetration though the same could not be linked to the appellant. The age of the injuries was 2 days. In his examination he also observed that the complainant had changed her clothes and wore washed ones. The age of the complainant was stated to be 15.

The appellant has faulted the medical evidence that it did not link him to the offence. I agree. However the evidence did indeed demonstrate that there had been penetration. Further the appellant has alleged that the charges against him were a frame up arising out of a land dispute. The record shows that he raised this allegation at the trial. It was found not to hold water. I have re-evaluated the evidence in totality. I agree with the trial court that the alleged frame up does not hold water.

In opposing the appeal, **Mr. Mutai** submitted before court that there was an attempt by the appellant to compound the offence by offering to pay Kshs.10,000 so to the complainant’s mother to stop her from pressing charges. I observe that the record bears out this allegation. However since the prosecution did not deem it fit to prefer relevant charges against the alleged perpetrators it cannot now at the appellate stage raise the issue as it would not be lawful for the court to entertain the same.

Having re-evaluated the record, I find that the charge against the appellant was proved and that he was properly convicted on sound evidence. In the premises, I uphold the judgment of the lower court.

The appellant was sentenced to serve 20 years’ imprisonment. Section 8 (3) of the **Sexual Offences Act** provides a minimum sentence of 20 years upon conviction. Harsh as the sentence may be I find that it was the only sentence provided by law.

The appeal is dismissed. The appellant shall serve the sentence imposed by the trial court.

Judgment dated, signed and delivered at Kisii this 25th day of September, 2012.

R. LAGAT-KORIR
JUDGE

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In the presence of:

Jacktone Ochieng Okweto: Appellant (present/not present)

..... for respondent

..... court clerk

R. LAGAT-KORIR
JUDGE