



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEAL NO.141 OF 2010

SAMMY ALARO EKIRAPA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

**[APPEAL FROM ORIGINAL CONVICTION AND SENTENCE IN BONDO CRIMINAL CASE
NO.9 OF 2010 – J. W. ONCHURU RM]**

J U D G E M E N T

The appellant herein was charged with the Offence of Defilement Contrary to Section 8(3) of the Sexual Offences Act No.3 of 2006. The particulars being that on the 30th of December, 2009, he the appellant **SAMMY OLARO EKIRAPA** at about 4 p.m. in Rarieda District within Nyanza Province, unlawfully and intentionally committed an act which caused penetration with **W.A.O.** a child of the age of 13 years. He also faced an Alternative Count of Indecent Act with a child contrary to Section 11(1) of the said Act. The appellant pleaded not guilty, was tried, convicted and sentenced to 20 years imprisonment.

Being aggrieved by the judgment of the trial court in **SRMCC No.9 of 2010** he appealed to this court on the following grounds:

- 1. THAT the learned trial magistrate erred in both law and facts when he appreciated the evidence of PW1 that she was defiled by the accused, now appellant.**
- 2. THAT the learned trial magistrate erred in both law and facts when he admitted the medical report that was produced in court which was inconsistent with the charge. Further, there was no specimen extracted from PW1 for laboratory analysis that marched that of the appellant's to confirm complicity of the appellant.**
- 3. THAT the learned trial magistrate erred in both law and facts when he convicted the appellant relying on the evidence of PW4 and PW5 not observing that the appellant worked for PW1 as a shamba-boy and that a grudge existed between us arising from my unpaid wages.**
- 4. THAT the learned trial magistrate erred in both law and facts when he relied on evidence by PW3 (investigation officer).**
- 5. THAT the learned trial magistrate erred when he observed that the case was proved beyond reasonable doubt.**
- 6. THAT the magistrate further erred when he failed to consider the defense statement by the appellant which was strong to earn an acquittal.**
- 7. THAT I pray to be supplied with a certified copy of the trial court proceedings to enable me raise more reasonable grounds of appeal.**

The appellant also filed a supplementary petition which emphasized the earlier grounds mainly.

At the hearing the appellant relied on written submissions whose salient features are:

- **prosecution evidence was full of contradictions;**
- **the prosecution's case was not proved to the required standards;**
- **investigations were not adequate;**
- **the trial court disregarded the defence evidence.**

On its part the prosecution being represented by **Mr. P. Kiprop** opposed the appeal on the following grounds: That the appellant defiled the complainant when they were left at the home together. That the evidence of the complainant was corroborated by the evidence of **PW2** and the **P3** form. Further that the evidence of **PW1** the complainant was credible. He argued that the appeal lacks merit.

This being the first appellate court it has to re-consider the evidence on record, re-evaluate and analyse the same in order to arrive at an independent conclusion. See **Republic versus Okeno 1972 E.A.** at **P 32**.

The prosecution case briefly is that on the 30th of December, 2009 the appellant who was a shamba boy at the complainant's home defiled her at about 4 p.m. The 2 had been left alone at the home. The appellant held the complainant while she was sweeping the kitchen. He then defiled her. The complainant was at the time of the incident aged 13 years. The complainant reported to her mother who informed the complainant's father an assistant chief who in person caused the appellant to be arrested the next morning.

In order to arrive at a decision I have to consider the evidence on record.

PW1 W.A.O. the complainant aged 13 years a standard 6 pupil at K. Primary School informed the court that on 30/12/2009 at around 4 p.m. while at home with the appellant who was a shamba boy in the absence of her parents, and while sweeping the kitchen the appellant got hold of her and took her to bed, he pulled her panty removed his trouser and inserted his penis in her vagina. She felt pain but was unable to scream as the appellant held her moth with his hand.

She later informer her mother. Her mother informed her father and also checked her. The appellant was arrested the next day at 6 a.m.

The complainant was taken to hospital examined, treated and a P3 form signed at Bondo District Hospital.

PW2 Kipkurui Ngeno, a clinical officer at Bondo Hospital produced a treatment book and the **P3** form. He told the court that **PW1** was at the hospital on 30/12/09. He examined her, saw no blood stains. The genitalia was normal, with visible vaginal discharge. The hymen was perforated, no lacerations, had whitish discharge with a foul smell. A vaginal swap revealed live spermatozoa and numerous bacteria cells sign of infection.

The child appeared traumatized. There was evidence that she was defiled.

PW3 B.A.B. the complainant's mother stated that on the 30th of December, 2009 at about 11 p.m. **PW1** informed her of the alleged defilement by the appellant. She informed her husband who asked her to check the child. She did and found a torn panty and saw whitish discharge from the complainant's vagina. She reported to her husband who had the appellant arrested.

PW4 S.O.B. an assistant chief and father to the complainant stated that on 30/12/2009 at about 11 p.m. as he was about to sleep the complainant knocked on their bedroom door asking for **PW3**. She learnt from **PW3** that **PW1** was traumatized as she had been defiled by the appellant during the day. He directed the wife to examine her. That **PW3** did so and saw some discharge in **PW1's** private parts.

At around 4 a.m. he went to M. A.P. camp and brought administration police who arrested the appellant. His daughter on the other hand was taken to M. hospital and later Bondo District hospital and was treated and issued with a **P3** form. The appellant had worked for him for 1½ months as a shamba boy for Kshs.2,500/=.

PW5 P.C. James Ledama of Aram Police Station recalled that on 30/12/2009 he received a suspect from two administration police having been arrested for the offence of defilement. He visited the scene and recovered the torn white panty which the girl wore at the time of the incident. He established the age of the victim. He produced her birth certificate as exhibit. He issued **P3** form to the complainant. He recorded statements and preferred the charge.

PW6 A.P.C. Susan Apudi of Manyando A.P. Camp also recalled that on 31/12/09 while at the station she received from **PW4** that his daughter was defiled. They proceeded to the home of **PW4**, and arrested the suspect whom they handed to Aram Police Station.

The court put the appellant on his defence. On his part, he stated that he worked at **PW4**'s as a shamba boy. That on 30/12/2009 he did his work on the same day he informed his employer that he wanted to go home. His employer said nothing. On the 31/12/2009 as he returned home from his night duty he found 3 officers who arrested him. He did not commit the offence.

From the above evidence of **PW1, PW2, PW3** and exhibit **P1 & 2** there is clear evidence that **PW1** was defiled. **PW2** saw a whitish discharge. **PW2**, a clinical officer found evidence of defilement and traces of spermatozoa when he took a vagina swab from **PW1**. This indeed was the finding of the learned trial magistrate which I concur with. **PW1** was consistent in her evidence on this. **PW2** confirmed this. **PW2** would have had no reasons to lie as he merely examined **PW1** as part of his duty at the Bondo Hospital.

The question for consideration is whether there is evidence to the required standard linking the offence to the appellant. There is a danger in relying on the evidence of a single witness who happens to be 13 years old. I warn myself of this danger as her evidence is against the appellant's denial. I remind myself of the need to have corroboration, however I have also considered that in the absence of corroboration I must be convinced that the complainant is truthful.

The appellant did not controvert the fact that complainant and himself were left at home on their own. I find that when **PW1** reported to her mother she gave the name of the appellant as the defiler. She was consistent in all her subsequent reports, to **PW4** and 6 who are police officers. In deed **PW2** corroborated her complaint. **PW1** appeared as was observed by the trial court, "**credible and honest**" and the court believed her. I have no reason to doubt the trial court's finding and hereby concur with the same. I equally do not believe the evidence by the appellant, he failed to cross-examine **PW4** on the allegation of a grudge between them and appears to have raised the same as an afterthought. In this regard I concur with the trial court that it came as an afterthought.

All in all I do concur with the trial court's conviction and therefore have no basis for upsetting the same.

The sentence in my view is well within the law and I need not interfere with the same either.

For the reasons above therefore the appeal is dismissed.

Dated and delivered this 23th day of September 2011

ALI-ARONI
J U D G E

In the presence of:

.....**State Counsel**

.....**Appellant in person**