



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
HCCRA NO.52 OF 2011

(From the judgement of M.W. NJAGI Resident Magistrate in Busia criminal case No.867 of 2009)

EMMANUEL ONYANGO ODIDOAPPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G E M E N T

The appellant Emmanuel Onyango Odido was convicted by Busia Senior Principal Magistrate of the offence of defilement contrary to Section 8 (1) of the Sexual offences Act. He sentenced to serve thirty years imprisonment.

The petition of appeal challenges both the conviction and sentence. They are two main grounds:-

- a) that the offence was not proved to the standards required;**
- b) that the defence was not considered.**

The State opposed the appeal on grounds that the conviction was safe and sentence lawful.

The facts of the case are that the complainant, PW1 and her younger brother PW2 went to the house of the appellant who was a neighbour to borrow a matchbox for lighting a fire. The appellant was in the house and he asked PW1 to enter while PW2 remained outside.

After some sometime, PW1 came out of the appellant's house crying. The complainant had been defiled by the appellant. PW1 was threatened with death if she ever disclosed the incident to anyone. The appellant also promised PW1 that he would go to Busia town and bring her ksh.200/- cash. PW1 went home but feared to inform her mother of what had happened. Three days later, the accused gave the complainant sh.100/- to go and buy some snacks. When the mother saw PW1 buying snacks (mandazi) she inquired where PW1 had gotten the money. PW1 then narrated the story of the appellant to her mother PW3. PW1, was taken to the police and then to the hospital for examination. She was diagnosed with a sexually transmitted disease. The accused was arrested, examined and found infected with gonorrhoea.

The evidence of PW1 on the sexual assault by the appellant was consistent and detailed. PW2 was waiting outside the house of the appellant when the incident occurred. He testified of how PW1 entered the house of the appellant and how the appellant closed the door. The two remained inside as PW2 aged five (5) years waited outside. PW2 then saw his sister PW1 come out of the house crying. PW2 accompanied his sister to a hotel to buy mandazi three (3) days later using sh.100/- note given to her by the appellant. It was in PW2's presence that PW1 disclosed to her mother the source of the cash.

PW3 testified on how she found her two children at a shop buying mandazi. She demanded to know where they got the money and PW2 disclosed to her that the cash was given by the appellant. PW3 reported the matter to the police after she learnt about the ordeal her daughter had experienced.

PW4 the clinical officer testified that PW1's lower abdomen was tender with pain and so was her private parts. There was whitish discharge in her genitalia and the hymen was broken. The complainant and the appellant were infected with a sexually transmitted disease. The treatment notes and the P3 forms were produced in evidence.

PW5 was the investigating officer who charged the appellant with the offence.

PW6 is the one who sold snacks to PW1 in her hotel. She corroborated the evidence of PW1, PW2 and PW3 on the issue of the money given by the appellant and the snacks bought.

In defence the appellant said there was a long-standing land dispute between him and the complainant's parents which led the parents to frame up the case against him.

PW7 Evalyne owned a shop at N[.....] village. She testified on how PW1 went to buy snacks at her shop. She was present when the mother of PW1 demanded to know where her daughter got the money. The story was narrated to PW2 in presence of PW7. This evidence rules out any framing up of the case against the appellant. The appellant and PW7 had no grudge against each other. The witness therefore had no reason to lie to the court. The trial court found PW7 a truthful witness. The evidence of PW1 and PW2 was unsworn because the witnesses were children of tender age. However, it was corroborated by that of PW3, PW4 and PW7. The medical evidence left no doubt that the appellant was infected with gonorrhoea and that he infected PW1 in the course of the sexual intercourse. The appellant said there was no bad blood between him and PW1. The trial court considered the defence of the appellant in his judgement and rejected it as a sham.

The age of the complainant was established as ten (10) years through the birth certificate and the P3 form.

I find that the conviction was based on cogent evidence and that it was safe. The same is hereby upheld

Section 8(2) of the Sexual offences Act no.3 of 2006 provides for life imprisonment where the complainant is aged eleven years and below. The appellant was sentenced for thirty (30) years which is not a lawful sentence. It is observed that the act of the appellant who is an old man was beastly and left the complainant greatly traumatized.

I find that this appeal has no merit and I dismiss it accordingly. The sentence of thirty years imprisonment is hereby set aside and substituted with life imprisonment. I hereby so order.

F.N. MUCHEMI
JUDGE

Judgement delivered and dated this 13th day of December 2011 in the presence of the appellant and the State Counsel Mr. Okeyo.

F.N. MUCHEMI
J U D G E