



ISACK OJUANG OGOYO.....APPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G E M E N T

Isack Ojuang Ogoyo, (the appellant herein) was convicted and sentenced to life imprisonment by the Principal Magistrate at Siaya for the offence of defilement of a girl under the age of 18 years contrary to section 9 (1) of the Sexual Offences Act No. 3 of 2006.

The particulars of the charge were that on the 25th March 2007 at A[PARTICULARS WITHHELD] sub-location Siaya District, Nyanza Province had carnal knowledge of **S.A** a girl aged 10 years.

There was an alternative count of sexual assault contrary to section 5 (1) (b) of the Sexual Offences Act No. 3 of 2006 in that on the 25th March 2007 at Siaya District, Nyanza Province, unlawfully and indecently assaulted **S.A**, a girl of the aged 10 years by touching her private parts.

Being dissatisfied with the conviction and sentence, the appellant has preferred four grounds of appeal contained in the memorandum of appeal filed herein on 23rd June 2008 and two additional grounds contained in the additional grounds of appeal filed herein on 13th May 2009 without leave of the court. Leave was subsequently granted on the 9th February 2009 when the appeal first came up for hearing.

At the hearing, the appellant represented himself while the Learned Senior State Counsel, M/S Oundo, appeared for the respondent.

Having heard the rival arguments for and against the appeal, this court is obliged to reconsider the evidence and make its own conclusion bearing in mind that the trial court had the advantage of seeing and hearing the witness **(see, Okeno – VS- Republic [1972] EA 32)**.

The prosecution case arose from the facts that follow:-

At the material time, the child complainant **S.A (PW 2)** was aged 10 years and a class three pupil . She was at home on the material date at about 11.00 a.m when the appellant whom she knew as Baba Isaac and who was a neighbour came to her house where she lived with an aunt and asked her to fetch for him some bananas. She was alone in the house at the time. Her aunt had gone to church. She picked some bananas and took them to the appellant's house.

She found the appellant alone. He forced her into his bed and removed her underpants. He thereafter removed his trouser and inserted his penis into her vagina thereby causing her pain. She later returned to her house and found that her aunt had not returned from church. She reported the matter to her sister called Annah on the following day. She also reported to her aunt who took her to the hospital and then to the police.

The aunt **M. O (PW 1)** said that the complainant was her late brother's child and an orphan who lived

with her. She (complainant) reported to her (PW 1) that she had been defiled by the appellant who is her (PW 1's) brother-in-law.

She (PW 1) noticed that the complainant had difficulties in walking. She examined and found that the complainant had injuries on her vagina. She took the complainant to hospital and reported the matter to the police.

P.C. Nelson Mukabwa (PW 3) received the necessary report at Yala police station and later arrested the appellant. He tendered in evidence the medical examination report (P3 form) filled and signed by a clinical officer who was not at the time available.

The appellant did not raise any objection to the production of the P3 form by **P.C. Mukabwa (PW 3)**. He freely accepted the production.

From the foregoing evidence, the appellant was placed on his defence. He elected to make an unsworn statement and had no witness to call. He stated that he was in his farm on 28th March 2007 when some people came there and alleged that he had defiled a girl. He was taken to the Chief's camp where he met the complainant whom he did not defile.

The learned trial magistrate considered the entire evidence adduced at the trial and found that the prosecution had proved its case beyond reasonable doubt. He then convicted the appellant on the main count of defilement and sentenced him accordingly. He carefully considered the evidence of the child complainant (PW 2) and found that it was credible and steadfast enough to sustain a conviction.

In his grounds of appeal, the appellant questions the credibility of the complainant's evidence and the failure by the prosecution to call a medical officer to testify. He further questions the non-production of exhibits such as the complainant's undergarments and the failure by the trial magistrate to consider his defence in which he raised the issue of a grudge with his brother over a piece of land.

The appellant contends that section 77 of the Evidence Act was not complied with and that his constitutional rights were violated by being held in police custody for more than twenty four hours.

The Learned Senior state Counsel, contended that the medical examination confirmed that the offence of defilement was committed and that the consistency in the evidence of the victim showed that the appellant was responsible.

The learned counsel further contended that the appellant's defence was misplaced and urged this court to dismiss the appeal.

After having considered the evidence adduced before the trial court in the light of the grounds for and against the appeal, this court is satisfied that the offence of defilement was indeed committed against the child complainant by the appellant.

The medical evidence vide the P3 form proved the fact of defilement. This was a confirmation of the complainant's evidence to that effect and the evidence of the complainant's aunt (PW 1) to the effect that she saw injuries on the complainant's genital organs.

Although, the P3 form was tendered in evidence by a police officer (PW 3) there was no prejudice occasioned to the appellant. He consented to the production of the form by the police officer rather than the medical officer who could not be available at the time. He therefore waived his right to cross-examine the author of the medical report. He could not therefore be heard to complain at this juncture. Indeed, the learned trial magistrate considered the issue in his judgment and observed as follows:-

“When P.C. Mukabwa testified on 8-5-2008 the clinical officer was on leave and therefore could not be in court on that day. PW 3 knows his signature.

The accused did not object to his exhibition of the P3 form and I think this was in order pursuant to section 77 of the Evidence Act”.

The appellant was well known to the complainant. This is a fact which was not in dispute even though the appellant contended in his defence that he did not defile her.

The learned trial magistrate saw the child complainant. He was in a better position to judge her credibility in comparison to this court. He believed her evidence and made a finding that it was the appellant and not any other person who defiled her. This court would have no reason to depart from that finding.

The appellant never raised the issue of a grudge with his brother over a piece of land at the trial. The issue was raised in this appeal and therefore smacks of an afterthought.

In essence, on the basis of the evidence, this court is of the considered opinion that the appellant’s conviction by the trial court was lawful and proper.

As to the alleged violation of the appellant’s constitutional rights under section 72 (3) (b) of the Constitution of the Republic of Kenya, the lower court record shows that the appellant was arrested on 30th March the 2007 and was later taken to court on 3rd April 2007 when the plea was taken.

A perusal by this court of 2007 calendar indicated that the 30th March 2007 was a Friday. The earliest the appellant could have been taken to court was the following Monday i.e. 2nd April 2007. However, he was taken to court on 3rd April 2007. this was a delay of about one day which may be countenanced by this court and left at that in terms of the decision of the Court of Appeal in the case of **Paul Mwangi Murunga –VS- Republic Criminal Appeal No. 35 of 2006 at Nakuru (unreported).**

In the end result, this appeal is without merit and is dismissed in it entirety.

The sentence of life imprisonment is lawful and mandatory under section 8 (2) of the Sexual Offence Act No. 3 of 2006.

[Delivered and Signed at Kisumu this 24th day of June 2009].

J.R. Karanja

J U D G E

J.R.K/va