



**MOSES OMONDI ODUOR..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*[From original conviction and sentence in Criminal Case number 46 of 2009 of the Senior Resident Magistrate's Court at Ukwala]*

## JUDGMENT

The appellant, **Moses Omondi Oduor**, was charged with defilement contrary to Section 8 (3) of the Sexual Offences Act number 3 of 2006 in that on the 8<sup>th</sup> February 2009 in Siaya District, had carnal knowledge of **J.A.O**, a girl of the age of fifteen (15) years.

In the alternative, the appellant was charged with indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act number 3 of 2006 in that on 8<sup>th</sup> February 2009 in Siaya District, unlawfully and indecently assaulted J.A.O, a girl of the age of fifteen (15) years by touching her private parts namely “**vagina**”.

The appellant appeared before the Resident Magistrate at Ukwala and after pleading not guilty to both counts was tried, convicted and sentenced to serve thirty (30) years imprisonment for the main count.

Being dissatisfied with the conviction and sentence, the appellant preferred eight grounds of appeal contained in his petition of appeal filed herein on 30<sup>th</sup> April 2009. He complains of violation of his Constitutional rights by not being informed of the charge in a language understood by him and by not being informed of the right to remain silent.

Generally, the appellant complains that he was not accorded a fair trial and that the exhibits were mishandled by the prosecution and also that the P3 form was not counterchecked with the initial treatment notes. He contended that the evidence of identification against him was suspect.

At the hearing of the appeal, the appellant represented himself and contended that he was framed due to a standing grudge between himself and the complainant's parent over land issues.

The Learned Senior State Counsel, **Miss Oundo**, represented the respondent and contended that the complainant a girl aged fifteen (15) years was examined and treated following the alleged incident and a P3 form was duly completed.

The Learned State Counsel further contended that the identification of the appellant was not disputed as

he was a person previously known to the complainant.

The learned State Counsel therefore called for the dismissal of the appeal.

In terms of the decision in the cases of **Okeno vs Republic [1972] E. A. 32 and Achira vs Republic [2003] KLR 707**, the obligation of this court is to re-consider the entire evidence and arrive at its own conclusion but bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

The prosecution case was founded on the facts that follow;

The complainant **J.A.O** also known as **M.A (PW1)** was at the material time aged fifteen (15) years old and on the material date she had gone to a nearby homestead to attend a memorial ceremony in which a musical band was in attendance. She remained there up to 4:00 a.m. On her way home, she was accompanied by C (PW2) and L (PW3) both children aged fifteen (15) years and eleven (11) years respectively and in the process a man who was also at the said ceremony pulled her dress from behind and threatened to cut and eat her.

The man was holding a panga (machete). He pulled her aside and said that he wanted to tell her something. He wanted them to go to a certain nearby place. In the meantime, C and L ran away.

The complainant indicated that the man was the appellant. He took her to a bush and ordered her to sit down. He likewise sat down and removed her clothes and inner wear. He then defiled her for about one hour while interchanging the scenes on hearing passersby. After he was done, he told her to go home. On the way she met one Jackie and informed him of what had happened. Jackie advised her to report to her parents and she reported to her mother who took her to Ambira hospital.

The complainant said that she had previously known the appellant and saw him clearly on that material date as there was full moon. She said that he was at the memorial ceremony wearing a T-shirt written “**speedo**” and a brown trouser and was intoxicated.

The appellant was arrested after the matter was reported to the police.

In a statement made on oath, **C.A (PW2)** indicated that she was a sister to the complainant and that on the material date they were heading home when a person grabbed the complainant. She (PW2) ran back to the aforementioned ceremony to inform their mother. She (PW2) said that she saw the person who got hold of the complainant as there was half moonlight and that they were only separated by a distance of three meters. She said that she had earlier seen the person at the ceremony where there was light generated from a generator. She said that he was wearing a red black T shirt and brown trousers and was holding a panga. She identified him as the appellant.

After reporting to her mother, C (PW2) and her mother returned to the scene but did not find the complainant. She (complainant) arrived home late in the morning and talked to her mother.

**L.A (PW3)** also indicated that she was a sister to the complainant and that they were together on the material date of the incident. She said that a person appeared and got hold of the complainant’s dress. She (PW3) did not see what the person was carrying. She said that they ran away and did not identify the person that night. She and C (PW2) returned to the ceremony and informed their mother. They proceeded to the scene but did not find the complainant who returned home on the following day.

L (PW3) also said that she had previously seen the person who held the complainant playing football in a school. She implied that since there was slight moonlight she was able to see him and that he was wearing a red T-shirt with black dots and brown trouser. She said that he was the appellant whom she had also seen at the ceremony where there was electric light.

**Duncan Ochieng Ogetto (PW4)**, a clinical officer at Ambira Sub-district hospital examined the

complainant thirty two hours after the incident. He said that she had initially been examined and treated at a health centre known as Holy Trinity Nangina. On examining her found a recently torn hymen and blood on the vagina. A vaginal swab was done but no spermatozoa was found. He concluded that she had been defiled and compiled the necessary P3 form.

**R.A (PW5)**, the mother of the complainant said that she was with her children at the material ceremony but at 4:00 a.m. the children left for home a short distance away. Immediately thereafter, two of the children returned to the ceremony and informed her that the complainant had been grabbed by a certain person. She (PW5) proceeded to the scene with her other children but did not find the complainant. She (PW5) was later told by a certain youth that a person called **Musa** had gotten hold of and beaten the complainant. She (PW5) did not pursue the said Musa that night due to fear. She said that the complainant arrived home at about 6:00 a.m. and informed her that she had been defiled in a bush by a person she was able to identify. Her (complainant's) clothes were dirty, soiled and blood stained. She was taken to Nangina Health Centre and the matter was reported to the police.

Rosemary (PW5) said that the culprit Musa was apprehended by his father at Funyula where he had disappeared to. She (PW5) said that he was the appellant, a bicycle taxi (boda – boda) operator at Bumala.

**P. C. Pamela Njeri (PW6)** of Ukwala Police Station received the necessary report from the complainant and her mother and handed to them a P3 form which was filled at Ambira hospital.

She (PW6) said that the appellant was arrested at Funyula and was collected from there to Ukwala Police Station.

In his defence, the appellant said that he was a farmer at Ndenga and was coming from work on the 9<sup>th</sup> February 2009 at a round 5:00 p.m. when he met two people who stopped and ordered him to alight from his bicycle. He was then hand cuffed and taken to the police station where he found a neighbour to his member of parliament. The neighbour told him that it was him that they were looking for. He was locked in the cells and later taken to court where he was informed of the charge which he denied. He contended that he was not seen at the scene by any witness and was also not tested by the clinical officer so as to be linked to the offence.

From all the foregoing evidence, this court is of the view that the basic issue that arose for determination was whether the complainant (PW1) was defiled and if so, whether the appellant was identified as the person responsible.

With regard to the charge, the evidence by the clinical officer (PW4) coupled with that of the complainant (PW1) and somehow that of her mother (PW5) who saw her in a distressful state was sufficient enough to prove that the offence was indeed committed against the complainant.

Basically, the occurrence of the offence was never disputed.

The dispute revolved around the identification of the person responsible for the offence and with regard to that, the only reliable evidence was that of the complainant (PW1).

The evidence of C (PW2) was not reliable as demonstrated during cross – examination when she stated that she did not know clearly that it was the appellant whom she had seen at the scene of the offence.

The evidence of L (PW3) was also not reliable due to her contradictory statement with regard to whether she was able to identify the culprit at the scene of the offence.

She initially said that she did not identify that person that night but again said and implied that there was slight moonlight to enable her identify the appellant as the culprit.

In her evidence, the complainant was firm that she was defiled by the appellant whom she had

previously known. She said that there was enough moonlight which enabled her see and recognize the appellant. She further said that the appellant took a duration of about an hour to execute his unlawful act.

It was therefore apparent that the identification of the appellant by the complainant (PW1) was more of identification by recognition which was solidified by favourable conditions and adequate opportunity such that the defence raised by the appellant was clearly discredited.

It is instructive to note that whereas in this appeal the appellant contended that he was framed due to an existing grudge with the complainant's parents over some land issue, the matter was never raised in his defence before the trial court.

The contention may as well be treated as nothing more than an afterthought

The rejection of the appellant's defence by the learned trial magistrate was correct. This left the complainant's evidence against him worth of credibility and reliability.

Consequently, this court does not find any reason to interfere with the appellant's conviction by the learned trial magistrate.

On the alleged violation of the appellant's constitutional rights pertaining to language, the record of the trial court clearly shows that the charge was read over and explained to the appellant in the Dholuo language which he understood. In fact, he replied in the same Dholuo language.

In any event, there was interpretation into English, Kiswahili and Dholuo provided by a court clerk.

The appellant cannot therefore be heard to allege violation of his said constitutional right. On the sentence of thirty (30) years imprisonment imposed by the trial court, Section 8 (3) of the Sexual Offences Act provides for a minimum sentence of twenty (20) years imprisonment.

The sentence imposed was therefore lawful. However, for a first offender, the sentence was rather excessive and has to be slashed to the minimum prescribed by the law i.e. twenty (20) years imprisonment.

All in all, the appeal is dismissed but instead of thirty (30) years imprisonment the appellant will serve twenty (20) years imprisonment.

Ordered accordingly.

**Dated, signed and delivered at Kisumu this 30<sup>th</sup> day of November 2009**

**J. R. KARANJA**

**JUDGE**

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