



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
(CORAM: OJWANG, J.)
CRIMINAL APPEAL NO. 205 OF 2007

-BETWEEN-

PETER ODHIAMBO ONYUONGO.....APPELLANT

-AND-

REPUBLIC.....RESPONDENT

(An appeal from the Judgement of Senior Resident Magistrate M.W. Mwai dated 13th July, 2006 in Criminal Case No. 720 of 2006 at Limuru Law Courts)

JUDGEMENT

The appellant was charged with defilement of a girl contrary to s.145(1) of the Penal Code (Cap.63, Laws of Kenya). The particulars were that, on 24th April, 2006 at *[Particulars Withheld]* Village in Kiambu District within Central Province, the appellant had carnal knowledge of **L D I**, a girl under the age of 13 years.

The appellant faced the alternative charge, under s.144(1) of the Penal Code, of indecent assault on a female contrary to s.144(1) of the Penal Code. The particulars were the same as in the main count.

The complainant (PW1) testified that on 24th April, 2006 she went to the appellant's house to get a shared toilet key; and when, later, she returned the key, the appellant forced her into his bedroom; he removed the complainant's clothes, including her underwear, and defiled her. She experienced much pain, during the sex act. The complainant's mother (PW2) happened to be passing by the appellant's house at the material time, and she noticed the complainant's slippers lying by the door. The appellant was then standing by his door, and when asked about the said slippers, he denied knowledge of the owner. PW2 got suspicious, pushed the complainant aside and got into his house, finding the complainant sitting on the appellant's bed. The appellant at the time became vituperative and hurled insults at PW2, who reported the matter to Government officials, and had the complainant taken to hospital for check-up. PW3, **Dr. Githuka** examined the complainant and found her hymen torn, her genital walls inflamed, and that she had a tear at the vaginal entry. A swab of the complainant's vaginal fluid was taken, tested, and found to contain spermatozoa.

PW4, **Police Constable Mark Kariuki** re-arrested the appellant after the appellant was taken to the Police station by the local Assistant Chief. PW5, **Police Constable Lydia Rikenye** conducted investigations, and

charged the appellant herein.

The appellant gave an unsworn defence and called no witness. He said he had met the complainant at a bar, and they agreed she would go to his house so they have sex. He denied any knowledge that the complainant was a child attending school.

The learned Magistrate found the complainant's testimony to be truthful and duly corroborated. In particular, the trial Court noted that PW2 had found the complainant sitting on the complainant's bed, and no explanation had been proffered for that state of affairs in which only the complainant and the appellant were in the house. The Court noted that the medical evidence showed that the complainant had, at the material time, been involved in sexual intercourse, in the course of which she took in spermatozoa, and sustained injury and damage to her private parts including her hymen. The learned Magistrate remarked: "Clearly therefore there was penetration [and, indeed] the accused also conceded that he had sexual intercourse with [PW1] on that date."

The Court dismissed the appellant's line of defence, that the complainant had consented to sex. The learned Magistrate stated:

"Under the section [whereunder the charge was brought], consent is not an issue. The complainant is a minor and consent does not, therefore, offer a defence. Even if [the] accused may claim that he did not know that the complainant was under-age, that too would not stand. The complainant is aged 13 years. We saw her in Court; her body is that of an ordinary 13-year-old girl. The accused [would clearly have been] able to tell that the complainant is a child. Further, [the] accused and [the] complainant are neighbours. The accused even said he has seen the complainant grow. Really, [the] accused had no excuse. His defence, therefore, lacks merit and the same is rejected."

The appellant was treated as a first offender, his mitigation statement taken into account, and he was sentenced to a 15-year term of imprisonment.

In his grounds of appeal, the appellant contended that the evidence against him was uncorroborated; that the trial Magistrate had failed to attach due weight to his defence; that the sentence imposed was harsh and excessive; and that proof-beyond-reasonable doubt had not been attained. On the day the appellant came to Court for the hearing of this appeal, he brought with him written submissions, as well as new grounds of appeal: one of these being that he had been held in Police custody for longer than 24 hours, before being charged in Court, and that this was in violation of rights-guarantees in s.72 of the Constitution; and the other being a mere restatement of his line of defence before the trial Court – that "the complainant had consented to the act."

Learned counsel, *Ms. Gateru* contested the appeal, and urged that there was safe evidence on record to sustain the conviction; the appellant had been positively identified as the one who defiled PW1, a thirteen-year-old girl attending school and at the Std. 7-level; PW1's testimony on the sex act had been specific and detailed – the appellant removed her underpants, unzipped his trousers, lay over her, penetrated her, and she felt much pain; and this testimony was corroborated in material detail by PW2 who entered the house that was the *locus in quo*, and found the complainant sitting on the appellant's bed; and the medical evidence well confirmed the account on defilement. Counsel submitted that sex in those circumstances, in law, amounted to defilement. She urged that a sentence of 15 years in jail was not harsh or excessive – especially as the law provided for up-to life imprisonment, for such an offence.

The foregoing analysis logically reveals how the incident which was the subject of the charge took place. The main thrust of the evidence is clear and uncontroverted: PW1, a young girl of 13 years of age, was dragged on to the appellant's bed, by the appellant himself, and he lustfully and off-handedly stripped off her clothing, and sexually penetrated her; indeed, he did not deny the fact of penetration. Yet, given the complainant's age, the offence committed was defilement as charged. There was no mistake in the trial Court's findings; and the appellant must know he was rightly convicted.

I dismiss the appeal, uphold the conviction, and affirm the sentence as imposed by the trial Court in its discretion.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 29th day of September, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Respondent: Ms. Gateru

Appellant in person