



REPUBLIC OF KENYA



KENYA LAW
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**Odhoa v Republic (Criminal Appeal E004 of 2020)
[2023] KEHC 17958 (KLR) (22 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17958 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CRIMINAL APPEAL E004 OF 2020
SM GITHINJI, J
MAY 22, 2023**

BETWEEN

ADEN ADHOW ODHOA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from Original Conviction and Sentence in So Criminal Case No.4 of 2017 of the Principal Magistrate's Court at Hola - Hon. A.P.Ndege – PM , dated 20th September, 2018)

JUDGMENT

CORAM: Hon. Justice S. M. Githinji

Appellant in person

Ms Mkongo for the State

1. Aden Adhow Odhoa was charged in the main count with the offence of defilement, contrary to section 8 (1) as read with section 8 (3) of the *Sexual Offences Act* No 3 of 2006.
2. The particulars of this offence are that on the 29th day of June, 2017 in Tana North Sub-County within Tana River County, the appellant intentionally caused his penis to penetrate the vagina of MIJ a child aged 13 years.
3. The appellant also faced an alternative count of committing an indecent act with a child, contrary to section 11 (1) of the *Sexual Offences Act* No 3 of 2006.
4. The particulars of this offence being that on the 29th day of June, 2017 in Tana North Sub-County within Tana River County, the appellant intentionally touched the vagina of MIJ, a child aged 13 years with his penis.



5. The prosecution case is that the complainant who gave evidence as Pw-1, with her younger sister the Pw-2, were on June 29, 2017 at around 1.00 pm in the forest grazing their father's goats. Their father gave evidence as Pw-3. While grazing the goats at around the said time, the appellant herein approached them. He questioned them about camels which he was allegedly grazing. He then held the complainant who was aged then 13 years old. He fell her down under a tree. When Pw-2 saw that she escaped and rushed towards home to report the incident. The appellant tore the complainant's clothes, he recovered his and defiled her by inserting his penis in her vagina. After he was done he escaped. The complainant collected herself, gathered the goats and drove them towards home while crying.
6. Pw-2 had already reported the incident. Pw-3 rushed towards the scene with other family members. They met with the complainant along the way crying. She led them back to the scene. The place appeared disturbed and there were the assailant's footmarks. Pw-1 stated that she could recognize her assailant whom she knew before then, and even described him. Pw-3 followed the footmarks in pursuit of him. Pw-3 met with some men in a group. He informed them about the person he was pursuing. One said he was the one and explained that he was looking for his camels. Pw-3 also met a man called Awes Maalim. Awes Maalim told him he was the employer of the suspect. Pw-3 said the employee had defiled his daughter. Awes Maalim said he had employed the suspect to look after his goats and camels but was at the time escaping. Awes Maalim ordered the suspect be returned. He also advised Pw-3 to take his daughter to the hospital.
7. The complainant was taken to Bura Sub-County Hospital on 2nd July, 2017. Pw-7 filled her P3 form using a medical report from Garissa Provincial General Hospital, dated June 30, 2017. He noted that she had scratch marks along the spine. On the low limbs she had blood stains in inner thighs and fresh scratch marks on the left medial aspect of the thigh. The hymen was broken without a scar. The perineum had also blood stains.
8. Laboratory test showed urine and HVS had blood. Presence of epithelial cells was also noted. Pregnancy, HIV and VDRL tests were negative. The P-3 form was thus filled.
9. Pw-5 assessed the age of the complainant and using her body parts development, indicated she was about 13 years old. Pw-6 the area chief followed on the suspect. He was pointed to him by members of the public. He arrested him on June 30, 2017 and was presented at Bura Police Station to Pw-2. He was re-arrested. Pw -9 investigated the case and had the appellant charged with the offences carried in the charge sheet.
10. The appellant in his defence denied the offence. He alleged he was arrested while herding camels and was not informed the cause for the arrest. He had fallen ill in cells and was unable to stand and to eat prison's food.
11. The trial court evaluated the evidence and relying mostly on the evidence of Pw-1 and that of the doctor, found him guilty of the offence in the main count. He was convicted of the offence and sentenced to serve 21 years imprisonment. He was as well declared a dangerous offender and ordered to undergo 5 years supervision by police officer after completion of sentence. This would also include 2 days attendance for guidance and counselling every month, by a probation officer. Review on this to be done at the end of the 3rd year.
12. The appellant dissatisfied with the said conviction and sentence, appealed to this court on the grounds that; -
 1. The medical report presented was not authentic.
 2. The facts of the case were twisted.



3. Penetration was not duly proved.
13. The prosecution opposed the appeal and it was canvassed by way of Written Submissions. I have considered the offences in the charge sheet, evidence adduced by both sides, judgment of the lower court, grounds of the appeal and Submissions by both sides.
14. What emerges for consideration is whether the prosecution proved beyond reasonable doubt that the complainant by the time of the alleged offence was a child under 18 years old, and in this case aged 13 years; Also if there was penetration of the complainant's genital organ, namely vagina, by the appellant's genital organ namely penis; And lastly if the appellant was identified or recognized as the real culprit. This is as provided in section 8 (1) of the *Sexual Offences Act* No 3 of 2006 and held in the case of *George Opondo Odunga-vs-Republic* [2016]eKLR.
15. On the first issue the complainant in voire dire stated she was 14 years old. She however did not indicate her year of birth, date and month. Her father the Pw-3 in this case stated he could not remember the date of her birth but knew she was 13 years old. Pw -5 who did age assessment using her body parts development, placed her age at about 13 years. Assessing the available evidence on her age, and given that there is no evidence to the contrary, one can conclude safely that the complainant was a child, aged then about 13 years.
16. The second issue is of penetration. The complainant herself stated she was penetrated by the appellant, using his penis, in her vagina. What was noted by Pw-7 in the P-3 he filled using notes from Garissa Provincial General Hospital of June 30, 2017, is that there was penetration. Broken hymen and presence of blood in the vagina and areas near the genitalia, and also the presence of epithelial cells, is enough evidence of penetration. Evaluating the entire evidence in relation to the issue I find conclusive and safe evidence that there was penetration.
17. In *Bassita-vs-Uganda* SC Criminal Appeal No 35 of 1995, the Supreme Court held that; -

“Usually the sexual intercourse is proved by the victim's own evidence and corroborated by the medical evidence or other evidence.”
18. The last issue is of identification of the appellant as the real culprit. The complainant said he knew the appellant before then. She described him to Pw-3. However, Pw-3 did not disclose the description he was given. In his search for him the suspect emerged from a group of men he met and said he was the one but was after his camels. Though no identification parade was held and the appellant denied involvement at all, his cross-examination of Pw-1 shows he is the real culprit. On some issues the complainant had not disclosed during her evidence-in-chief on what had transpired during the incident, the appellant led her to disclose, to the effect that there was a physical quarrel with him where she even tried or attacked him using a stick. The appellant appears to have been driving the complainant to accept he was fixed out of that quarrel or fight. He therefore placed himself at the scene. His denial during his defence that he did not know the complainant is therefore not true. He was merely denying the real facts. I therefore find presence of sufficient and reliable evidence that he is the real culprit.
19. The conviction by the trial court is therefore proper.
20. On sentence, the minimum for the offence is 20 years. He got 21 years imprisonment which is well within the law. I find no ground to interfere with the same in favour of the appellant.
21. The bottom line is that the appeal lacks merit and is hereby dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 22ND DAY OF MAY, 2023



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S.M.GITHINJI

JUDGE

In the Presence of:-

1. The Appellant in Person
2. Ms Mkongo for the State

