



REPUBLIC OF KENYA

AT THE HIGH COURT OF KENYA

IN BUNGOMA

CRIMINAL APPEAL 24 OF 2017

AMOS ODERA SUTI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the judgment in original criminal case number 15 of 2014

Kimilili on 23.9.2020 by HON. M.A NANZUSHI)

JUDGMENT

The Appellant Amos Odera Suti was charged with the offence of defilement contrary to section 8(1) (4) of the sexual offences act No. 3 of 2006. The particulars of the charge were that on the 24th October 2014 in Mt. Elgon within Bungoma county, intentionally caused his penis to penetrate the vagina of AW a child aged 8 years.

He also faced an alternative charge of committing indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. Particulars of that charge were that on the 24th October 2014 in Mt. Elgon within Bungoma county, intentionally inserted his penis into the vagina of AW a child aged 8 years.

The evidence before the trial court was that PW 1 is AW a student in class 2. She testified that on 27.10.2014 left school at 1.10pm and went home where she found her mother. After having lunch she went to fetch water at Muchule place and later went to play with D in their home. She testified that Odera called her and gave her Kshs.20/= to go and buy Mandazi and Juice Cola. She testified that the appellant held her hand and took her to his house and removed her cloths. He removed his thing and did bad manners to her and she felt a lot of pain. She testified that he told her not to make noise. She went back home and did not tell her mother. She testified that she was sent to the posho mill and while there Mama Rukia told her mother that she had been defiled the way she was walking. PW 1 explained to her mother what happened and she was later taken to the hospital. She testified that accused/appellant is their neighbor.

PW2 CW a pastor with [Particulars Withheld] Church. He recalled that on 29.10.2014 at around 4.00pm he had come from fellowship and found a crowd in his compound. He testified that he enquired what was the problem and he was informed that complainant had been defiled. He testified that village headman came to the scene and complainant revealed accused/appellant had defiled her.

PW3 RC. She recalled that on 29.10.2015 while at home she sent her daughter J to the Posho mill and she came back in the company of the complainant. She testified that the complainant was wailing and on inquiry she said she had a wound. She testified that she and a neighbor known as Dorcas examined the complainant and they saw swollen vagina and there were mucus substance. She testified that the complainant informed them she was defiled about 2 days by the accused in the dock.

PW4 Andrew Etyang a farmer testified that he comes from Kipchiria and he is in charge of 10 houses. He recalled that on 29.10.2014 at around 8pm he was told that a daughter of pastor had been defiled. He recalled that on interrogation the victim implicated the accused. He arrested the accused and was later escorted to Kapsokwony Police Station.

Pw5 Edward Wafula Simiyu testified that he is medical officer at Mt. Elgon sub-county hospital. He testified that complainant was brought to the facility in 2014 with allegation of having been sexually assaulted by one known to her. He testified complainant was 8 years old and on examination of her genital she had bruises on the labia majora. The hymen was broken. She had pus cells which indicated an infection and had mucus in the vagina. He produced P 3 Form.

Upon close of prosecution case the appellant was placed on his defence and he gave sworn evidence and called his witness. The accused testified that in January, 2013, complainant father approached him for help to cultivate his farm. He refused and he threatened to revenge by having him imprisoned. He testified that the complainant even chased him while armed with a panga.

It is upon this evidence that the trial court convicted and sentenced the appellant to life imprisonment. Having been dissatisfied with that decision the appellant preferred this appeal on grounds that:

- i. The trial magistrate erred in law and fact when he sentenced and convicted the appellant without collaborating facts.*
- ii. That the trial magistrate erred in law and fact when he convicted the appellant knowing prosecution evidence was inconsistent.*
- iii. That the trial magistrate erred in law and fact when he rejected the appellant defense.*
- iv. That the trial magistrate erred in law and fact when he violated article 50 of the constitution.*

The appellant also filed written submissions in court which he reiterated grounds of appeal. He briefly submitted that mandatory sentences deprive courts legitimate jurisdiction relying **CHRISTOPHER OCHIENG V R (2008) eKLR**. He submitted that the discretion of trial court to met out a sentence that is commensurate to with the circumstances of his case curtailed by mandatory minimum sentence.

State counsel Mr. Thuo opposed that appeal. Counsel submitted the authority cited by the appellant permits court to exercise discretion in sentencing. He submitted the argument and opposition of his sentencing is based on wrong application of law and court precedents.

He submitted that penalty can therefore not be reversed as the appellant argues. He submitted the trial magistrate did not err in fact or in law in sentencing the accused. This being the first appellate court this court is tasked with the duty of reevaluating the entire evidence and coming up with its own independent findings bearing in mind it did not have the privilege of hearing the witnesses and will thus give that allowance. [See **Okeno vs R 1972 EA**]

Having analyzed the appeal the issue this court will determine is whether the three ingredients forming the offence of defilement that is age, penetration and whether the penetration was by the appellant were proved beyond reasonable doubt as to find the appellant guilty. Secondly whether the sentence was properly meted against the appellant.

The age of the complainant. The charge herein indicate that minor was 8 years old. It was the evidence of pw2 during examination in chief that complainant is 9 years old and in 2014 she was 8 years old when she was defiled. The question that arise therefore is whether the evidence by prosecution was sufficient proof of age?" Rule 4 of the Sexual Offences Rules stipulates that:

"When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document."

The birth notification produced as exhibit 3 indicates complainant was 8 years old. Therefore I that the age of minor was properly proved.

With regard to penetration it is important to note that penetration can be complete or partial.

Section 2 of the Sexual Offences Act defines penetration as:

'the partial or complete insertion of the genital organs of a person into the genital organ of another person.'

This position was fortified in the case of **Erick Onyango Ondeng v. Republic (2014) eKLR** held as such on the aspect of penetration:

"In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured. "

In response to penetration it is important to note Section 124 of the Evidence Act comes to play. The section is clear that no corroboration is necessary in criminal cases involving a sexual offence. In fact a court can convict on the sole evidence of the victim if the court records the reasons for believing the victim and also records that it was satisfied that the victim was telling the truth. In this case the complainant narrated how the ordeal unfolded. She stated as follow;

'...He removed my clothes and did bad manners using his urinating thing..'

PW2, who was the mother stated that she was informed by PW 1 that appellant had defiled her. PW3 testified that on examining the complainant's her vagina was swollen and had mucus substance. Evidence of PW3 corroborated by evidence of PW5, medical officer who examined the complainant and found that she had missing hymen and bruises on labia majora.

There is therefore sufficient evidence on record to prove that the complainant's vagina was penetrated by penis since the then status of the complainant cannot reasonably be explained otherwise in the face of the evidence. I find and hold that penetration was proved.

The third issue is with regard as to whether the appellant was the alleged perpetrator. It is the evidence of the complainant that the appellant defiled her at his home and that they are neighbors. It is clear that the appellant is well known to the complainant. The incidences and threshold on identification or recognition and the position stipulated in Law is now settled as can be observed from the principles in **Abdalla Bin Wendo v R {1953} 20 EACA 156, Roria v R {1967} EA 583, R v Turnbull {1976} 3 ALL ER 549.**

The appellant was well known to the complainant as they were neighbours. Indeed the appellant in his defence alluded to this. The offence occurred during the day and the complainant when asked who had defiled her readily named the appellant.

The duration that the appellant has been known by the complainant was sufficient opportunity to positively identify the appellant as the one who defiled her. As regards the sentence, the section states that a person convicted of such offence is liable to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment to life. In ***S vs. Mchunu and another (AR24/11) [2012] ZAKZPHC 6***, Kwa Zulu Natal High Court held that:

"It is trite law that the issue of sentencing is one which vests a discretion in the trial court. The trial court considers what a fair and appropriate sentence should be.

The trial magistrate sentenced the appellant to life imprisonment considering age of a minor that she was only 8 years the sentence is within the law. I, therefore, find that the appellants were properly convicted in the evidence and the sentence not excessive in the circumstances.

In the premises I find the appeal herein is without merit and is hereby dismissed.

Dated and Delivered at Bungoma this 10th day of February, 2021.

S.N RIECHI

JUDGE