



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**HCCRA NO. 90 OF 2018**

**VINCENT ODUOR ODHIAMBO..... APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*[Being an appeal against the conviction and sentence of the Senior Principal Magistrate's Court at Nyando*

*.(Hon. P. Olenko PM) dated the 26<sup>th</sup> September 2018 in Nyando SPMCCRC No. 1257 of 2015]*

**JUDGMENT**

The Appellant, **VINCENT ODUOR ODHIAMBO** is serving a sentence of Life Imprisonment after being convicted for the offence of Defilement. The victim of the offence was 7 Years and 11 Months old.

- 1.** In his appeal, the Appellant submitted that there was a failure to comply with the provisions of **Section 200** of the **Criminal Procedure Code**.
- 2.** He submitted that there was a legal requirement that the succeeding magistrate should inform the accused that he had a right to demand that the witnesses who had already testified, should be recalled.
- 3.** According to the Appellant, the trial court violated his right to a fair trial, as the record of the proceedings was mute on the requirements of **Section 200 (3)** of the **Criminal Procedure Code**.
- 4.** The second issue which the Appellant raised was that the trial court failed to adhere to the provisions of **Section 19** of the **Oaths and Statutory Declarations Act**.
- 5.** He submitted that the court failed to ascertain whether or not the Complainant understood the nature of an oath, or if not, whether the Complainant possessed sufficient intelligence of telling the truth.
- 6.** Although the trial court carried out some examination regarding the Complainant's understanding ability, the Appellant described the said examination as being perfunctory, and of little use in assisting the court to make an assessment about whether or not the child ought to have been sworn.
- 7.** In his considered opinion, the evidence of the Complainant ought to have treated as unsworn testimony, so that the court could then evaluate the rest of the evidence to ascertain if it could sustain a conviction.
- 8.** The third issue taken up by the Appellant was about the sentence. He emphasized that an

appropriate sentence can only be handed down when the trial court took into account the relevant aspects of the character of the accused.

9. As he was a first offender, the Appellant submitted that the imposition of the maximum sentence could result in the undesirable effect of over-punishing him by a long incarceration.

10. In answer to the appeal, the Respondent submitted that the case against the Appellant had been proved beyond any reasonable doubt.

11. It was the Respondent's case that the age of the Complainant was proved through the Birth Certificate.

12. It was the Respondent's further case that this was a clear case of recognition, as the victim and the offender were immediate neighbours at home.

13. As regards the actual act giving rise to the charges against the Appellant, it was submitted that the medical evidence proved beyond any reasonable doubt that the Complainant's sexual organ had been penetrated by the sexual organ of the Appellant.

14. On the issue of the alleged non-compliance with the provisions of **Section 200** of the **Criminal Procedure Code**, the Respondent pointed out that there was proof of compliance, as the trial begun de novo, at the request of the Appellant.

15. In respect to the provisions of **Section 19** of the **Oaths and Statutory Declarations Act**, the Respondent drew attention to the fact that the trial court had recorded the answers which were given to questions that the said court had asked.

16. I have re-evaluated all the evidence on record, as I am obliged to do, being the first appellate court.

17. The trial begun on 19<sup>th</sup> April 2016, before Hon. Ng'arng'ar SPM (as he then was). The said Judicial Officer recorded the evidence of 4 prosecution witnesses.

18. The record of the proceedings shows that on 6<sup>th</sup> March 2017, Hon. P. Olengo PM (as he then was) took over the proceedings as the succeeding magistrate.

19. The typed record indicates as follows;

***“Court: This is a part-heard matter before a court that was transferred.***

***(Section 200 Complaint).***

***Accused: It should start de novo.***

***Court: The matter to start de novo.***

***Hearing 15/3/17.”***

20. The phrase “Section 200 Complaint”, did not appear to me, to make sense. I therefore perused the original hand-written record. I ascertained that the said hand-written record reads as follows;

***“(Section 200 Complied).”***

21. In my considered opinion, the trial court has demonstrated substantial compliance with the requirements of **Section 200 (3)** of the **Criminal Procedure Code**. I so find because, although the record does not reflect the actual explanation which the trial court gave to the accused, the record shows that the accused made a choice, to have the trial begin *de novo*.

22. He made a choice to have all the witnesses who had given evidence earlier, recalled to give evidence anew. That exercise of his right to choose is only consistent with an informed decision, as can only have been based upon knowledge provided by the learned succeeding magistrate, when he noted that **Section 200** had been complied with.
23. **PW1, RA**, was the Complainant. Before she begun giving evidence, the Court examined her, and recorded her answers.
24. The court ascertained that the Complainant goes to church to pray, and also that she knew that if a person told lies, the said person would be punished.
25. The learned trial magistrate noted that the minor understood the meaning of an Oath, and therefore the minor was sworn.
26. The best practice for recording *voire dire* examination is by putting on record both the questions asked by the court, and the answers given by the minor.
27. However, it has also become acceptable to only record the answers given by the minor,
28. In this instance it is clear that the trial court was fully conversant with the need to satisfy itself that the minor understood the meaning of an oath, before the court decided to have her sworn.
29. Whilst it would have been more preferable to have a record of proceedings from which the appellate court, and anybody else could verify how and why the court concluded that the minor understood the meaning of an oath, I find that there was substantial compliance with the requirements of a *voire dire* examination.
30. Furthermore, the accused was provided with the opportunity to test the veracity of the evidence tendered by the minor, and he utilized it.
31. The use of the opportunity to cross-examine the Complainant did enable the accused to assist the court gauge even further, the testimony tendered by the minor.
32. I find that the failure to record, in detail, the questions or answers that were uttered during the *voire dire* examination did not occasion any prejudice to the rights of the accused, to a fair trial.
33. **PW1** was the daughter of **PW3** (H). On the material day H sent **PW1** to the home of a neighbour named W (**PW4**). **PW1** was sent to buy milk.
34. However, **PW1** was informed by W's wife that there was no milk.
35. As **PW1** was walking back towards their home, she met a man, who was known to her. The said person, whom **PW1** recognized as the Appellant herein removed the trousers and the panty of **PW1**. He also removed his own trousers, and he then "*did bad manners*" to **PW1**.
36. **PW1** testified that she screamed, but the offender strangled her. However, the screams had already attracted the attention of J (**PW2**).
37. When **PW2** got into the maize plantation where the offender was defiling **PW1**, the offender ran into the plantation, with **PW1**.
38. **PW2** testified that on the material day, at about 1p.m she was going to collect vegetables from her farm.
39. The said farm was close to her home. Between her said home and the farm, there was the homestead of her son George (**PW6**).

40. **PW2** said that when she reached her shamba, she found the Appellant on top of the Complainant. The Appellant was putting on his trousers, whilst the Complainant was crying.
41. Upon noticing what was happening **PW2** raised an alarm, and that caused the Appellant to run-off. Meanwhile, the Complainant was pointing at the Appellant, saying that it is he who had defiled her.
42. **PW3**, H, is the mother of the Complainant. She testified that the Complainant was born on 29<sup>th</sup> December 2007, and she produced the Birth Certificate to verify that fact.
43. She arrived at the scene of crime, where she found **PW1**, looking confused. There were many people at the scene.
44. Upon hearing that the Appellant had defiled **PW1**, **PW3** removed her trouser and examined her: **PW3** noticed “*some creamy white substance on her private parts.*”
45. The mother of the Complainant said that her daughter was attended to at the Katito Health Centre.
46. **PW4**, W, was at his farm, where he was weeding, when he heard a lady screaming. He rushed to the scene, where he found his mother (**PW2**), who told him that she had found the Appellant having sex with the Complainant.
47. After **PW2** told him that the Appellant had ran-off into the bush, **PW4** followed him there, and arrested him.
48. **PW5**, **PC WESLEY KIBET ROP**, was at the Katito Patrol Base when members of the public escorted the Appellant to the said Patrol Base. **PW5** said that the Complainant was also in the group of persons who arrived at the Police Patrol Base.
49. He described the Complainant as terrified and traumatized. Nonetheless, the Complainant did tell **PW5** about how she had been defiled by the Appellant.
50. **PW6**, **GEORGE OKUKU ODONGO**, testified that on the material day he was grazing cattle near his homestead, when he heard his mother (**PW2**), screaming.
51. **PW6** rushed together with **PW4** to the scene, where they found the Complainant with **PW2**. Upon inquiring what had transpired, **PW2** told them that she had found the Appellant having sex with the Complainant.
52. **PW6** entered further into the maize plantation, together with **PW4**, and they arrested the Appellant from his hiding place.
53. **PW7**, **FREDRICK APIDA** is a Clinical Officer, who was based at the Katito Sub-County Hospital.
54. When the Complainant was escorted to that hospital, she informed **PW7** that she had been defiled by a person who was well known to her.
55. In his assessment, the Complainant was confused and in great emotional fear.
56. When he examined her, **PW7** found superficial bruises on the inner lining of her labia minora. He also found;

*“... A viscid discharge on the vulva opening and streaks of blood.*

*Vaginal swab was taken, which showed spermatozoa and bacterial infections.*

*It showed numeral epithelial cells, which showed forceful penetration.”*

57. Following the physical examination of the Complainant, the Clinical Officer concluded that the minor had been forcefully penetrated.
58. **PW7** also examined the Appellant. He found that the Appellant had viscid discharge on the opening of his penis.
59. After **PW7** testified, the prosecution closed its case.
60. Thereafter, when putting forward his unsworn defence, the Appellant said that on the material day, he met the mother of the Complainant.
61. The Appellant said that **PW3** started yelling, and when he inquired from her about what was wrong, **PW3** said that the Appellant wanted to defile her daughter.
62. Thereafter, G (**PW6**) and W (**PW4**) arrived at the scene, and they escorted him to the police station, after beating him up.
63. The Appellant confirmed that they were taken to the Katito Hospital.
64. Having re-evaluated all the evidence on record, I find that there is indisputable proof that the Complainant was defiled.
65. I also find that the person who defiled the Complainant was recognized by her. Even the Appellant's evidence confirmed that the Appellant and the prosecution witnesses were not strangers.
66. The incident took place in broad daylight, at about 1p.m.
67. Finally, the age of the victim was proved to be under 9 years, as she was born on 21<sup>st</sup> December 2007, whilst the incident took place on 14<sup>th</sup> December 2015.
68. As regards the Appellant's defence, I hold the considered view that the alleged grudge between his father and George (**PW6**), W (**PW4**) and H (**PW3**) was nothing but an afterthought. I so hold because when the Appellant had the opportunity to cross-examine the said witnesses about the alleged grudge, he raised no such issues.
69. In any event, the defilement of the Complainant was real: it was not a figment of imagination.
70. The Appellant was caught in the act; and the person who caught him is J (**PW2**). The Appellant did not assert that even the said J had a grudge against his father.
71. I find that the case against the Appellant was proved in every respect, beyond any reasonable doubt. Therefore, I uphold the conviction.
72. As regards the sentence, I acknowledge that "*the Muruatetu case*", which was determined by the Supreme Court has opened up new frontiers which had hitherto been beyond the scope of the trial court, when a statute had enacted mandatory sentences.
73. After finding an accused person guilty, the trial court is supposed to determine the most appropriate sentence in the circumstances. In order to make that determination, the court ought to take into account the mitigating circumstances and all the individual characteristics of the particular case.
74. One such factor is the age of the offender. And in this case, he was 19 years old when the offence was committed.
75. He must be punished, but in a just manner. At the same time, there must be a deterrence, so that the Appellant would not ever consider committing a similar offence.

76. Having taken into account all the peculiar circumstances of the case, I find that although sentence handed down was lawful, an appropriate sentence would be **TWENTY (20) YEARS** Imprisonment. Accordingly, the sentence passed by the trial court is set aside, and it is substituted with Imprisonment for 20 Years. The said sentence shall run from 26<sup>th</sup> September 2018, when the Appellant was first sentenced.

77. In determining the date from when the sentence is to run, I have taken into account the provisions of **Section 333 (2)** of the **Criminal Procedure Code**.

**DATED, SIGNED and DELIVERED at KISUMU**

This **13<sup>th</sup>** day of **April** 2021

**FRED A. OCHIENG**

**JUDGE**