



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

HCCRA NO. 26 OF 2019

JODAM OMOLLO ODHIAMBO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal from the Judgment of Hon. F. M. Rashid SRM

delivered on 8th May 2019 in the Winam PMCRC (S.O) No. 30 of 2018

JUDGMENT

The Appellant, **JODAM OMOLLO ODHIAMBO**, was sentenced to 20 years Imprisonment for the offence of Defilement.

1. The particulars of the offence, as spelt out in the Charge Sheet were as follows;

“JODAM OMOLLO ODHIAMBO: On the 6th day of July 2018 at about 1845 hours at Manyatta in Kisumu East District, within Kisumu County, intentionally caused his Penis to penetrate the vagina of IAO a child aged 13 years.”

2. The learned trial magistrate held that the evidence on record proved that the Complainant was 12 years, 10 Months and 22 Days, at the time of the incident.

3. Secondly, on the issue concerning the identification of the perpetrator, the learned trial magistrate held that this was a case of recognition.

4. And on the question of penetration, the trial court held that the same had been proved.

5. But the Appellant says that the prosecution failed to prove penetration.

6. Indeed, the Appellant’s understanding was that the Complainant had expressly stated that on the material date, she was not defiled.

7. Therefore, the Appellant submitted that his conviction was unsafe.

8. Furthermore, the Appellant believes that if the Complainant had been defiled, she could have raised an alarm. He said that the place where the incident is alleged to have taken place, was occupied by many people.

9. In the circumstances, the Appellant wondered why there was nobody who had made any report of the alleged offence.

10. The other issue canvassed by the Appellant was that the mandatory nature of the sentence prescribed under **Section 8 (3) of the Sexual Offences Act**, deprived the Court of its discretion to hand down an appropriate sentence, depending on the circumstances of the particular offence.

11. He also submitted that because of the mandatory nature of the sentence, he was denied the benefit of the right to the least severe punishment, pursuant to **Article 50 (2) (p) of the Constitution**.

12. Finally, the Appellant submitted that the trial court failed to discharge its obligation under **Section 211 of the Criminal Procedure Code**.

13. As a result of the alleged failure, the Appellant submitted that he was left without the benefit of information on what could have constituted the best option of putting forward his Defence.
14. In determining this appeal, I have, first, re-evaluated all the evidence on record.
15. I have also given due consideration to the submissions made by both sides.
16. **PW1** was the Complainant. She stated thus;

“The accused person then put his penis in my vagina. He, at the time, had laid me on his beddings which was on the floor.

When he was about to have sex with me, someone knocked on the door.”

17. When the Appellant heard the knock on the door, he left the Complainant.
18. I find that, contrary to the Appellant’s contention about the Complainant having said that she was not defiled, the girl actual said that the Appellant had put his penis in her vagina.
19. When it is borne in mind that the offence of defilement is committed when there has been either complete or partial penetration, I find that the very act of the Appellant putting his penis in the Complainant’s vagina, constituted penetration.
20. I also find that the age of the Complainant was proved through the Birth Certificate, which showed that the Complainant was born on 15th August 2005.
21. As the offence was committed on 6th of July 2018, the Complainant was 13 years old as at the date when the incident occurred.
22. The said age was consistent with the particulars of the Charge Sheet.
23. When the incident took place, it is true that the Complainant did not raise an alarm. The Complainant said;

“I did not scream because you said you Would give me money.”

24. The Complainant further testified that the Appellant had defiled her about 4 times, prior to the incident which gave rise to this case. This is what she said;

“He used to have sex with me in his house.

The accused person used to call me and tell me that he wanted to give me money for chips, and then he could say, I had to do something to him before he gives me money for chips. In all the times, he wanted my vagina.”

25. As the Complainant had been enticed into allowing the Appellant to defile her, in exchange for money for buying chips, it is understood why the Complainant did not raise an alarm.
26. **PW4**, Brenda Luvembe, is a Clinical Officer at the Jaramogi Oginga Odinga Teaching and Referral Hospital.
27. She said that her colleague had examined the Complainant at the hospital, and testified having found;
- “Whitish discharge adhere to labia minora.***
- Whitish discharge from vagina non-mucoid...”***
28. She said that the said findings were evidence of defilement.
29. **PW6**, Dr. Paul Ogola examined the Complainant at the Jaramogi Oginga Odinga Teaching and Referral Hospital, Kisumu.
30. He also testified that there was whitish discharge at the Complainant’s labia minora, as well as some whitish discharge from her vagina. He described the discharge as *“non-blood stained and not thick.”*
31. From the evidence of the Complainant, the Clinical Officer and the Doctor, I am satisfied beyond any reasonable doubt that there had been penetration of the Complainant’s vagina, using the Appellant’s penis.
32. Finally, the identity of the Appellant was not ever in doubt, as he was well known by the Complainant for about one year, prior to the date when the incident in issue took place.

33. When the prosecution had closed its case, the learned trial magistrate put the Appellant to his defence.
34. The record of the proceedings shows that the trial court read out the provisions of **Section 211** of the **Criminal Procedure Code**, to the Appellant.
35. The Appellant told the Court that he would give an unsworn defence, and also that he would not call any witness.
36. I find that those answers must have been given in answer to questions and explanations tendered by the trial court.
37. Therefore, I hold that the trial court complied with the provisions of **Section 211** of the **Criminal Procedure Code**.
38. The task of enacting laws has been assigned to the Legislature. That is the arm of government which determines what constitutes a criminal offence; and then determines the punishment for any such offence.
39. When the Legislature lays down the minimum sentence to be meted out in respect to any offence, it is carrying out its constitutional mandate.
40. I find that the Appellant has not demonstrated how his rights have been violated through the enactment of “*minimum sentences*” in respect of Sexual Offences such as defilement.
41. The statute does not take away the court’s discretion, as the court may sentence an accused person to higher sentences: That implies that the persons who we tasked with the mandate to establish the appropriate sentences, held the considered view that any such offence cannot be adequately punished if the person convicted for the same, was given a sentence lower than the prescribed minimum.
42. In principle, the legislature acted lawfully in discharging its mandate.
43. If Kenyans feel that any such sentences ought to be re-visited, so as to give complete discretion to the courts, the answer lies in persuading the law-makers.
44. But because the sentence herein was lawful, I find no basis, in law, to declare that the trial court was wrong to have handed it down to the Appellant.
45. And as the minimum sentence prescribed under **Section 8 (3)** of the **Sexual Offences Act** is 20 years imprisonment, it follows that the Appellant was actually given the least severe punishment prescribed by law.
46. If the trial court had given a lesser sentence than the 20 years imprisonment, that would have been unlawful.
47. In the result, there is no merit in the appeal. It is therefore dismissed.

DATED, SIGNED and DELIVERED at KISUMU

This 6th day of **February** 2020

FRED A. OCHIENG

JUDGE