



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL APPEAL NO. 13 OF 2018

DAVID OKOTH ONYANGO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and Sentence of Hon. Japheth Bii, RM, in Mbita PM's Court Sexual Offence Act Case No.14 of 2017 dated 11/04/2018)

JUDGMENT

[1] After appearing before the lower court at Mbita, the appellant **DAVID OKOTH ONYANGO**, pleaded not guilty to a charge of defilement, contrary to **Section 8 (1)** read with **Section 8 (2)** of the **Sexual Offences Act** and in the alternative, a charge of indecent act with a child, contrary to **Section 11 (1)** of the **Sexual Offences Act**.

He was alleged to have defiled **YAO**, a child aged nine (9) years on the 8th June 2017 in Mbita Homa Bay County or intentionally and unlawfully touching her vagina and anus.

[2] After a full trial, the appellant was convicted on the main count and sentenced to life imprisonment. He was however, aggrieved by the conviction and sentence and preferred this appeal on the basis of the grounds contained in the petition of appeal filed herein on 17th April 2018. He appeared in person at the hearing of the appeal and placed full reliance on his written submissions in support of the appeal.

[3] **MR. OLUOCH**, the learned Senior Assistant Deputy Public Prosecutor (S/ADPP), appeared for the state/respondent and opposed the appeal by orally submitting that the complainant narrated in detail the circumstances leading to the commission of the offence by the appellant. That, PW3, noted that the complainant was unwell and was informed on inquiry that she had been defiled by the appellant who on being confronted with the allegation admitted the fact.

[4] The learned state counsel, further submitted that the clinical officer (PW4) confirmed that the complainant was indeed defiled and that she was a mentally challenged person.

Learned state Counsel, contended that there was no contradiction with regard to the offence and urged this court to dismiss the appeal.

In response to the foregoing, the appellant contended that his co-workers forced him to confess that he committed the offence.

[5] This is a first appeal. In that regard, the duty of this court was to re-consider the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing the witnesses.

Briefly, the prosecution case was that the appellant worked as a grounds man at a school called [particulars withheld] Academy where the complainant child (PW1) was a pupil.

On the material date, the appellant led the complainant to a bath shelter where he removed her clothes and defiled her.

[6] The complainant's mother, **JAO** (PW2), noted some fluid in the complainant's genitals and was told by the complainant what had happened. Later, while in school, she (complainant) felt some pain in her genital and reported to her teacher, **JOD** (PW3), who summoned the appellant who allegedly admitted the offence and while being taken to the police was accosted and assaulted by a mob of people.

[7] A Clinical Officer, **VICTOR AKOTH ADIKA** (PW4), examined the complainant on the 16th June 2017, and confirmed that she had actually been defiled. He thereafter, completed and signed the necessary P3 form (**P. Exhibit 3**). He indicated that the complainant was penetrated through her anus rather than vagina.

[8] On receipt of the necessary report, **P.C. PRISCILLA WAMBOI (PW5)**, investigated the matter and preferred the necessary charge against the appellant.

In his defence, the appellant denied the offence and implied that he was assaulted by a teacher before being threatened so that he could admit the offence.

[9] The evidence was considered in its entirety by the trial court which arrived at the conclusion that defilement was committed against the complainant and that the appellant was the person responsible for it.

The opinion of this court is that the fact of defilement was not substantially or at all disputed. This was in any event, established through the complainant's evidence as supported by that of her mother (PW2), teacher (PW3) and most importantly, the Clinical Officer (PW4).

[10] Penetration is a vital ingredient of the offence of defilement and this was clearly established by the medical evidence availed by the clinical officer (PW4) who indicated that the penetration herein was through the anus rather than the vagina. The definition of genital organs under **Section 2** of the **Sexual Offences Act** extends to the anus. Therefore, any contradiction with regard to whether the complainant was penetrated through the anus or the vagina was immaterial and could not water down the prosecution case in relation to the commission of the offence.

[11] With regard to the identification of the offender, the complainant's evidence was credible and sufficient enough as the offence occurred in a school in broad daylight and the appellant was a person previously known to the complainant and indeed any person who related to the school in one way or the other. He (appellant) was therefore positively identified as the offender. His defence was thus discredited and effectively rebutted.

[12] It is the finding of this court that the appellant's conviction was sound and safe. As such, his grounds one (1), two (2) and three (3) of the appeal are hereby overruled. Grounds Four (4) and Five (5) do not find any support in the record which clearly shows that the trial was properly and fairly conducted and that the appellant was given adequate opportunity and time to prepare for his defence and indeed the entire trial. He could not therefore be heard to complain about violation of his constitutional right to a fair trial.

[13] The failure by the prosecution to call additional witnesses was not prejudicial to the appellant. There is no requirement that a given number of witnesses is required for purposes of establishing of the offence for which a suspect is charged. Even a single witness can establish the necessary ingredients of an offence if his/her evidence is cogent and credible.

The sentence imposed on the appellant by the trial court was lawful and in accordance with **Section 8(2)** of the **Sexual Offences Act** as the complainant was under the age of eleven (11) years at the material time of the offence, a fact which was never disputed. Consequently, ground six (6) of the appeal must also fail.

[14] In sum, this appeal is lacking in merit and is hereby dismissed in its entirety.

J.R. KARANJAH

JUDGE

04.04.2019

[Delivered and signed this 4th day of **April, 2019**].