



THE REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL 116 OF 2018

MICHAEL OLOO AMOTH.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's

Court in Makadara Cr. Case No. 3192 of 2014 delivered by Hon. S. Jalong'o on 8th June, 2018).

JUDGMENT

1. The Appellant was charged with defilement contrary to **Section 8(1)(2) of the Sexual Offences Act No. 3 of 2006**. It was alleged that between 24th April and 27th April, 2014 in Nairobi within Nairobi County, intentionally caused his penis to penetrate the vagina of LAO a child aged 15 years.

2. In the alternative, he was charged with an indecent act with a child contrary to **Section 11(1) of the Sexual Offences Act No. 3 of 2006** in that on diverse dates between 24th and 27th April, 2014 intentionally touched the breasts, buttocks and the vagina of LAO a child aged 15 years with his hands.

3. After the trial, the Appellant was found guilty of the main charge. He was accordingly convicted and sentenced to serve twenty (20) years imprisonment. Aggrieved by both the conviction and sentence, he preferred the instant appeal. He relied on the Amended Grounds of Appeal filed contemporaneously with the written submissions. He raised seven grounds of appeal which I have collapsed into four, namely, that the charge sheet was defective, that the conviction was premised on insufficient, contradictory and inconsistent evidence, that the trial court misapplied **Section 124 of the Evidence Act** and that his evidence was not considered.

4. In total, the prosecution called nine (9) witnesses. Their case was that on the 24th April, 2014, PW1, the complainant then aged 15 years went to visit the Appellant in his house. The Appellant had earlier introduced himself to her as one Hassan. She stayed in his house for three days after which he told her that her father was looking for her. He had threatened to kill her if she fled. After PW1's father learnt where she was, she (PW1) and the Appellant moved to the latter aunt's house. Thereafter, PW1 came across her father who took her to Muthaiga Police Station where the incident was reported. The Appellant was thereafter arrested after his wife took PW1's teachers to their house. PW1 was thereafter treated at Medicines San Frontier Clinic (MSF) and a Post Rape Care Form filled. **PW5, Irene Nyambwachi**, a Clinical Officer from the clinic confirmed that PW1 was treated at the clinic on 30/4/2014. The examination revealed cervical erosion (inflammation), old hymeneal tears and whitish vaginal discharge. The witness produced a medical certificate and Post Rape Care (PRC) Form as exhibits 1 and 4 respectively.

5. **PW2 JOO** the father of PW1 testified that PW1 went missing from their home on 24/4/2014. He reported the matter at Muthaiga Police Station. On 29/4/2014, he got information that PW1 was in the house of the Appellant. A younger brother of the Appellant informed him that the dual were in Deep Sea Slum in Westlands. A Police Officer and PW2's neighbour, one George Odhiambo accompanied PW2 to the slum where PW1 was found in the Appellant's house. PW1 was carried away and taken to hospital. She also returned to school. It was while in school that the Appellant's wife confronted her, angry that she had befriended her husband. The Appellant's wife led the teachers to their home where the Appellant was arrested. **PW,6 CR**, a class teacher to PW1 testified that on 9/7/2014 he accompanied the Appellant's wife to her home with a view to arresting the Appellant. Apart from arresting the Appellant, he reported that the Appellant had threatened him at the time of arrest.

6. **PW3, RA**, a step mother to PW1 entirely corroborated the evidence of PW2. She in addition identified PW1's Birth Certificate which showed that she was born on 29th November, 1999. **PW4, George Odhiambo** a neighbour to PW2 also corroborated the evidence of PW2. He confirmed he accompanied PW2 to Deep Sea Slum in the house of the Appellant's aunt where they found PW1. **PW7, PC Daniel Oniang** together with **PW8, PC Dorcas Akoth** of Muthaiga Police Station effected the arrest of the Appellant. They summed up the case

for the prosecution. PW8 was the investigating Officer who additionally adduced PW1's Birth Certificate in evidence as P. Exhibit 3.

7. **PW9 Dr. Shako** of Police Surgery examined PW1 on 10th July, 2014 and filled her P.3 Form. She found that the hymen had multiple tears. She adduced the P.3 Form as P.Exhibit 2.

8. At the close of the prosecution case, the court ruled that the Appellant had a case to answer and was accordingly put on his defence. He gave an unsworn statement of defence. He stated that he was arrested on 9/7/2014 by a group of men without being informed the reason for his arrest. He was escorted to Muthaiga Police Station where he was locked up in the cells. He added that on the following day, the complainant went to the police station but denied he knew her. He said that he learnt of the reason for his arrest at the time of taking plea. His witness, **Benson Okoth** who testified as **DW2** stated that the Appellant was arrested from his father's house which neighbours his. He asserted that the Appellant was a man of good conduct and was framed in the case.

Analysis and determination

9. The Appellant was in person whilst the Respondent was represented by learned State Counsel Mr. Momanyi. The Appellant relied on written submissions whilst Mr. Momanyi made oral submissions. After carefully considering the evidence on record and the respective rival submissions, I have deduced that the issues arising from determination are as follows:

- a) *Whether the charge sheet was defective.*
- b) *Whether the case was proved beyond a reasonable doubt.*
- c) *Whether the prosecution failed to call crucial witnesses.*
- d) *Whether the trial court properly applied Section 124 of the Evidence Act, and*
- e) *Whether the Appellant's defense was considered.*

Whether the charge sheet was defective

10. Under this head, the Appellant submitted on two issues. The first was that the charge sheet was defective having been drafted under a non-existent provision of the law. It was his case that the Sexual Offences Act does not have a **Section 8(1)(2)**. Further, the learned trial magistrate convicted him under Section 8(1) as read with **Section 8(2) of the Act**. According to Mr. Momanyi, the defect did not prejudice the Appellant because the age of the complainant was established to be 15 years and a sentence imposed under that provision.

11. This court entirely concurs with the Respondent. It is true that the Sexual Offences Act does not provide for a **Section 8(1)(2)**. It is also factual that the age of the minor having been proved to be 15 years, the conviction fell under **Section 8(3) of the Act**. Nevertheless, it is trite that sentence for the offence of defilement under **Section 8 of the Sexual Offences Act** is determined by the age of the minor. The learned trial magistrate imposed the proper sentence after age of PW1 was proved to be 15 years. The only error he made was to state that he had found the Appellant guilty under **Section 8(1)** as read with **Section 8(2) of the Sexual Offences Act**. A glance at the charge sheet clearly attests that the drawing of it under a non-existent provision of the Act was the result of poor draftsmanship. It does not affect the substance of the charge and the evidence adduced in proof of the offence. Moreover, the Appellant pleaded to the offence of defilement in whose particulars the age of the minor was stated to be 15 years. In the circumstances, I find that the error by both the drafters and the trial court were technical in nature and are curable under **Section 382 of the Criminal Procedure Code**.

Whether the offence was proved to the required standard

12. Under this head, the Appellant submitted that the key elements of the offence of defilement, namely; age of the complainant, penetration and identification of the perpetrator were not established. He zeroed in on penetration and identification. As regards penetration, he submitted that the same was not established as no spermatozoa were found in PW1's genitalia. He also pointed to the failure in the P3 form to indicate that any injuries were found. Mr. Momanyi on his part submitted that penetration was established by the evidence of PW1 who testified that she was in the Appellant's house during which days they had sex. He added that PW1's evidence was corroborated by the medical evidence of PW5 and 8.

13. The court concurs that the evidence of PW1, 5 and 8 sufficiently established penetration. In corroborating PW1's evidence, PW5, a Clinical Officer from MSF Clinic where PW1 was first treated on 30th April, 2014 testified that the examination revealed cervical erosion and old hymenial tears. This was noted in both the PRC Form and medical certificate that were adduced in evidence. They had been filed by PW5's colleague one Barabara Salano Kerre, also a Clinical Officer. A P3 Form adduced by **PW8, Dr. Shako** also concluded that PW1 had been defiled.

14. As regards to the identification of the perpetrator, the Appellant submitted he was not properly identified as PW1 testified that when she first met her assailant, he introduced himself to her as 'Hassan' and that was not his name. He argued that PW1 could not claim to know him yet she had met a stranger. He further argued that PW1 mentioned to have visited one Roden who the court did not bother to know who he was. On the part of Mr. Momanyi, he submitted that the identification of the Appellant was by recognition as PW1 knew him before the date of the incident. He submitted that she referred to him by his nick-name, one Oshena.

15. There is no doubt that Appellant enticed PW1 to go and stay in his house for three days. In fact, on 29/4/2014 when PW2 collected PW1 from his house, the Appellant attempted to follow them. Besides, PW1 clearly disclosed who her perpetrator was and in fact positively identified the Appellant upon his arrest. The issue of a mistaken identity did not arise. PW1 was clear in her mind that the person who had

had sex with her was the Appellant. I accordingly hold that the element of identification was established.

16. As regards the age of the minor, PW3, the step mother to PW1 adduced her Birth Certificate which indicated that she was born on 29th November, 1999. She was therefore 15 years old at the time of the incident.

17. The Appellant further submitted that the prosecution's case was tainted with contradictions and inconsistencies in the witnesses' evidence. He pointed to the fact that the charge sheet indicated that the offence was committed on diverse dates between 24th and 27th April, 2014, hence lacking in specificity on the actual date the offence was committed. In my view, this did not vitiate the fact that between these dates, the Appellant had a sexual encounter with PW1. It does not lessen the fact that an offence was committed.

Whether the Appellant's defense was considered

18. The Appellant also pointed to lack of clarity as to whether the sexual intercourse was consensual or coerced. I do not wish to thoroughly re-evaluate this piece of evidence because lack of consent does not constitute an element for proof of the offence of defilement. I have already outlined that the three key elements are proof of penetration, proof of the age of the minor and proof of the identity of the perpetrator. The prosecution met this test.

19. Another issue raised by the Appellant is the introduction of a third person one Roden, whom PW1 visited first before going to his house. I agree that PW1 mentioned this person but again the evidence did not link him to the offence.

20. On the whole, it is my view that the prosecution witnesses gave consistent and corroborative evidence. Indeed, the consequence of events on the ground since PW1 went missing from her parents' house was well articulated by the prosecution witnesses. PW2 was accompanied by PW4 when they smoked PW1 out of the Appellant's house. On the other hand, PW6 a class teacher of PW1 confirmed that the Appellant was arrested after his identification by his wife who had complained of his relationship because of this incident. There is no doubt that the Appellant was the perpetrator and that his conviction was therefore safe. The failure to call Roden or the Appellant's aunt in whose house he and PW1 had spent a night did not weaken the prosecution case.

21. Further, it is my view that the trial court did not improperly apply the proviso to **Section 124 of the Evidence Act** which empowers a court to convict an accused person based on uncorroborated evidence of a minor in a sexual assault case as long as the court believes in the minor. In this case, the evidence of the minor was corroborated by that of PW2 and 4 who confirmed that they smoked PW1 out of a house occupied by the Appellant. She also candidly narrated how both had sexual encounters.

22. The Appellant submitted that the learned trial magistrate failed to consider his alibi defence, which, if he had would have entertained a doubt in his mind that he did not commit the offence. His defence was that he was arrested from his father's house for an offence he did not commit. The learned trial magistrate in his judgment observed that it did not shake the prosecution case. I also find and hold that indeed the prosecution tendered a cogent case against the Appellant. The alibi defense fell far short of dislodging the strong prosecution case.

23. In the upshot, I find that the prosecution proved its case to the required standard. Although the Appellant claimed that he was young when he was arrested, the fact is that he took advantage of a young school girl when he was married and had a child. He merely wanted to wreck a young soul's life rather than concentrate on fending for his young family. He should shoulder the responsibility of his mistake. I accordingly dismiss his appeal. I uphold both the conviction and sentence.

DATED and DELIVERED THIS 13TH DAY OF MAY, 2019.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Appellant present in person

2. Mr. Momanyi for the Respondent.