



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 30 OF 2018

MICHAEL ONYANGO OJUOK..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal against the conviction and sentence of the Senior Principal Magistrate's Court at Maseno (Hon. R.S. Kipngeno SRM) dated the 20th March 2018 in Maseno SPMCCRC No. 1005 of 2015]

JUDGMENT

The Appellant, **JOSEPH OKOYO NYAMWAYA**, was convicted for the offence of **Defilement** of a minor who was 16 years old. He was then sentenced to imprisonment for 15 Years.

1. In his appeal, the Appellant has submitted that the Charge Sheet was defective as it indicated that the offence was committed on 7th June 2014 whilst all the prosecution witnesses testified about an incident which took place on 9th June 2014.
2. Secondly, he submitted that his constitutional right to a fair trial had been violated because he was only arraigned in court more than one year after he had been arrested.
3. He pointed out that he was arrested on 9th June 2014, but that he was not taken to court until 6th July 2015.
4. In his considered view, the police ought to have given an explanation why there was a delay in taking him to court.
5. As no such explanation had been provided, the Appellant reasoned that he had been prejudiced, and that there had been a miscarriage of justice.
6. Another issue that was raised by the Appellant was about the medical evidence which was adduced at the trial.
7. He noted that whilst the offence was allegedly committed on 7th June 2014, it was not until 9th August 2014 when the Complainant first visited the hospital.
8. The Appellant submitted that it would not have been possible for the doctor to see the physical signs of the alleged defilement, as the doctor only examined the Complainant after the lapse of over two months.
9. He believes that the following cannot have been seen after 2 months;
 - (a) ***Bruises on the vaginal wall and perineum;***
 - (b) ***Reddened external genital.***
10. The Appellant reminded the court that the female gender ordinarily experience their menstrual periods on a monthly basis. Therefore, he believes that some of the alleged signs seen by the doctor may have been impacted by the Complainant's menstrual cycles.
11. According to the Appellant, it is important that medical tests be conducted on both the Complainant and the offender, if the medical evidence is intended to enrich the trustworthiness of the Complainant.

12. Finally, the Appellant submitted that the *voire die* examination of a witness who is a minor, was a total fiasco if it was intended to enable the court ascertain the truthfulness of such a minor.
13. It was the Appellant's case that the process of *voire dire* constituted a violation of the accused person's right to a fair trial.
14. In answer to the appeal, Mr. Muia, learned State Counsel submitted that the Charge Sheet was not defective at all.
15. The section of the law pursuant to which the Appellant was charged, as well as the particulars of the said charge, were described as clear.
16. The Respondent also submitted that all the elements of the offence of defilement had been proved beyond any reasonable doubt.
17. Being the first appellate court, I am obliged to re-evaluate all the evidence on record and to draw my own conclusions.
18. However, whilst giving consideration to the evidence, this court is required to remind itself that, unlike the learned trial magistrate, I did not have the benefit of observing any of the witnesses when they were giving evidence.
19. A perusal of the Charge Sheet shows that the offence was alleged to have been committed on 9th June 2014. Therefore, I fail to understand why the Appellant submitted that the date on the Charge Sheet was 7th June 2014.
20. The Charge Sheet spells out the particulars of the offence, to the effect that the Appellant had intentionally caused his penis to penetrate the vagina of the Complainant, who was a child aged 16 years old.
21. I find that the Charge Sheet, as drawn was not defective.
22. The information on the face of the Charge Sheet was that the Appellant was arrested on 9th June 2014, and that he took plea on 6th July 2015.
23. The period between the time of arrest and the time when plea was taken is just over one year.
24. The Appellant has not indicated that he was in police custody, from the time of his arrest until the date when he took plea.
25. And immediately after taking plea, the Appellant was granted bail pending trial.
26. There is therefore no factual or legal basis for declaring that there had been a miscarriage of justice.
27. **PW1** was the Complainant. She testified that the Appellant defiled her on the night of 7th June 2014.
28. **PW2** was the father of the Complainant. He also testified that it was on the night of 7th June 2014 that his daughter went missing from home. She had been sent to buy some paraffin from the shops, but she did not return.
29. A search was conducted for her on that night, but it was not successful.
30. It was only on the next day that the Complainant was traced at a house where she was in the company of the Appellant.
31. However, the record also shows that **PW2** talked about the 9th of June 2014 as the date when he traced his daughter at the house where she had been defiled the previous night.
32. **PW3** is a Clinical Officer. He testified that the Complainant was taken to the Chulaimbo Sub-County Hospital on 9th June 2014.
33. The P3 Form is dated 9th June 2014 and upon its face it is indicated by the Police Officer who had requested for the medical examination of the Complainant indicated that;

“Date and time of alleged offence – BETWEEN 7th June 2014 and 9th June 2014.”

34. The date of the alleged offence and the date when the Complainant was examined are in very close proximity in terms of time, that there is no merit in the Appellant's contention about a delay of 2 months, which could have made it difficult for the Clinical Officer to observe the physical impact on the Complainant's body.
35. The Treatment Card from the Chulaimbo Sub-District Hospital indicates that the Complainant had informed the medical personnel that she had been defiled between 7th and 9th June 2014.
36. In my considered opinion, the fact that the Charge Sheet only cited 9th June 2014 as the date when the offence was committed could not have prejudiced the Appellant as that date fell within the period cited in the P3 Form and in the Treatment Notes.

37. I find that the Charge Sheet was not defective.

38. I further find that the question as to whether or not the Complainant had had her menstrual periods, and if such an occurrence could have had any impact on the Complainant's body, are matters which could have been raised through cross-examination.

39. When the Appellant chooses to raise the issue during the appeal, that becomes a matter of speculative arguments, which cannot therefore be a basis for upsetting the conviction.

40. On the issue about *voire dire* examination of the Complainant, the records show that the Complainant actually gave her evidence on oath.

41. The Complainant was already 19 years old by the time she testified. She was not a minor.

42. Accordingly, the submissions on the issue about the constitutionality or otherwise of a *voire dire* examination of the minor has no bearing on the matter before me.

43. On the issue concerning the need to medically examine both the Complainant and the accused person, I find that there is no such a legal requirement in every case of defilement.

44. In the event that the Complainant was found to have contracted a sexually transmitted ailment or disease, it may be prudent to have the accused person examined, so as to ascertain if he/she also had the same or similar ailment or disease.

45. Finally, I noted that when the Appellant was cross-examining Corporal Rael Ambasa, the said witness explained that some members of the Miji Kumi leadership, who were related to the Appellant, approached the police officer, in a bid to have the case withdrawn.

46. It is thus not surprising to me, that on 9th March 2017, the prosecutor notified the trial court that there had been a real struggle in securing the attendance of witnesses.

47. The court directed that the trial would proceed, noting that the proceedings were of a retrial, which had been ordered for in the year 2015.

48. In effect, it appears that the "*delay*" which the Appellant complained about was non-existent, as he had already gone through a trial earlier.

49. I feel obliged to commend Cpl Rael Ambasa for not accepting the bid by the Miji Kumi to have the case withdrawn. It is a tragedy that persons in positions of authority could try to compromise a case in which a minor had gone through the trauma of defilement.

50. In the same breath, therefore, the said Miji Kumi, who tried to have the case withdrawn, stand condemned.

51. Children require protection from persons who molest them sexually. It would be a sad day when, instead of protecting minors, we shield offenders from the due process of the law.

52. In the final analysis, I find that the prosecution had proved all the ingredients of the offence of defilement beyond any reasonable doubt.

53. Accordingly, there is no merit on the appeal against conviction, as the same was founded upon sound evidence.

54. The conviction and the sentence are upheld, and the appeal is dismissed.

DATED, SIGNED and DELIVERED at KISUMU

This 9th day of July 2019

FRED A. OCHIENG

JUDGE