



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. 47 OF 2018

BETWEEN

RICHARD OMONDI OBONYO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against judgment, conviction and sentence in Maseno

Criminal Case Number 1106 of 2014 by Hon. R.S.Kipngeno (SRM) on 23rd April, 2018)

JUDGMENT

Background

1. The Appellant herein **RICHARD OMONDI OBONYO** has filed this appeal against conviction and sentence on a charge of defilement contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act No. 3 of 2006 (hereinafter referred to as **the Act**) which was allegedly committed on 22nd August, 2014 against **JA** a girl aged 17 (Seventeen) years.
2. *In a judgment dated 23.04.18, the Appellant was convicted and was sentenced to 15 years' imprisonment.*

Appeal

3. Aggrieved by this decision, the Appellant lodged the instant appeal on 03.05.18. At the hearing, the Appellant relied wholly on the grounds of appeal and written submissions filed on 26.09.19.
4. Ms. Gathu, Learned Counsel for the State opposed the appeal on the basis of written submission filed on 26.09.19 and urged the court to find that all the ingredients of defilement had been proved and dismiss the appeal.

Analysis and Determination

5. The duty of the 1st appellate court was explained by the Court of Appeal in the case of **Kariuki Karanja Vs Republic [1986] KLR 190** that: -

"On first appeal from a conviction by a judge or magistrate, the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. The court has a duty to rehear the case and reconsider the material before the judge or magistrate with such materials as it may have decided to admit."

6. In order to consider this appeal, it is important to remind myself of the key ingredients necessary to establish a sexual offence under the Sexual Offences Act which are the same rounds that the Appellant has raised in his appeal. These are the age of the victim, penetration and identity of the offender.
7. In the case of **Alfayo Gombe Okello v Republic [2010] eKLR**, the Court of Appeal stated that:

In its wisdom, Parliament chose to categorise the gravity of that offence (defilement) on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8 (1).

8. It is therefore important for the prosecution to prove the age of a victim since age determines the sentence to be meted out on the offender. Complainant who is an orphan did not know her age. The P3 PEXH. 2 shows that the complainant's age was assessed to be 17 years. An Educational Assessment and Resource Services Form PEXH. 4 shows that complainant was born on 10.07.96. Complainant was allegedly defiled on 22.08.14 which was one month into her 18th birthday and was therefore not a minor.

Penetration

9. The complainant told court that on 22.08.14, she was going to fetch water when the Appellant called her and defiled her. PW1 P A testified that on 22.08.14 at about 06.00 pm, she saw Appellant open a gate through which the complainant went through and the two of them went into a certain house. She stated that she reported the matter to PW2 GO. PW2 stated that he saw the Appellant and the complainant emerge from the house that PW2 had told her they had entered. Upon examination by PW4 Mose Jones a clinical officer, 1½ weeks after the alleged assault, complainant had neither bruises nor tears in her genitalia but the hymen was missing. The clinical officer concluded that there as evidence of penetration.

10. **Section 2 of Sexual Offences Act** defines penetration to entail: -

“partial or complete insertion of a genital organ of a person into the genital organ of another person.”

11. The broken hymen in my considered view proved that there was penetration.

Identity of the offender

12. The Appellant was not a stranger to the complainant. Appellant and the complainant were seen by PW1 getting into the house where complainant said she was defiled. PW2 stated that he saw the Appellant and the complainant emerge from the very house that PW2 had told him they had entered. I am satisfied that the Appellant was properly identified as the one that had sexual contact with the complainant.

13. From the totality evidence, I find that the evidence on record discloses that there was sexual contact between the Appellant and the complainant who was one month into her 18th birthday and therefore not a minor. Consequently, the prosecution did not prove the offence of defilement contrary to section 8(1) as read with section 8(4) of *the Act*.

14. The foregoing notwithstanding, I have taken the liberty to consider if the offence of rape was proved. Section 3 of *the Act* provides that

(1) A person commits the offence termed rape if—

- (a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;**
- (b) the other person does not consent to the penetration; or**
- (c) the consent is obtained by force or by means of threats or intimidation of any kind.**

15. Whereas the prosecution was able to establish penetration, there is no evidence that there was no consent. According to the complainant, the Appellant called her into a certain house where she had sex with him. There is no evidence of threats or intimidation of any kind being used on the complainant. From the foregoing, I consequently also find that rape was not established.

16. Accordingly, and for the reasons set out hereinabove, this appeal succeeds. The conviction is quashed and the sentence set aside. Unless otherwise lawfully held, it is ordered that the Appellant be set at liberty.

DELIVERED AND SIGNED IN KISUMU THIS 14th DAY OF November, 2019.

T. W. CHERERE

JUDGE

In the presence of-

Court Assistant - Amondi/Okodoi

Appellant - Present in person

For the State - Ms. Gathu