



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL APPEAL NO. 37 OF 2018

CALEB ODUOR OBONGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the judgment, conviction and sentence dated 8/8/2018 in Siaya Principal Magistrate's Court

Criminal Case No. 40 of 2017, before Hon. J.O. Ong'ondo, Principal Magistrate)

JUDGMENT

1. The Appellant **CALEB ODUOR OBONGO** was charged with the offence of defilement contrary to Section 8(1) as read with subsection (4) of the Sexual Offences Act No. 3 of 2006. Particulars of the offence are that on 11.12.2017 at Komolo Sub-Location, Siaya County the appellant intentionally and unlawfully caused his penis to penetrate the vagina of OTA [full name withheld for legal reasons] a child aged 16 years. The appellant also faced an alternative count of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006 that on 11th day of December, 2017 at Komolo sub-location, in Siaya County the appellant intentionally touched the vagina of OTA a child aged 16 years.

2. The appellant denied the offence. After a full trial, the trial court found him guilty of the substantive charge and convicted him. The appellant was sentenced to serve fifteen (15) years imprisonment.

3. Being aggrieved by the said conviction and sentence, the appellant lodged this appeal setting out the following grounds of appeal:

1. THAT I Pleded not guilty to the charges

2. THAT the learned trial magistrate erred in facts & law by failing to analyze the evidence on record hence arriving at a wrong decision.

3.THAT the learned trial magistrate erred in facts & in law by failing to consider the glaring inconsistencies on the prosecution witnesses hence arriving at a wrong decision.

4. THAT the trial magistrate erred in law and in fact by failing to consider the defence raised by the appellant which was unconstitutional and his witnesses [sic]

5. THAT I cannot recall all that was adduced before the court and pray for the copies of the proceedings to adduce more grounds.

4. This being a first appeal, this court is under a duty to reassess and reevaluate the evidence adduced before the trial court and arrive at its own independent conclusion bearing in mind the fact that it neither heard nor saw the witnesses as they testified. See **Okeno v Republic [1972] E.A. 32**

5. Revisiting the evidence before the trial court, the prosecution's case was that on 11.12.2017, PW1, OTA was at home sleeping when her brother by the name **J** and the appellant(Caleb) whom she referred to as her boyfriend went to her brother's house at 4.00 a.m. She was awakened by the sound of the motor cycle. She peeped through the window and saw them clearly. There was a girl in the company of the two. Shortly PW1's brother left with the girl aboard the motorcycle.

6. Shortly, PW1 on her own accord left the house she had been sleeping in and went to join the appellant in her brother J's house. She engaged in sexual intercourse with the appellant. This is what she said in her testimony:

“In the house we talked about our relationship. I went to the bedroom. We engaged in sexual intercourse removed my trouser and panty and remained with a shirt. He removed his trouser and boxer. I lied on my back. He wore a condom on his penis and inserted it into my vagina for 3 – 5 minutes. After that I put on clothes and sat on the bed. We both dressed. I put the lights on.”

7. Shortly according to PW1, they heard footsteps from PW1's mother's house. The complainant's mother came calling the name of J. There was no response so she entered the house of J and found PW1 seated on the bed as the appellant was lying in bed. The complainant's mother started quarrelling and told PW1 to go back to where she slept prior to joining the appellant at J's house.

8. PW1 stated that she had told the appellant that she was a student but that the Appellant told her that he would protect her by using a condom. Later she was arrested with the appellant. She was issued with a P3 form and was examined at Siaya County Referral Hospital by a Clinical Officer.

9. **Sila Omindi – PW4** testified that on 11.12.2017 he examined the complainant and filled her P3 form which he produced in evidence as an exhibit. In his testimony as contained in the P3 form – PEx3, PW4 stated that he could not find evidence of penetration on physical examination because intercourse was consensual. He stated that the minor admitted to him that she willingly went to have sex with the appellant in her brother's room. Further, the Clinical Officer was informed that it was not the first time it was happening.

10. **PW2, MO** the mother of the complainant testified that on 11.12.2017 at 4.00 am she was asleep with her husband, PW3 – VO, when she was awakened by sound of a motor cycle approaching her homestead. She woke up and stealthily walked to the house of her son JO. She knocked at the door but there was no response. The door was not locked from inside and so she pushed it and entered. There was nobody in the sitting room. When she walked into the bedroom and upon entering she was shocked to see the appellant and the complainant in bed. The minor was sitting on the edge of the bed while the appellant lay in bed well dressed. She told PW1 to leave immediately, which she did. Thus, the minor had left her room for her brother's house to meet the appellant.

11. PW 3 was informed of the incident by PW2 and they reported the matter to the police for investigations.

12. PW4 investigated the case and produced a birth certificate – PEx2 showing the minor was born on 6.2.2001. She then informed PW3 – the minor's father who also proceeded to the scene of crime. He found the appellant in the house. He informed the police at Ndere wherein, A.P.C. Lillian Akinyi arrested the appellant and handed him over to PW6 Fatuma Cheronu who commenced investigations.

13. Placed on his defence, the appellant gave unsworn evidence and stated that he was **Caleb Oduor** a body building engineer at Bamburi, Mombasa. He stated that on 10.12.2017 he was with his friend JO – the complainant's brother. That he had been at Kawet Primary school grounds with others to raise money for funeral arrangements of one of the players who practiced football with him.

14. He stated that after visiting another bereaved family at Ukwala, the two returned to the complainant's home. They used a motor cycle which J – PW1s brother J was riding. That J dropped the appellant at J's house and left to escort his girlfriend home leaving the appellant in the house.

15. Shortly thereafter, the minor complainant entered the house, greeted the appellant and sat on a chair in the sitting room. He stated that in about 5 minutes PW1's mother entered the room. She told the minor to leave the room and started quarrelling the appellant. He refused to leave when PW2 asked him to do so contending that he was waiting for J to bring the motorcycle. That PW2 called PW3 who later informed the Police and the appellant was arrested and charged. The appellant vehemently denied the offence alleging that there was a grudge between the families.

16. In support of this appeal, the appellant submitted reiterating his grounds of appeal. He asserted that there was no proof of penetration as the Clinical Officer so found that there was no penetration and that he was framed.

17. The Respondent opposed the appeal maintaining in oral submissions by Mr. David Okachi Senior Principal Prosecution Counsel that the prosecution proved its case against the appellant beyond reasonable doubt hence the conviction was sound and sentence was lawful.

DETERMINATION

18. I have considered the evidence before the trial court, the grounds of appeal and submissions for and against this appeal. The main issue for determination is whether the prosecution proved their case against the appellant beyond reasonable doubt warranting his conviction for the offence of defilement.

19. The scene of crime was at the homestead of the PW2 and PW3 wherein the complainant is their daughter. The appellant admitted being at the house where the offence took place at 4.00 a.m. He also acknowledged that PW1 entered the house where he was waiting for the complainant's brother J. He however claimed that he sat on the chair.

20. The evidence of PW1 was not challenged as there was no cross examination. The trial court that saw and heard the minor testify observed that her evidence was cogent, reliable and completely unchallenged.

21. PW1 stated that the appellant was her boyfriend of 2 months. She voluntarily left her room to go and join him at her brother's cottage at the risk of her parents finding out when it was meant to be a secret.

22. I find no evidence of ill will on the part of the minor so that she could frame the appellant. The trial court which had the opportunity to see and hear the complainant testify concluded that “She **was sincere cogent and truthful.**”

23. Although medical examination did not corroborate the minor’s testimony, her evidence was not shaken at all hence the trial court correctly admitted it under section 124 of the Evidence Act (Cap 80) for reasons that PW4, Sila Omondi the Clinical Officer stated that the minor told him that she willingly had intercourse with the appellant and therefore physical examination did not reveal any penetration as there was allegedly consensual sexual intercourse which was happening not the first time, according to the Clinical Officer. PW1 told PW4 exactly what she stated to the police and in court. There was no reason why she would frame the appellant. Although the appellant claimed that the appellant’s mother framed him, he did not pose any question to her as to why she had framed him with the offence. He has also not told this court the type of grudge that the family of the complainant had against him. Accordingly I find that the appellant was identified as the perpetrator.

24. On whether there was penetration, although PW4 stated that there was consensual sexual intercourse hence there was no evidence of penetration, PW1 was clear that when she entered the brother’s bedroom and found the appellant who was her boyfriend, she removed her trouser and her pant and remained with her shirt and the appellant too removed his trousers and they had sex by the appellant wearing a condom and inserting his penis in her vagina for between 3- 5 minutes then he removed it and they dressed up and she sat on the edge of the bed while the appellant lay on her brother’s bed where her mother found them at 4am.

25. Penetration as defined in section 2 of the Sexual Offences Act need not be complete or obvious or be supported by evidence of use of force. A child under the age of 18 years has no capacity to consent to sexual intercourse and even if the complainant in this case considered the appellant to be her boyfriend, innocently, the appellant being an adult owed her a duty of care to protect her from sexual manipulation and abuse. In addition, whereas it is possible that the complainant had had several sexual encounters with the appellant and therefore that particular incident could not be unusual, penetration is nonetheless achieved where she truthfully testified and stated that she had sexual intercourse with the appellant on the material night. The appellant’s defence was therefore valueless.

26. According to the complainant, she had told the appellant that she was a student at [particulars withheld] Girls as per the school identity card – PEx1 but the appellant manipulated the minor, misleading her that there was no problem as long as he wore a condom while defiling her. He assured her of protection. In law, it matters not that the minor permitted the appellant to defile her, the act of defilement is unlawful.

27. The age of the complainant was proved to be 16 years as she was born in 2001 as shown by her birth certificate produced by PW4 the investigating Officer.

28. Accordingly, I find that all the elements of defilement were proved to the required standard beyond reasonable doubt and therefore the conviction of the appellant by the trial court was sound. I uphold it and dismiss this appeal against conviction.

29. On sentence, I observe that the trial court meted out the minimum mandatory sentence prescribed by law. The current jurisprudence from the Court of Appeal is that there is no mandatory minimum sentences even in sexual offences see **Jared Koita Injiri v Republic [2019] eKLR** applying the principles laid down in **Francis Karioko Muruatetu v Republic SC Petition No. 15 and 16 of 2015**.

30. Considering the circumstances under which the offence was committed, and the age of the appellant and that of the complainant victim who innocently followed the appellant to her brother’s cottage and had sex with the appellant and bearing in mind the fact that as a child, she must have been manipulated to believe that she could have the appellant as her boyfriend and have sex with him without fearing any consequences as the condom protected her, I order for a pre sentence report to be filed by the Siaya County probation Officer to guide the court on appropriate sentence having regard to the appellant’s antecedents. Mention for Resentencing on 19th December, 2019.

31. Orders accordingly.

Dated, Signed and Delivered at Siaya this 4th Day of December, 2019.

R.E. ABURILI

JUDGE

In the presence of:

The appellant in person

Mr. Okachi Senior Principal Prosecution Counsel for the State

CA: Brenda & Modestar