



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 100 OF 2017

LINUS JOSEPH OKAKHA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant herein **LINUS JOSEPH OKAKHA** was charged with the offence of defilement contrary to Section 8(1) as read with Section 8 (3) of the Sexual Offences Act No. 3 of 2006. The particulars were that on the diverse dates between 15 day of November 2016 and 20th November, 2016 at [particulars withheld] village, South Sakwa Location, Bondo Sub-County within Siaya County, intentionally and unlawfully caused his penis to penetrate the vagina of **BAO [full name withheld]**, a girl aged 15 years.

2. The appellant also faced an alternative charge of committing and indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars were that on the diverse dates between the 15th day of November, 2016 and 20th day of November, 2016 at [particulars withheld] village, South Sakwa Location Bondo Sub-County within Siaya County, unlawfully touched the vagina of **BAO** a child aged 15 years with his penis.

3. The appellant denied the charges and the prosecution called four (4) witnesses who testified in support of their case.

4. Placed on his defence, the appellant gave his evidence on oath and called no witness.

5. The trial court found that the prosecution had proved the main charge against the appellant and convicted him under section 8(1) as read with section 8(4) of the Sexual Offences Act. After mitigation, the appellant was sentenced to serve 15 years in prison.

6. Aggrieved by the said conviction and sentence, the appellant filed this appeal setting out the following grounds of appeal:

1. That the learned trial magistrate erred in law and fact by putting the prosecution witnesses under duress to admit the fact of the alleged offence.

2. That the learned trial magistrate erred in law and fact to convict yet the evidence adduced was insufficient in law and in fact or a sound conviction to stand.

3. That, I cannot recall all that transverse during the trial court proceedings to adduce sufficient grounds

7. This being a first appeal, this court is called upon to reevaluate, reassess and reexamine the evidence adduced before the trial court and arrive at its own independent conclusion bearing in mind that it did not hear or see the witnesses as they testified. This is a principle espoused in several decisions as pioneered by ***Okeno v Republic [1972] E.A. 32.***

8. Revisiting the evidence before the trial court, PW1 that is **BAO** gave evidence after voire dire examination and stated that on the 15th day of September, 2016, she went to [particulars withheld] to visit her sister and proceeded to the home where the appellant was working and living. She found the appellant who welcomed her. She stated that on the said day, she slept in the kitchen and the appellant slept in another house. On the following day, she again slept in the kitchen and the appellant slept in another house. However, on the third day which was on a Thursday, the appellant went to the kitchen and they slept together and they engaged in sexual intercourse. She stated that the appellant promised to marry her.

9. It was her further testimony that on the 20th day of November, 2016 Raphael and Alice went and arrested both of them and escorted them to Bondo Police Station. Later she was treated and examined. She stated that she is 17 years old having been born on the 20th day of June 2000. she was taken to hospital on 21/11/2016.

10. In cross examination by the appellant, PW1 stated that the appellant did not take her from her home. She stated that she went to where the appellant was staying on her own and that she was crying and told him that she had a problem. She stated that on 18th/11/2016 when the appellant went to Nyamonye he left PW1 alone in his house. She also stated that she told the appellant that she was going to tell her mother that she had found a man to marry her. She stated that his employer found them on 19/11/2016 and that when they were both arrested on 20/11/2016 she threatened to commit suicide.

11. In reexamination, she stated that from 15th to 20th November 2016 she was with the appellant and that she did not leave his house.

12. **PW2 JAO** testified that the complainant herein was her daughter. She stated that the complainant left home on the 15th day of November, 2016 while angry, after disagreeing with her father and did not return. She further stated that on the 20th day of November, 2016 at about 7.00 p.m. she received information from Aloice that the complainant had been found at the appellant's home. Later she went to Bondo Police Station where she found the complainant in the cells. she recorded her statement. She stated that she knew Joseph that is the appellant herein as a member of their church.

13. In cross examination by the appellant, the witness stated that she did not know how her daughter reached the home of the appellant and that the appellant did not go to church on 20th November 2016.

14. **PW3 MOURINE ACHIENG OKWARA** a Clinical Officer based at Bondo Sub-County Hospital testified and stated that she examined the complainant and filled a P3 form on the 1st day of February, 2017. She stated that prior to the examination, the complainant had been treated at the hospital on the 21st day of November, 2016 and that she relied on the treatment notes while filling the P3 form.

15. On examining the complainant, in her genitalia, she had normal external genitalia, no bruises noted that the hymen was broken. She also noted that the complainant was having her menses. No spermatozoa was seen. She confirmed that there was penetrative sexual intercourse. She produced the P3 form, the treatment notes and the laboratory request and result form as exhibits.

16. **PW5 No. 43449 PC Omudho Okwaro** stationed at Bondo Police Station testified that he investigated the case after receiving a report through APC CPL Odera of Utonga Chief's Camp who had a prisoner suspected to have defiled a girl. He proceeded to the said Camp where he found the suspect, the complainant and her mother and the area Assistant Chief. He took the suspect and the complainant to Bondo Police Station and escorted the complainant to Bondo District Hospital for medical examination. He later issued her with a P3 form and after recording witness statements he charged the appellant with the offence of defilement. He stated that the complainant told him that the appellant had gone to her home and took her to the place where he worked where he had sexual intercourse with her for five days also obtained the birth certificate for the minor showing she was born on 20/6/2000 hence a minor, he produced the birth certificate as an exhibit 1.

17. At the close of the prosecution's case, the appellant gave sworn evidence and stated that from 15th to 20th November 2016 he was at Sinyanya and he was arrested on 20/11/2016. He stated that the Complainant in this case went to his house on 15th November, 2016 crying, knocked the gate and he opened for her. He asked her why she was crying and she stated that she wanted to commit suicide because her father wanted to cut her with a panga. That he prayed for her and told her that because it was late she could not go back to her home so she spent the night in the home and the appellant went and slept in a different house.

18. That on the three successive days he asked her to go to her home but she refused saying she would commit suicide and that even when he left and returned in the evening on 18th November 2016 after telling her to go to her home, he returned and found her.

19. He stated further that on the 20th day of November, 2016 both of them were arrested and escorted to Bondo Police Station. He denied the allegations that he had sexual intercourse with the complainant. He stated that the complainant wanted to commit suicide and he only accommodated her as a Good Samaritan since they belonged to the same church. He however conceded in cross examination that he did not inform her parents that the complainant was at his house for those five days. He admitted that he knew she was a young girl but that he prayed for her and counseled her. He denied being her boyfriend or having sexual intercourse with her.

SUBMISSIONS

20. In support of this appeal, the appellant submitted orally urging the court to help him by upsetting the judgement of the lower court. He claimed that he was framed. That he was a workman and that those who arrested him were his rivals in the church where he was a leader a leader. That they were envious of the appellant and that they threatened him and wanted him to return to his home to continue the church ministry there.

21. Mr. Okachi Senior Principal Prosecution Counsel opposed the appeal and submitted relying on evidence on record. He submitted that the victim and appellant were not strangers. That the complainant stated that the appellant was her boyfriend and that they were 'married' only to be told that they were underage and could not consent to a marriage. Counsel maintained that there was evidence of sexual activity. He urged this court to uphold the conviction and sentence

DETERMINATION

22. I have carefully considered the evidence on record together with the grounds of appeal and oral submissions for and against this appeal. The main issue for determination is whether the prosecution proved its case against the appellant beyond reasonable doubt that he defiled the complainant minor.

23. It is not in dispute that the appellant and the complainant were known to each other prior to the date of the alleged incident as they

belonged to the same church. It is also not in dispute that the complainant left their home and went to the home where the appellant was working and living and stayed there from 15th November 2016 till the 20th day of November, 2016 when the two were arrested on the 20th day of November, 2016 and escorted to Bondo Police Station.

24. The only issue is whether the prosecution established all the essential elements of defilement which are:

i. Proof of age of the complainant.

ii. Proof of penetration of the complainant's vagina.

iii. Whether the perpetrator was positively identified.

25. On the age of the complainant at the time of the alleged incident, the charge sheet states that the complainant was a child aged 15 years old. However, in her testimony, the complainant stated that she was aged 17 years as she was born in the year 2000. The Birth Certificate produced as exhibit 1, No. [particulars withheld] dated 23/11/2016 shows that the complainant was born on 20.6.2000 to AOB and JAO, at Nyangoma in Bondo District.

26. The complainant's mother stated that the complainant was 16 years old at the time of the incident. The incident in this case allegedly occurred on the 20th day of November 2016. From the birth certificate, the complainant was about 16 years and five months old. She was therefore a child as defined in section 2 of the **Children's Act**.

27. On whether there was penetration of the complainant's genitalia, the complainant testified that she went to visit the appellant on the 15th day of November, 2016 and they had sexual intercourse on the 3rd day and the appellant promised to marry her. According to the P3 form the complainant's hymen was absent. The clinical officer who examined the complainant made a finding that there was penetrative sexual intercourse although the complainant was in her menses.

28. From the evidence of PW1, and the Clinical Officer, I am persuaded that the appellant used his penis to penetrate the complainant's vagina.

29. The complainant was firm that the appellant had sexual intercourse with her and promised to marry her. The appellant admitted that the complainant went to his house where he worked on 15th until 20th November, 2016 but denied the allegations that he had sexual intercourse with the complainant.

30. The trial court which had the opportunity to see and hear the complainant testify stated that:

"I have considered the evidence of the complainant together with the defence staged by the appellant. My humble opinion is that the complainant's testimony was very consistent and firm and I do not have any reasons to doubt the same. As such, I am of the finding that the appellant had sexual intercourse with the complainant thus causing penetration.

31. On whether the perpetrator was positively identified, it is not in dispute that the complainant lived with the appellant between the 15th day of November, 2016 and 20th day of November, 2016. The complainant's mother testified that they used to go to the same Church with the appellant and the appellant stated that he knew the complainant from their church. Accordingly, the appellant and complainant were not strangers to one another. The appellant stated that he was only a good Samaritan who gave the complainant shelter when she went to him crying saying her father wanted to cut her with a panga and that she wanted to commit suicide so he prayed for her and counseled her during those five days while imploring her to return to her home but she refused.

32. Although the appellant claimed that the trial court put prosecution witnesses under duress to admit the fact of the alleged offence, I find no evidence of duress on record. The complainant's mother is said to have shown unwillingness to bring the complainant to court to testify for reasons known to her and when the complainant finally appeared, she wanted to change her statement and retract it.

33. The prosecution asked the court to treat her as a hostile witness but the court before treating her as such warned her of the consequences of becoming a hostile witness and she told the court that she was going to tell the truth.

34. A person who records a statement with the police as a witness or complainant which statement implicates another for an offence is bound to testify in court on the truthfulness of that allegation, unless they claim that they were compelled to write their statements or that circumstances had changed. In my humble view, the fact of the trial court warning the witness of the consequences of turning into a hostile witness is not a compulsion for the witness to lie to the court. A witness is under a legal duty to tell the court the truth and not to lie to the court as they could be perjured.

35. From the questions put to the complainant and her answers in cross examination, it was clear that she went to the appellant's house and was not forced to have sexual intercourse with the appellant hence she might have thought that she was on the wrong and wanted to clear the appellant of the offence. However, where the complainant is a child under the age of 18 years, she is incapable of consenting to sexual intercourse. The complainant appears to have had a disagreement with her father as stated by her mother and hence she sought refuge at the appellant's house because they went to church together but the appellant took advantage of her.

36. In my humble view, the evidence on record was sufficient to establish all elements of defilement against the appellant beyond reasonable doubt. The defence by the appellant did not water down the evidence adduced by the prosecution witnesses. He knew that the complainant was a child. He should have informed her parents after the child went to him crying saying she wanted to commit suicide because her father

wanted to cut her with a panga. Instead he kept her and in the name of praying and counseling her, comforted her with sexual intercourse.

37. The appellant's allegation in submissions that he was framed because he was a church leader and that the people wanted him to leave and return to his home area is in my view an afterthought as he never raised any issue of a grudge with the church congregation of parents of the complainant to warrant him being framed for such an offence.

38. I find and hold that the conviction of the appellant by the trial court was sound and safe, I uphold it. I find and hold that all the grounds of appeal by the appellant are devoid of merit. I dismiss the appeal against conviction.

39. On sentence, the appellant was a first offender and in mitigation before he was sentenced by the trial court, he stated that he was a first offender, prayed for leniency and that he had children who depended on him. However, the trial magistrate meted out on him mandatory minimum sentence which was not discretionary at the time. The sentence was lawful but this has since changed with the Superior Courts making findings that such mandatory sentences deprive the trial court of judicial discretion in sentencing and also deprive an accused person the right to mitigate before sentencing. Nonetheless, the appellant was accorded an opportunity to mitigate and he did, only that the trial court had no discretion to sentence him to any other sentence.

40. Taking all the circumstances of this case into account, the age of the complainant and the mitigation by the appellant in the trial court, I allow the appeal against sentence and set aside the 15 years imprisonment imposed on him and substitute it with a prison term of Five years to be calculated from 12/10/2017.

41. Orders accordingly

Dated, Signed and Delivered at Siaya this 10th Day of December, 2019

R.E. ABURILI

JUDGE

In the presence of:

The appellant in person

MR Okachi Senior Principal Prosecution Counsel

CA: Brenda and Modestar