



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

HIGH COURT CRIMINAL APPEAL NO. 46 OF 2015.

SIMON OMBITO JUMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence in Criminal Case No 1533 of 2012

at Ogembo Law Courts before Hon. N. Wairimu SRM delivered on the 8th June 2015)

JUDGMENT

1. The appellant's appeal is against sentence and conviction meted on him on the 8th of June 2015. The appellant was charged with the offence of, Defilement contrary to Section 8 (3) of the Sexual Offences Act No. 3 of 2006." The particulars of the offence are, "On the 10th day of June 2007 in Gucha District within Kisii County, unlawfully and intentionally committed an act which caused penetration of his penis into the vagina of RKO child aged 13 years.
2. The appellant's ground of appeal is that the trial magistrate mishandled the entire trial as a result his constitutional right to a fair was violated and as a result it was mistrial.
3. As the first appellant court it's my duty to re-evaluate the evidence and reach an independent conclusion bearing in mind that I neither heard or saw the witnesses testify (see **Okeno vs. Republic [1972] E.A 32**).
4. From the recorded proceedings the appellant was charged before the SPM Court at Ogembo on the 4th October 2012. He pleaded not guilty to the charge of defilement and was granted a bond of Kshs. 100,000/- . The case was fixed for hearing on the 8.11.2012. On the 8.11.2012 the matter was adjourned after the prosecution sought an adjournment to the 6.12.2012. Thereafter there were a series of adjournments between 8.11.2012 to 18.6.2013 when the Prosecution indicated that he had 2 witnesses and was ready to proceed. The appellant informed the court that the complainant should pay him 40,000/- which he had given to withdraw the case. He indicated he would not proceed with the case before his money was returned. The court ordered that he be remanded at Ogembo police station so that he could record his statement. On the 24.7.2013 the appellant stated that he was not ready to proceed as he wanted them to refund his money first before he proceeds. The court ordered that the matter proceeds. Pw1 was heard and the matter was adjourned. The appellant was released on bond on the 11.9.2013. On the 17.12. 2013 the appellant did not attend court his brother attended court and informed the court that he was unwell. The matter was adjourned to the 13.1.14 the court noted that the appellant was absent and a warrant of arrest was issued against the appellant and a summons for his surety. The matter came up several times for mentions thereafter. On the 5.5.2015 the appellant was brought to court under warrant of arrest. He informed the court that he was sick and that he did not have the documents. The court ordered that the appellant be remanded in custody until the matter was heard and determined.
5. The appellant asked the court to read the charge to him again. It was read in Kiswahili and he responded, "*Ni ukweli*". The court entered a plea of guilty. The facts were read to him. The facts were as follows;

'On the 10.6. 2007 at 6.30pm the complainant aged 16 was on her way home from church and as she was about to reach her parents' home she noticed the accused chasing her. The accused grabbed her and pushed her the ground and removed her clothes and defiled her. The complainant screamed and nobody responded. The complainant managed to escape and reported the incident to the accused's brother's wife who escorted her home. The following day the complainant was taken to Kenyena health centre where she was treated and referred to Gucha District hospital. She later recorded her statement and the accused was arrested and charged. A P3 form was issued to the complainant and filled on the 13.7.2007 the remarks by the doctor indicated she was raped and had vaginal trauma.' The P3 form was produced as exhibit.

6. After the facts were read the appellant reply was, “**All facts are correct**”. The court then convicted the appellant on his own plea’. In mitigation he informed the court, “**I have nothing to say in mitigation**’. The court thereafter sought a probation report. The surety withdrew stating that he had caused the accused to be arrested after he absconded. The court granted his request. On the 8.6.2015 the court considered the probation report and stated as follows, ‘**Having considered the probation officer’s, circumstances of this case and the relevant law, I would sentence the accused to 20 years imprisonment, right of appeal 14 days.**”

7. Mr. Kaburi for the appellant submitted that when the appellant was brought to court for mention on 5.5.2015 the appellant explained his reasons for his non-attendance but the trial magistrate proceeded to cancel his bond and ordered the appellant to conduct his case while in remand. It is further submitted that the appellant was *made to plead guilty and hurriedly sentenced* and convicted of the offence of defilement.

8. I have carefully perused the court proceedings and note the appellant was brought to court after a warrant was issued against him. The court cancelled his bond as he had no evidence to show that he had been sick as he alleged. The record further shows that the appellant asked for the charges to be read to him. This was done and he pleaded guilty, the facts were read and he admitted the facts. From the court record there is nothing to show that the appellant was *made to plead guilty*. He chose to voluntarily plead to the charge and after the charge was read to him he pleaded guilty by saying, “*Ni ukweli*”. After the facts were read his response was “*All facts are correct*”. The appellant was aware of the charge he was facing. Before his plea the complainant had testified in part and was to be re-called. The case did not proceed to further hearing after he absconded. I find that the appellant was properly convicted on his own plea of guilty. The facts as read to him disclosed an offence of defilement. The p3 form disclosed that the complainant was raped and had vaginal trauma. The conviction was proper. The trial court even took time and asked for a probation report on him. He was not hurriedly sentenced. The trial was not unconstitutional and there was no miscarriage of justice. The complainant was 13 years. Under section 8 (3) of the Sexual Offences Act No. 3 of 2006 , “**A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years**’ The sentence was as per the law. The appellant’s appeal fails and is dismissed.

Dated signed and delivered at Kisii this 5th day of December 2018.

R.E.OUGO

JUDGE

In the presence of;

Appellant In person

Mr.Otieno for the State

Rael Court Clerk