



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT HOMA BAY
CRIMINAL APPEAL NO.19 OF 2016

BETWEEN

SHADRACK OWAGA OJAL APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from original conviction and sentence in original Ndhiwa SRM's Court Criminal Case No.389 of 2015 – Hon. B.R. Kipyegon, RM, dated 14th April, 2016)

JUDGMENT

1. SHADRACK OWAGA OJAL (the appellant) was convicted on a charge of defilement contrary to **Section 8 (1) (3)** of the **Sexual Offences Act No.3 of 2006** and sentenced to serve 20 years imprisonment.
2. The charge stated that on 14th October, 2015 at [Particulars Withheld] village in **LUALA KADAWA LOCATION** in Kisumu County, he intentionally and unlawfully caused his penis to penetrate the vagina of **AAE**, a girl aged 14 years after having moved her from **KAMENYA** location in **NDHIWA** District. The appellant denied the charge.
3. **PW1 E O O** (AAE's father) testified that on 14/10/2015, while at home with his family, **AAE** left the home saying she was taking food to her mother who was at work, but she never returned for the next two months. He later got information that his daughter had been seen with the appellant (who was their neighbour) in Kisumu.
4. Since **AAE** was then a student at [Particulars Withheld] Primary School, **PW1** informed the head teacher, the chief, the D.O. and the children's Officer. He testified that **AAE** was 14 years old and produced her birth certificate as **Exhibit 1**.
5. **AAE** (**PW2**) confirmed that she left her parents' home on the date in question at 2.00 p.m., to take food to her mother who was at the jaggery plant. She then proceeded to **PALA** School where the appellant worked and found him making school windows at **ANDINGO PALA**. After exchanging greetings the appellant boarded a motor cycle with her to Unga, and left her there until 8.00 p.m. when he returned.
6. **AAE** and the appellant stayed together in a small house at Unga, and shared a bed, whereupon the appellant removed all his clothes as did **AAE** and they had sex. She described the experience as painful and she bled. She stayed at Unga for seven days, during which time they had sex every night.

7. The pair then moved to Kisumu as the appellant had some work to perform there, and they lived together for 2 months during which period they had sex several times. On cross examination she explained that her parents were not aware of her affair with the appellant, although they had talked with the appellant about taking **AAE** to school.

8. **JOSEPH ONYANGO OMBEWA** (PW3) the clinical officer who examined **AAE** found that she had a venereal infection but no traces of spermatozoa, while the appellant's genitals appeared normal.

9. **CPL WILSON CHERUIYOT** (PW4) received a report from **AAE**'s father on 1/09/2015 that she was missing. The girl's father had expressed suspicion that she may have eloped with the appellant – so PW4 carried out investigations leading to locating the pair in **MASENO** area.

10. In his sworn testimony, the appellant stated that he had talked with the girl's parent in March 2014, but he never went to pick her, and she would after go to him crying for help and eventually she went to his home and he gave her Kshs.10,000/=. On 18/04/15 the girl's father **E O** brought her to the appellant's home, then on 27/06/2015, PW2 requested the appellant to allow the girl to go back to her parent's home for a function – so he released. On 27/06/2015, PW2 brought back the girl to the appellant and he left with her for Kisumu where he was working.

11. It was the appellant's testimony that at no time did the girl's parents ever mentioned that she was in school – infact her father had said she had dropped out of school and was aged 20 years. It was his contention that because he had only paid Kshs.10,000/= (I suppose in reference to bride price), the girl's parents maliciously accused him of an unpaid balance and set him up saying he was aware **AAE** was a minor yet he wanted to marry her.

12. In his judgment, the trial magistrate pointed out that the girl's age as supported by her father's evidence and the birth certificate, and his own observation of her physical appearance nature and cognition placed her at 14 years.

13. He warned himself on the danger of convicting on the child's evidence alone but believed she was telling the truth.

14. As regards proof of the offence – which hinges on the evidence of penetration, the trial magistrate noted that the findings by the clinical officer did not address the issue of penetration. However he was satisfied that the minor narrated the events with –

“determination and elaborate conscience, without any contradiction or bias against the accused.”

15. The fact that her testimony regarding material facts such as how she left home, their movements and eventual location was corroborated by independent evidence, persuaded the trial magistrate to conclude that even her evidence as to how they regularly indulged in sex could not be untrue. He also noted that the appellant never denied engaging in sex with **AAE** on a regular basis.

16. In challenging the decision, the appellant submitted in writing that the prosecution case was not proved to the required standard saying that PW2 never produced the letter he purportedly obtained from the head teacher to whom he reported that his daughter was missing.

17. Further, that he had properly married **AAE** under customary law and even paid bride price, but PW2 was just too demanding and had only reported the matter to police in the scheme of getting back his daughter, and has since apologized to him as he didn't realize it would cost the appellant his freedom.

18. The appeal is opposed and Mr. Oluoch has submitted on behalf of the State that the appellant on his own admission he had married **AAE** and claims by the appellant that the girl's parents were complicit in the matter were an afterthought as no such issue was raised during cross examination of PW2 and indeed the investigating officer found no such complicity.

19. As regards **AAE**'s age, **MR. OLUOCH** submitted that before eloping with her, the appellant was aware that she was in primary class 6 and no amount of imagination could have placed her at 20 years and the defence that appellant believed she was over 18 years old was not available.

20. He urged this court to find that the conviction as proper, and dismiss the appeal.

21. I have considered the submissions made and I have also analysed the evidence presented at the trial. Indeed the appellant did not deny that he had sexual relations with **AAE**, whom he stayed with for at least over 2 months and whom he considered to be his wife as he had purportedly paid bride price.

22. **AAE** testified in clear details the trysts they had and what exactly was involved as they got intimate.

23. Indeed the appellant's evidence regarding their liaison confirmed exactly what **AAE** stated and I cannot fault the trial magistrate finding that such consistency persuaded him that her testimony regarding their sexual relations was also true.

24. I doubt that PW2 was entirely innocent as to what was going on between his daughter and the appellant – otherwise how is it that upon her disappearance he immediately suspected that she had eloped with the appellant?

25. Unfortunately for the appellant even such parental complicity does not absolve him from the offence. Was there any credible reason to cause the appellant to believe that **AAE** was over 18 years? These were people who were neighbours and they knew each other. The trial magistrate had a chance to see **AAE** and make an independent observation, he recorded that from her physical appearance, nature and cognition, she appeared around 14 years of age. Not only that, but the pre-bail report indicated that the appellant had children ranging from 36 years to some in Form 2 and class 4 – so it is not as if he did not have encounters with children or lacked an opportunity to interact with young persons and assess even just by appearance that **AAE** ought to be under 18 years at time of the “**cohabitation.**”

26. Consequently the conviction was safe and I uphold it. The sentence is as provided in law and I confirm the same. The appeal is dismissed.

Delivered and dated this 16th day of March, 2017 at Homa Bay

H.A. OMONDI

JUDGE