



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 146 OF 2015

JOSEPH JAMES ODONDE APPELLANT

VERSUS

REPUBLIC RESPONDENT

[Being an appeal from the conviction and sentence of the Senior Resident Magistrate's Court at Tamu (Hon. S. A. Opande SRM) dated the 3rd June 2015 in Tamu SRMCCRC No. 404 of 2014]

JUDGMENT

The Appellant was charged with Defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act, the particulars being that on 20th October 2014 in Muhoroni District within Kisumu County he intentionally caused his penis to penetrate the vagina of J A a child aged 3 years.

At the end of the trial he was found guilty, convicted and sentenced to serve eighty (80) years imprisonment. This appeal is against the conviction and sentence. The grounds in the Petition are:-

- “1. That, he pleaded not guilty to the charge;***
- 2. That the learned trial magistrate erred in law and facts when he upheld that he committed the offence without putting consideration that he was not examined by the doctor;***
- 3. That the honourable magistrate erred in both law and facts by not providing him with necessary documents i.e. prosecution statements for him to prepare his defence during the trial.”***

Supplementary grounds were filed together with the submissions but as this was done without leave they shall not be considered.

At the hearing the appellant relied on written submissions in which he inter alia faulted the trial magistrate for not considering that he himself was not medically examined and for not making a finding that there was no medical evidence to connect him to the offence. He also complains of not being supplied with the necessary documents that the prosecution relied on hence breaching his right to a fair trial. He also contended that his right to be assigned an Advocate was violated. On the sentence his submission is that the sentence of 80 years is excessive and embarrassing and is also inconsistent with the law as the sentence provided is life imprisonment.

Prosecution Counsel opposed the appeal. She submitted that the sentence is lawful and that it was not necessary for him to be medically examined as Section 124 of the Evidence Act allows the victim of a sexual offence to be the sole witness; that the victim's mother testified on her behalf and the doctor found a broken hymen which proved penetration. On witness statements she submitted that this was never raised

during the trial and that the appellant followed the proceedings ably and this is but an after thought. Prior to the hearing she served the appellant with a notice to enhance the sentence and she urged this Court to enhance the sentence to life imprisonment.

The appellant did not say anything in reply.

As the first appellate Court I am under a duty to reconsider and evaluate the evidence at the trial so as to reach my own conclusion while bearing in mind that I did not have the benefit of seeing the witnesses.

In summary the prosecution's case was that on the material day the complainant's grandmother (PW1) heard her grandchildren – the victim herein and her brother – who had followed the appellant (their herdsman) to a nearby homestead to graze cattle, crying. She went to investigate but on the way met her grandson who informed her that the appellant was doing something bad to the complainant. She proceeded to go to the scene but again met the complainant and when she inquired what the problem was the complainant told her how the appellant had removed her pant and asked her to lie down before placing his penis on her vagina. She also tearfully narrated how the appellant had removed his own pant. When the victim was examined at Ahero seven days later marked healing bruises were found between her thighs and her hymen was broken. This led the clinical officer (PW5) to conclude that there was penetration.

The appellant made an unsworn statement in which he stated that he was a guard in Ngera and had nothing to say in regard to the case.

There is evidence that the complainant herein was three (3) years old at the material time. The Clinical Officer who examined her confirmed this and in the application for late registration of a birth produced as EXB Plaintiff 2 her date of birth is stated as 18th August 2011. There is also evidence that the child was defiled. Soon after the incident she vividly but tearfully narrated to her grandmother how her pant was removed, how she was held and asked to lie down and how the assailant removed his own pant then placed his penis on her vagina. She also did tell her grandmother that when she screamed the assailant ordered her to stop. This confirms the grandmother's (PW1) evidence that she heard the children crying. I am satisfied that the complainant spoke the truth and did not make this up. Whereas under Section 124 of the Evidence Act corroboration is not necessary there is medical evidence that confirms the child was defiled. The

Clinical Officer testified that whereas there was no active bleeding there were bruises and a broken hymen which was evidence of penetration.

The question then is whether it was proved beyond reasonable doubt that the appellant was the culprit. On this I am satisfied that there was proof beyond reasonable doubt that the appellant defiled the child.

To begin with, the children's grandmother (PW1) saw the children follow the appellant to the place he was going to graze the animals. He was their herdsman and so they knew him well and being daytime there could have been no mistaken identity. Secondly when the grandmother went to find out what was happening she found the appellant in the vicinity and the child named him as the person who had hurt her. At the hearing though the child initially denied it she later referred to the appellant "Jagem" as her assailant. From the record she appears to have been nervous and shaken during the hearing.

The appellant alleges that his right to a fair hearing was infringed. The proceedings however show that he was accorded a fair opportunity to defend himself. Indeed the trial magistrate sought an explanation as to why he was held in police custody for more time than is allowed by the law. The trial magistrate also ensured that he was certified fit to plead. Regarding the complaint of being afforded legal representation the Court of Appeal stated in **Kennedy Oboya V. Republic Kisumu Criminal Appeal No. 52 of 2014:-**

"9. As regards the alleged contravention of the appellant's right to a fair trial under Article 50(2)(h), there is no obligation on the state to provide Counsel to defend suspects charged with defilement. The Learned Judge cannot therefore be faulted for failing to advise the appellant that he was

required to demand representation by Counsel paid by the state.”

That was the position prevailing at the time of this trial. Fortunately the State has recently put in place the measures to actualize this right. All in all I find

the conviction herein sound.

As for the sentence it is correct that the sentence provided is life imprisonment. Accordingly I substitute the sentence imposed with one of life imprisonment. The appeal is otherwise dismissed.

Signed, dated and delivered at Kisumu this 12th day of May 2016

E. N. MAINA

JUDGE

In the presence of:-

N/A for the state

Appellant in person

CA: Felix Magutu