



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CRIMINAL APPEAL NO.29 OF 2015**

*(An appeal from original conviction and sentence of Ogembo PM'S C Criminal Case No. 754 of 2014 by Hon. NAOMI WAIRIMU PM dated 24<sup>TH</sup> February, 2015))*

**DN.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. The Appellant herein, **DN** was arraigned before the Senior Principal Magistrate's court at Ogembo on the charge of Defilement contrary to **Section 8 (1) (3) of the Sexual Offences Act No. 3 of 2006**. The particulars of the charge were that on the 11<sup>th</sup> May, 2014 at about 1 a.m. in Gucha South District within Kisii County, intentionally caused his penis to penetrate the vagina of DOM (particulars withheld) a child aged 14 years.
2. The appellant faced a second court of committing an indecent act with a child contrary to **Section 11 (1) of the Sexual Offences Act No. 2 of 2006**, the particulars of which were that on 11<sup>th</sup> May 2014 in Gucha South District within Kisii County, intentionally touched the vagina of DOM (particulars withheld) a child aged 14 years with his penis.
3. The appellant pleaded not guilty to the two counts and after a full trial, the lower court found him guilty of the first count of defilement, convicted him and sentenced to serve 20 years imprisonment.
4. The appellant is aggrieved by the said conviction and sentence. He has therefore filed this instant appeal against both the conviction and sentence and has put forth the following grounds of appeal.

**1. That, the learned trial magistrate erred in both law and facts by not considering that I entered a plea of not guilty and that the prosecution relied upon untested single witness.**

**2. That, the learned trial magistrate erred in both law and fact by convicting the appellant on the basis of contradictory, flimsy evidence of the prosecution, who seemed to be coerced to implicate me.**

**3. That, the learned trial magistrate erred in both law and facts by convicting me with the details and judgments of Evans Osoro whom was convicted and sentenced on 24<sup>th</sup> February 2015 yet the appellant was convicted on 31<sup>st</sup> March 2015.**

**4. That, the learned trial magistrate erred by law and fact by convicting me and sentencing me on a defective charge sheet on Section 8 (1) instead of 8 (2) of Sexual Offence Act no. 3 of 2006.**

5. At the hearing of the appeal, the appellant informed the court that he wished to rely on the written submissions that he had filed in court. I have perused the appellant's written submission and I note that he challenges the judgment of the trial court on the grounds that it was founded on the untested evidence of a single eyewitness, the contradictory evidence tendered by the prosecution witnesses and that the charge was defective. Mr. Otieno, state counsel, opposed the appeal and submitted that the prosecution's case had been proved beyond reasonable doubt and that the complainant positively identified the appellant as she knew him very well. Mr. Otieno submitted that the complainant's testimony was corroborated by the testimony of PW2 who confirmed that he was able to see the appellant using light from a torch. Mr. Otieno added that medical evidence confirmed that the appellant was 14 years old and that the sentence of 20 years imprisonment passed on the appellant was not only lawful but was also the minimum sentence provided for by the law.

6. The prosecution called a total of 7 witnesses whose evidence can be summarized as follows:

7. On 11<sup>th</sup> May, 2014 at about 1 a.m. PW1, the complainant in this case, was sleeping in the same bed with her younger brothers BM (PW2)

aged 12 years and AM aged 5 years when someone broke into the house through a wooden window while wielding a panga on his right hand and a torch on the left hand. The intruder threatened to kill the complainant and her brothers after which he asked PW2 and the younger brother to cover themselves and took the complainant to the sitting room where he defiled her for about 1 hour before escaping through the door.

8. PW1 and PW2 then closed the window and the door but no sooner had they decided on what to do next than the same intruder returned to the house through the window after which he continued to defile the complainant.

9. The complainant managed to escape from the grip of the intruder and ran out of the house to the house of one Shem Onchoka where she reported the attack.

10. The complainant stated that she recognized the appellant through his voice and the white cloth he had covered his head with. She said that the attacker was the appellant whom she knew as DN a neighbor living about 300 meters from their home. The complainant's testimony was that it was raining heavily on the night of the attack.

11. On cross-examination, PW1 testified that the attacker and her were not talking and that the lights were off but that she knew the appellant when he told her not to tell on him. She confirmed that she knew him as she heard his voice while passing on the road.

12. PW2, BM testified that on the material day, he was sleeping with the complainant and one AM, a younger brother, when a man broke into the house through the window. He stated that the intruder, whom he recognized as DN, then took the complainant to the sitting room where he raped her. His evidence was that he recognized the appellant by his voice because he knew him as they had spoken before.

13. He added that he saw and recognized the appellant because he had a torch and a white headscarf.

14. PW3 Shem Onyango Onchoka's testimony was that on the material day at about 2 a.m. the complainant knocked at his door while shouting for help and upon opening the door, he noted that her clothes were soaked in rain water as it had rained heavily on that night. Upon enquiring from the complainant what the problem was, she informed him that the appellant had broken into their house through the window and raped her. PW3 then informed the area chief who advised him to accommodate the complainant in his house for the night as they would try to track down the appellant later. Indeed the appellant was arrested the same morning at about 6.30 a.m.

15. PW4 Josephine Kerubo took the complainant to the hospital for treatment. PW5 David N. Maiso was present when the accused was arrested.

16. PW6 Sakwa Thadeus Motendi was the health officer who examined and treated the complainant after the attack. He stated that the complainant knew her attacker and she had earlier been treated at another facility, Nduru District Hospital. He added that the complainant's labia majora and minora were lacerated. He produced treatment notes and the P3 form as exhibits 3 and 4 respectively.

17. PW7, no. 73670 Corporal David Kapkori was the Investigating Officer who recorded the statements of the witnesses, visited the scene of the crime and issued the complainant with the P3 form.

18. When placed on his defence, the appellant who gave an unsworn statement in which he only explained the circumstances under which he was arrested by PW3 and the area assistant chief who took him to the police station and he was later charged in court.

19. As the first appellate court, I have considered and re-evaluated the entire evidence afresh so as to reach my own conclusion (**See Okeno Vs Republic [1972] E.A P 32**). I have considered the issues of law raised by the appellant in his petition of appeal and I am alive to the fact that I neither heard nor saw the witnesses testify.

20. On the first ground of appeal regarding the trial court's reliance on the evidence of a single eye witness. I note that this allegation by the appellant is far from the truth. There were 2 eyewitnesses to the defilement, the complainant and her 12 year old brother PW2. Both PW1 and PW2 gave a vivid account of how the entire attack took place. Their testimonies were not overturned upon cross-examination by the appellant. Both PW1 and PW2 recognized the appellant by his voice, they knew his name and the white scarf that he had on his head. Furthermore, the complainant immediately reported to PW3 that it was the appellant who had defiled her. PW6, the medical officer confirmed the injuries on the complainant's labia majora and labia minora as an indication that she had been defiled.

21. I have no doubt in my mind that the complainant positively identified the appellant as her attacker as not only did the appellant defile her for a period of about 1 hour thereby giving her ample opportunity to identify him, but the appellant came back a second time on the same night and defiled her again.

22. The complainant and PW2 knew the appellant as their neighbor before the night in question.

23. PExhibit 1, a birth certificate established the complainant's age at 14 years.

24. There is therefore no doubt in my mind that the complainant was defiled by the appellant. I find the prosecution's case before the trial court was proved beyond reasonable doubt. I find that the appellant's claim that the evidence against him was flimsy and contradictory is not consistent with the cogent evidence on record and I reject it.

25. The defence offered by the appellant when put on his defence by the trial court only focused on how he was arrested and presented to the police by the local administrators.

26. The appellant steered clear of explaining his alleged involvement in the attack. I find that his unsworn defence did not shake the sworn testimonies of the prosecution witnesses who corroborated the evidence of the complainant.

27. The appellant did not state if there was any grudge or bad blood between him and the complainant or the rest of the prosecution witnesses that could have prompted them to implicate him in the heinous crime of defilement.

28. In **Nguku Vs Republic [1985] KLR 412 at P 413** it was held that:

**“When analyzing the facts and the opposing evidence in a judgment, the individual facts and the assessment of the relative credibility of the witnesses thereon must come first. The trial magistrate should consider all the evidence in its respective stages and then arrive at a general conclusion on the totality of the evidence.”**

29. Further, in **Ouma Vs Republic [1986] KLR 619** the court had the following to say on evaluation of the evidence.

**“At the time of evaluating the prosecution’s evidence, the court must have in mind the accused person’s defence and must satisfy itself that he prosecution had by its evidence left no reasonable possibility of the defence being true. If there is doubt, the benefit of that doubt always goes to the accused person...”**

30. In the instant case I am satisfied that the evidence tendered by the prosecution left no reasonable possibility of the defence being true. In **May Vs Republic [1981] KLR P. 129** it was held that whereas no adverse inference can be drawn against the appellant for electing to make an unsworn statement, its potential value is less cogent.

31. On sentence, **Section 8 (1) and (3) of the Sexual Offences Act** provides as follows:

**Section 8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.**

**(3) 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.**

32. The complainant’s age on P-Exhibit 1, the complainant’s birth certificate, placed her age at 14 years. The minimum sentence for the above charge is 20 years. I am therefore satisfied that the sentence of 20 years imprisonment was lawful and I reject the appeal on sentence.

33. Having found that the evidence adduced by the prosecution witnesses was consistent, cogent and credible and that the charge against the appellant was proved beyond reasonable doubt, the order that commends itself to me is the order to dismiss this appeal and upholding the conviction and sentence passed by the trial court.

**Dated, signed and delivered in open court this 8<sup>th</sup> day of September, 2016**

**HON. W. A. OKWANY**

**JUDGE**

**In the presence of:**

- Miss Mbelete for the State

- N/A for the Appellant

- Omwoyo court clerk