



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT HOMA BAY
CRIMINAL APPEAL NO.16 OF 2016

BETWEEN

ERICK OTIENO OWADE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence in original Homa Bay CM's Court Criminal Case No.1018 of 2012 – Hon. N. Kariuki, RM dated 20th September, 2013)

JUDGMENT

1. **ERICK OTIENO OWADE** (the appellant) was convicted on a charge of defilement contrary to **Section 8 (1)** as read with **Section 8 (3)** of the **Sexual Offences Act** and sentenced to serve 20 years imprisonment. He denied the charge and after trial in which 4 witnesses testified the trial magistrate held that the charge had been proved.
2. The charge against the appellant stated that on 15th September. 2012 at [particulars withheld] village of WAKULA sub location, Mfangano South in Mbita, he unlawfully caused his penis to penetrate the vagina of JAO a child aged 15 years.
3. JAO told the trial court that while seated outside their house at Ugina combing her hair, the accused suddenly grabbed the comb from her and went into his house, saying if she wanted the comb back, she would have to follow him. She indeed followed him up to the house.
4. Once inside the house, she found the appellant lying on his bed, so she took the comb and headed out for the door, but the appellant locked it and forced her onto his bed.
5. He then removed her blouse and panty, and pushed off her skirt, unzipped his trousers and had sexual intercourse with her, while holding her neck so that she could not scream. She bled and in the process they were caught in the act by the appellant's wife who was carrying a baby.
6. The matter was reported to the area chief by Bernard Odhiambo (PW3) uncle to JAO and later on the appellant was handed over to police. PW2 (**CPL FREDRICK OJWANA**) confirmed being called by the area chief who handed over the appellant to him. He did not retrieve JAO's panty which was left in the appellant's house, saying he suspected it got lost in the melee.

7. **DR. STEPHEN OMONDI** (PW4) who examined JAO found that her hymen was broken and she had semen like discharge from the orifice of the vagina. A vaginal swab and urinalysis disclosed dead spermatozoa cells. He concluded that JAO had been defiled.
8. The appellant's unsworn defence was that the allegations were untrue and that he had been framed up as a result of a disagreement he had with PW3 whose wife he had assaulted.
9. The trial magistrate considered the evidence and found that JAO had given a graphic description of how the appellant had sex with her. Although JAO was the sole witness to the incident, the trial magistrate recorded that she believed her because she was calm and forthright and her testimony was consistent and supported by medical evidence. She also found that the malice alleged by the appellant was not proved and rejected his defence.
10. The appellant contented the trial court's findings saying he was not accorded a fair trial as the charge sheet was defective in light of the medical evidence. Further that crucial witnesses were not called.
11. In his written submissions the appellant pointed out that there was no evidence tendered to prove that JAO was 15 years old.
12. I have analysed the evidence, I have no doubt that JAO was defiled – that was clear from her evidence and the doctor's findings. The incident took place in broad daylight – the appellant was someone well known to her – there could be no mistake in his identity. His argument that his wife should have been called as a witness is a factor the trial magistrate took into account and rightly noted that rules of evidence make her an uncompellable witness.
13. Failure to call the other two individuals MOSES OTIENO and JULIUS (mentioned by PW2) as persons who told him that "someone has raped your niece" inconsequential as they did not mention any name of the person alleged to have committed the offence. They merely explained to PW2 that the cause of the noise from the crowd he was hearing was because "**someone has raped your niece.**"
14. The trial magistrate duly took into consideration the fact that JAO was a single witness but believed she was telling the truth and recorded her reason in the judgment – thus fulfilling the provisions of **Section 124** of the **Evidence Act**.
15. I therefore find that the conviction was safe.
16. However on sentence, the court observed the appearance and demeanour of the appellant when he appeared to argue his appeal. He gave me the impression of one who had just turned 18 years, so I directed that he undergoes an age assessment. The report by Dr. Odhiambo (the Medical Superintendent – Homa Bay Hospital) confirmed that the appellant is no waned between 18-19 years.
17. This would mean that at the time of committing the offence he was under 18 years to be precise, when the offence occurred in 2012 he was between 14-15 years – and therefore a child under the provisions of **Section 2** of the **Children Act**.
18. Under the **Children Act NO.8 of 2001, Section 190** provides that no child shall be ordered to imprisonment or placed at a detention camp.
19. It was therefore illegal to sentence the appellant to 20 years imprisonment. **Section 191 (1)** provides for alternative modes of dealing with offenders. In my view the appellant has more than paid the price – the record shows he was held in remand custody from 17th September 2012 and he remained in prison custody until the conclusion of the trial on 23rd September 2013. He has since then served three years prison term and I deem that to be sufficient punishment. He shall thus be set at liberty forthwith unless otherwise lawfully held.

Delivered and dated this 6th day of October, 2016 at Homa Bay.

H.A. OMONDI

JUDGE