



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 17 2014

JOHN ODUOR AMARA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[From original conviction and sentence in the Principal Magistrate's Court at Bondo Criminal Case No. 777 of 2013]

J U D G M E N T

1). The appellant was charged with the offence of prostitution of a Person with Disability contrary to section 19 (1) (c) of the Sexual Offences Act No. 3 of 2006.

The particulars were that on the 18th day of September 2013 at around 10 am at [particulars withheld] Sub location, East Yimbo Location in Bondo District within Siaya County for financial favour offered S A a child aged 14 years a person with disability for the purposes of sexual acts made financial advances by giving the said S A Kshs. 100/= in order to induce her to have sexual acts with him.

2). The appellant was equally charged with the alternative count of Committing an Indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006.

3). The particulars were that on the 1st day of September 2013 at around 10 am at [particulars withheld] Pala Sub location in Bondo District within Siaya County touched the private parts namely the breasts of S A a child aged 14 years.

4). The appellant was convicted and sentenced to 10 years imprisonment hence this appeal which he argued in person.

5). The brief facts of this matter are that PW1 on 1-9-2013 at around 10 am was fetching firewood with PW2. According to the evidence presented before court, the appellant then came and gave her Kshs. 100/=. Thereafter at a nearby bush he proceeded to defile her. She later told PW3 who was her father. On cross examination she said that she went to the hospital the following day.

6). PW2 told the court that they were fetching firewood with PW1 when the appellant came and requested PW1 to go with her. She told the court that he saw the appellant give something to the complainant. She also said that she saw the appellant enter the bush with PW1 and when she emerged she was happy.

7). PW3 told the court that he was at home on the material day when the two children had gone to fetch firewood. They both came home quarrelling about money and upon inquiry he learned that it was the

appellant who had given the money to the complainant in exchange for her body.

8). The investigating officer was PW4 who told the court that one Olago came with the two girls and reported the incident. He said that he had found the children playing with the Kshs. 100/= note. He confirmed that the money belonged to the appellant.

9). The appellant gave sworn defence denying the charges. He said that he had a grudge with one Ajuma over a land issue and that is why he conspired to fix him.

10). The court has perused the evidence on record as well as the petition of appeal by the appellant. The said petition substantially raises constitutional issues to the rights of an accused person and the fact that there was no sufficient evidence to convict him. The same has been raised in the written submissions by the appellant. The state supported the conviction and sentence and argued that the appeal was meritorious.

11). This court is enjoined to evaluate the evidence afresh with a view of arriving at an independent finding as was enunciated in the now famous case of **Okeno -VS- Republic [1972] EA 32.**

12). The charge in respect to the appellant was in regard to a minor who was allegedly disable. From the evidence on record there was no medical documents produced to this effect. The only mention of her mental disability is by PW3 and PW4. Otherwise the court on its own did not determine at all whether the minor was of unsound mind in anyway. I think in a case of similar nature greatest care ought to be undertaken to ascertain that the complainant is indeed disabled in a manner that somebody would take advantage of her. This is clearly provided under section 2 of the Sexual Offences Act No. 3 of 2006.

13). Secondly and of great significance is on how the complainant received the Kshs. 100/= note. The complainant alleged that she was given after the appellant had had sex with her yet on the same breath she says that it was before. PW2 on the other hand said that she saw the appellant give something to the complainant. That something turned out to be the note. I find that the two pieces of evidence are contradictory.

14). PW3 said that the children came home and were fighting over the money. This was not brought out by the children. They did not in their evidence say that they fought or disagreed over the money.

15). Of great importance is the question whether the appellant defiled the complainant. The complainant said that she was defiled and was infact taken to hospital. PW3 confirmed the same. There was no medical documents to support this assertion of defilement. If PW3's wife was involved in taking her to the hospital the same did not come out.

16). Consequently, I do not think that there was sufficient evidence to convict the appellant. There was no proof that the minor was disabled and neither was there sufficient evidence that she gave the money to her. In the premises the appeal is hereby allowed. The appellant shall be released unless lawfully held.

Dated, signed and delivered at Kisumu this 2nd day of March, 2015.

H.K. CHEMITEI

JUDGE