



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 16 OF 2014

WALTER OKALO ONGONY.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[From original conviction and sentence in the Principal Magistrate's Court at Bondo Criminal Case No. 642 of 2013]

J U D G M E N T

1). The appellant was charged with the following counts:

Count I: Defilement contrary to section 8 (1) (3) of the Sexual Offences Act No. 3 of 2006.

Particulars: Walter Okalo Ongony on the diverse dates between 26th July 2013 at about 5.00 pm to 28th July 2013 at about 11.00 am, [particulars withheld] Sub location in Siaya County, unlawfully and intentionally caused his penis to penetrate the vagina of Maureen A A a child girl aged 14 years.

Count II: Defilement contrary to section 8 (1) (3) of the Sexual Offences Act No. 3 of 2006.

Particulars: Walter Okalo Ongonyo on the diverse dates between 26th July 2013 at about 5.00 pm to 28th July 2013 at about 11.00 am, [particulars withheld] Sub location in Siaya County, unlawfully and intentionally caused his penis to penetrate the vagina of C A O a child girl aged 13 years.

Alternative charge for Count II: Committing an Indecent Act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006.

Particulars: Walter Okalo Ongonyo, on the diverse dates between 26th July 2013 at about 5.00 pm to 28th July 2013 at about 11.00 am, [particulars withheld] Sub location in Siaya County, unlawfully and intentionally caused his penis to penetrate the vagina of C A O a child girl aged 13 years with his penis.

2). At the conclusion of the trial the appellant was sentenced to 20 years imprisonment to run concurrently hence this appeal.

3). The brief facts of this case are that both PW2 and PW3 are minors who decided to run away from home for fear of being disciplined by their father/guardian PW4. They went to the home of the complainant who decided to confine them on 26-7-2013 at around 5 pm. The appellant then slept with them in one bed and defiled them that night separately and in turns. Both described graphically how the appellant forcefully removed their panties and defiled them that night.

4). PW4 decided to look for them the following day and found them near the appellant's house. They took off but he managed to arrest PW3 who informed him of what had transpired. He then informed the police as well as the chief and had the appellant arrested.

5). PW1 produced the P3 form and the treatment notes which established that the complainants had been defiled.

6). The appellant gave sworn evidence denying the charge. According to him the difference between him and PW4 was the fact that his cows had grazed in his field. He denied ever meeting or knowing the complainants.

7). The court has perused the evidence on record as well as heard the parties submissions. The appellant's petition of appeal is premised on two grounds namely that he was not served with the witness statements so as to enable him prepare for trial and that section 211 of the CPC was not complied with by the trial court.

8). On the first ground I note from page 2 of the proceedings that the court gave an order for the appellant to be supplied with witnesses statements. As to whether he actually took them was upon the appellant to confirm. From the proceedings however it is clear that he fully participated and nothing can be construed to suggest otherwise.

As to the question of compliance with section 211 of the Criminal Procedure Code I think is preposterous to suggest that the court failed to comply. In page 13 of the proceedings the court stated: **“Having perused the record so far, a prima facie case is made out to warrant a defence. The accused may elect to give either sworn, unsworn statement or play his right of silence”.**

“Accused: I will give sworn statements with no witness. I need time to prepare”.

10). Clearly, the appellant was granted the opportunity and this ground therefore fails.

11). The other issued to determine is whether indeed the appellant defiled the minor girls. The evidence of the two girls corroborate each other very well. Although it is not clear from the proceedings what happened on 27th and 28th it is not in dispute that the minors were defiled while they were under the custody of the appellant. Neither do I believe the appellant's assertion that he did not know the minors and only knew PW4. He did not deny that they were neighbours and it is not entirely true that he only saw the minors in court for the first time.

12). The medical documents namely P3 forms sufficiently corroborated the minors evidence of defilement.

13). In the premises I do not find this appeal meritorious. The appellant took advantage of two afraid minors to defile them without any due regard to their age or the predicament they were in. There was no reason why he did not return them to their home. The appeal is hereby dismissed.

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

H.K. CHEMITEI

JUDGE