



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 76 OF 2012

FRANCIS OMOLLO OWENGA ALIAS OMONDI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No. 218 of 2011 in the Principal Magistrate's court at Siaya)

J U D G M E N T

1). The appellant was charged with the offence of Defilement of a child aged 11 years contrary to section 8 (1) (2) of the Sexual offences Act No. 3 of 2006.

The particulars were that on the 7th day of April 2011 at around 1 pm [particulars withheld] Sub location in Siaya County intentionally and unlawfully penetrated the vagina of C A O a child of the age of 11 years with his penis.

2). He was equally charged with the alternative count of Indecent Act with a child of the age of 11 years contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006.

The particulars were that on the 7th day of April at around 1 pm at [particulars withheld] Sub location in Siaya County, intentionally and unlawfully touched the vagina of C A O a child of the age of 11 years with his penis.

3). The appellant was convicted and sentenced to life imprisonment. In his earlier petition filed on 13-6-2012, the appellant had raised several issues but during the hearing of this appeal he relied on an amended petition which in essence was mitigation.

4). Before considering the appellant's mitigation, it is better to briefly discuss the history of the matter. PW1 on 7-4-2012 was sent by her mother to get some clothes. On the way he met the appellant who was cutting grass. The appellant forcefully pulled her out of the road and proceeded to defile her.

5). **PW3 Brian Omondi**, heard the scream and saw what was happening. He immediately went to tell PW2, the minor's mother who also came to the scene. **PW4 B O W**, the minor's father also came. The appellant was arrested.

6). Both the minor and the appellant were subjected to medical examination and according to Evaline Atieno Othuono PW5 the clinical officer there was evidence to suggest that the appellant had engaged himself in sexual activity within 12 hours.

7). In his defence the appellant simply denied the offence and blamed the minor's father. He did not however disclose the nature of the disagreement.

8). Before dealing with the appellant's mitigation, what I find uncomfortable and clearly spelt out in the entire proceedings at the lower court is the actual age of the complainant. All that the mother did was to tell the court that she was in standard 4 at [particulars withheld] School and that she was 11 years. Her mother and father did not help things either PW6 the investigating officer only relied on the clinical card. I have perused the clinical card which apparently has the age of the minor cancelled from 13 years to 11 years. Nobody explained who did the cancellation and for which reasons. From the naked eye, it appears that the pen used and the handwriting are different.

9). In the absence of the age clearly spelt out, I shall then turn to the definition found under the Children Act Cap 141 which states under section 2 as:

“age” where actual age is not known means apparent age;”

10). With the above definition I do find that the minor as at the time of the incident should have been around 11-13 years. I am so guided by the fact that since there was no other source even from the parents it would be fair and reasonable to consider the complainant to be above 11 years.

11). Consequently, and taking into consideration the mitigation by the appellant, I shall proceed to find that the proper section in which the appellant ought to have been charged should have been section 8 (1) (3) of the Sexual Offences Act No. 3 of 2006. Effectively therefore the appellant ought to have been sentenced to a term less than 20 years.

12). The sentence as provided under section 8 of the said Act is mandatory it has to be custodial and nothing else.

In the premise I do allow the appeal only to the extent of setting aside the life imprisonment of the appellant and order that he serves 20 years imprisonment from the date of the judgment at the lower court. Orders accordingly.

Dated, signed and delivered at Kisumu this 4th day of May, 2015.

H.K. CHEMITEI

JUDGE