



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 51 OF 2013

STEPHEN ODHIAMBO ODODA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No. 112 of 2012 in the Senior Principal Magistrate's court at Siaya)

J U D G M E N T

1). The appellant and his co-accused were charged with the following offences:

Charge: Gang Defilement contrary to section 10 of the Sexual Offences Act No. 3 of 2006.

Particulars: Philip Ochieng Owino & Stephen Odhiambo Ododa on diverse dates between 1st and 6th February, 2012 at [particulars withheld] sub location, in Siaya District within Nyanza province in association, intentionally caused their penises to penetrate the vagina of C A O a child aged 14 years.

Alternative Charge: Committing Indecent Act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006.

Philip Ochieng Owino on diverse dated between 1st and 6th February 2012 at [particulars withheld] Sub location, within Nyanza province, intentionally touched the vagina of C A O a child aged 14 years with his penis.

Alternative Charge: Committing Indecent Act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006.

Stephen Odhiambo Ododa on diverse dated between 1st and 6th February 2012 at [particulars withheld] Sub location, within Nyanza province, intentionally touched the vagina of C A O a child aged 14 years with his penis.

2). After full trial they were both convicted and sentenced to 20 years imprisonment. The appellant has filed this appeal citing several grounds.

3). The facts of this case were that **PW1 C A O**, was on her way to school on 1-2-2012 when she met the appellant and his co-accused one Philip Ochieng Owino. Both of them convinced her to go to his place. According to her it was PW2 who got hold of her while his colleague pushed a bicycle. When they reached his house (simba) they locked her in and left. The appellant threatened to kill her if she attempted to leave.

4). Both the appellant and his colleague defiled her for 6 days. Eventually they let her go and was found on the way by one K who was a neighbour and took her home. She found her father and mother whom she narrated the ordeal. She was taken to Siaya hospital as well as Siaya police station where they reported the incident.

5). **PW2 L A N**, the complainant's mother told the court that she waited for PW1 to come home from school for lunch to no avail. She called the school teacher but she was told that she did not report to school. She then decided to look for her together with the pastor and the village elder. They even went to the home of the co-accused but by then they had already left. Later she was found on 6-2-2012 and she took her to hospital where a P3 form was filled.

6). **PW3 Bob Onyango Ahenda**, was among the people who mounted a search for the complainant. In the process of looking for her she was assaulted by the appellant herein and he reported the incident at Karemo AP post. He said that the minor was found near a bush on 6-2-2012 and told them that she had been in the house of the appellant.

7). **PW4 Simon Nyamwembe**, produced the P3 form. According to the analysis and the result of examination the minor's external genitalia was normal and the hymen was broken. There were no tears. There was discharge but not blood stained.

8). **PW5 the investigating officer**, narrated the incident as told to him by the witnesses. He issued the warrants of arrest which led to the appellant and his co-accused to be arrested.

9). The appellant gave sworn defence. He did not know the events of 1st – 6th February 2012 but all that he knew was his arrest on 8-2-2014 when he was arrested in his house in the presence of his wife. He denied the charge arguing that the whole saga was fabricated by PW2 the complainant's mother because of a land dispute regarding her and his late brother.

10). I have perused the proceedings as well as the submissions by the parties herein. The court is enjoined to reevaluate afresh the evidence on record and come up with independent finding. In his petition of appeal dated 24-4-2013 he attacked the lower court's judgment on the following areas:

1. **That the evidence of PW1 was inconclusive and uncorroborated.**
2. **Forensic examination was not done.**
3. **Vital witnesses were not summoned.**
4. **The court failed to adhere to the provisions of section 324 and 329 of the CPC.**

11). It is true that other than the evidence of PW1, no other eye witness testified on the whole incident. What is certain however from the evidence of PW2 and PW3 is that the minor disappeared from 1st February to 6th February. The question is, where was she for 6 days? She told the court how she was taken literally forcefully on her way to school by the appellant and his accomplice.

12). There is no doubt that the minor was school going. PW2 infact said that she telephoned the teacher namely Mike Okoth and Willis Obiero who told her that she did not go school that day. Further, there is no dispute that PW2 and others including the village elder were mobilised to look for the complainant for those days.

13). Is it possible that there was a mistaken identity? In other words could there be a possibility that the minor was in another place and not the appellant's home? From the evidence of the relationship between the minor and the parties it is clear that the minor knew them very well. Infact on cross examination PW1 was emphatic that she knew the appellant. She said that his nickname was Sunday. Further, if the events took place for 6 days it would then be very difficult to suggest that there was mistaken identity or that the circumstances were difficult for PW1 to appreciate who were her captors.

14). The evidence of defilers was not corroborated even during cross examination. The P3 form clearly shows that even if the minor had taken bath, there was sufficient proof that she had been defiled.

15). In regard to failure to call some important witnesses including K who picked the minor from the road and took her home, I respectfully do not think that it would have added any meaningful weight to defence. In any case the appellant had the liberty of calling those witnesses mentioned but not called by the prosecution. Further, no amount of witnesses is required to establish a case. A single witness could suffice especially in such Sexual Offences. Infact section 124 of the Evidence Act presupposes that where a single witnesses testify in Sexual Offence such as this, the court could convict provided it believes that the victim is telling the truth.

16). I do not find any evidence to suggest that PW1's evidence was doubtful. Clearly, she was threatened by the appellant and his accomplice with harm if she tried to run away or make any noise. The argument that section 324 and 329 of the CPC were not complied with is to say the least preposterous. The evidence on record clearly shows that the appellant was granted opportunity to mitigate which he did.

17). Consequently, and in light of the above analysis I do not think that this appeal is meritorious. The same is hereby dismissed.

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

**H.K.
JUDGE**

CHEMITEI