



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 131 OF 2013

RAJIV ONYANGO OTIENO APPELLANT

V E R S U S

REPUBLIC RESPONDENT

(Being an appeal from the conviction and sentence of the Principal Magistrate's Court at Bondo

(Hon. P. W. Mutua PM) dated the 23rd October 2013 in Bondo PMCCR No. 414 of 2012)

J U D G M E N T

In the Court below the appellant was charged with three counts of defilement contrary to section 8 (1) (3) of the Sexual Offences Act. He faced three alternative counts of inducing an Indecent Act with a child contrary to section 6(b) of the Sexual Offences Act.

He was acquitted on all the principal counts but was convicted on the three alternative counts and sentenced to serve a concurrent sentence of five (5) years imprisonment.

On the first alternative count it was alleged that on 8th May 2012 in Bondo District within Siaya County he intentionally and unlawfully induced MAO to engage in an Indecent Act with George Olingo.

The particulars of the second alternative charge were that on 10th May 2012 in Bondo District within Siaya County the appellant intentionally and unlawfully induced MAO to engage in an Indecent Act with Erick Ochieng.

The third alternative count alleged that on 9th May 2012 in Bondo District within Siaya County he intentionally and unlawfully induced MAO to engage in an Indecent Act with Charles Orwa.

The complainant who stated, and produced a child health card to that effect, that she was born on 22/7/1996 testified that although she hailed from Migori she was at the material time living at Bondo with her brother in-law. On 8th May 2012 at about 7pm she met the appellant as she was going to buy tomatoes. He allegedly told her that he needed to tell her something. After buying the tomatoes she returned home. Thereafter she had dinner and was going to bed when she decided to go answer a call of nature. On her way back from the latrine she met the appellant again and he asked why she had not gone. Since she knew him as they lived in the same plot she accompanied him to his house. He then excused himself to go make a call but shortly afterwards returned with George Olingo, a teacher at [particulars withheld] Primary School. The appellant asked her to accompany the said George to his house which she did but once in his house George undressed her and had carnal knowledge of her five times. She spent that night with George but in the morning he called the appellant to pick her.

On 9th May 2012 the appellant took her to the house of one Charles Orwa at a place called Guba. There was nobody in the house at the time but he opened the house with a key, put her inside and left locking her inside. When at around 8pm Charles Orwa came home he asked her who had taken her there and when she said it was the appellant he wanted to know how he had obtained the key. She told him she did not know. He then proceeded to undress her and to have sexual intercourse with her while carressing her and touching her breasts. The next day the appellant went to the house at about 10AM and informed her that things were serious as the matter had reached her school. He ordered her to implicate her brother in-law failing which she and her brother in-law would die. He then removed a knife and escorted her to [particulars withheld] sub-location where they found one Erick Ochieng waiting with a motorcycle to allegedly take her to Mageta Island. However when they reached a place called Usenge Erick Ochieng bought her tea and chapati. Thereafter they boarded a ferry and went to Mageta Island where he took her to what he claimed was his mother's house and saying she was now his wife had sexual intercourse with her. The next morning she told him she wanted to go back home but he took her to a lodging where he carressed her breasts, buttocks and vagina before taking away her clothes leaving her with an under pant only. He locked the room and left. Then she saw a lady through the window and called her. The lady gave her something to wear and also opened the door for her. She also gave her 100/= with which she boarded the ferry and went back home. Her brother in-law (PW3) testified that after she disappeared he reported the matter to her school and also the Children's Office at Bondo. When he asked the appellant if he had seen her his response was that he suspected that she was with George Olingo and promised to take him there. The appellant however disappeared. It was while he was at the police station that the appellant called him to say he was with George Olingo. The next day PW3 met George at [particulars withheld] Primary School and it was agreed the appellant would show them where the girl was. He took them to Charles' house but she was not there. They however found her clothes. On 11/5/012 the complainant's headmaster summoned PW3, the appellant, George Olingo and Charles Orwa and once again the appellant undertook to produce her but he disappeared. When she showed up on 5th June 2012 PW3 took her to the police station as well as to the Children's Office and it was there that she narrated what had befallen her. It was then that the appellant was arrested and charged. The complainant was also taken to Bondo District Hospital for examination. Dr. Malik (PW5) testified that she was seen at the hospital on 7/6/2012 and that her hymen was torn.

When put on his defence the accused gave sworn testimony and called one witness. He stated that on 5th May 2012 while he was in Homabay his wife (DW2) called to say that his brother in-law was asking where the complainant was. When he went home on 7th May 2012 his brother in-law told him that he had caned the girl and she had run away and that he thought she was in his house. He advised him to report the matter to the school and to the police. On 8/5/012 they were called to the school and when they were asked where the girl was his brother in-law said she had disappeared. They looked for her but did not find her but on 6/8/2012 at about 6pm she resurfaced. He did not talk to her and on 7/8/2012 went to work as usual. However when he returned home at 6pm his wife told him that police officers were looking for him and had asked him to go to the station the next day. He complied only to be arrested and charged. He contended that he had a grudge with his brother in-law arising from a debt. His wife narrated how when the girl went missing her husband told their brother in-law to report the matter to the police and how the girl resurfaced on 7/6/2012 at about 7pm. Then on 8/6/2012 while her husband was away at work police officers came looking for him. Then on 12/6/2012 he was charged. She denied that there was any truth in the allegations made against him.

In his petition the appellant raises the following grounds:-

- 1. That the Learned trial Magistrate erred in law in convicting the Appellant on charges that did not exist in law.**
- 2. That the learned trial Magistrate erred in law and in fact in convicting the accused while basing the conviction on unproven offences.**
- 3. That the learned trial Magistrate erred in law and in fact in failing to appreciate that there was no proof that the Appellant intended any sexual acts between the complainant and other persons or that such persons did commit any such sexual acts with the complainant.**

4. **That the Learned trial Magistrate erred in law and in fact in allowing the admission of evidence and more specifically the documentary evidence irregularly thereby prejudicing the Appellant's right to a fair trial.**
5. **That the Learned trial Magistrate erred in law and in fact in convicting the Appellant when the evidence before Court could not be held to have proven the charges faced by the Appellant beyond reasonable doubt.**
6. **That the learned trial Magistrate in his analysis of the evidence before Court shifted the burden of proof to the Appellant.**
7. **That the learned trial Magistrate in sentencing the Appellant brought into consideration factors extraneous to what was before him, thereby sentencing the Appellant to an excessive jail term.**

Mr. Madialo Advocate relied on these grounds in arguing the appeal which was vehemently opposed by Miss Wakio, learned prosecution counsel.

I have as the first appellate court re-considered and evaluated the evidence adduced at the trial. I have also considered the submissions by both at the hearing of the appeal. The complainant in this case was 16 years old when these offences are said to have been committed. She vividly narrated how she first met the accused on her way to buy tomatoes and later when she was leaving the toilet and how he took her to the homes of all the three men on the dates alleged. On each occasion the man would have sexual intercourse with her. Indeed the last man took her to an Island where he stayed with her for almost a week. She vividly narrated her escape from her ordeal and told the Court that the appellant would pick her the day after. She had spent the night with the men he had delivered her to. There is medical evidence that when she was examined her hymen was missing. In any event this being a sexual offence her evidence alone suffices provided that the Court believes her – see section 124 of the Evidence Act. It is my finding that her narration of the events was so vivid and consistent as to leave no doubt that what she narrated happened. I believed her. The fact that the three men were not arrested to be charged does not change the fact that the appellant delivered the complainant to them. He must have intended them to defile her or to have indecent acts with her because he always took her to their houses and left her alone with them. Indeed to the first man – G – he took her at night.

I am not persuaded that the trial Magistrate shifted the burden of proof to the appellant or that he ignored his evidence. To the contrary I find that the evidence against the appellant was so overwhelming that his defence could not stand up to it. He himself admitted being summoned to the girl's school together with the three men. It would of course have been prudent to call that head teacher as well as the woman who rescued the complainant. However my finding is that the omission to call them did not take anything away from the very cogent evidence given by the complainant. I would on my part also reiterate the order by the trial Magistrate to the police arrest the three men who committed the indecent acts with the complainant.

The appellant acted unlawfully and intentionally and the charges against him were proved beyond reasonable doubt. This appeal is dismissed and the conviction and sentence are upheld.

Signed, dated and delivered at Kisumu this 11th day of June, 2015

E. N. MAINA

JUDGE

In the presence of:-

Ruto for the state

Appellant in person

Moses Okumu/Rose Abondo CC