



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 107 OF 2013

CLEOPHAS WAMBARE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

Introduction

1). The appellant herein was charged with the offence of Defilement contrary to section 8(1) (2) of the Sexual Offences Act.

The particulars are that on the 28th day of August 2012 in Ugunja district within Siaya County intentionally caused his penis to penetrate the vagina of **E A O** a child aged 10 years.

2). He was equally charged with the alternative charge of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006.

The particulars are that on the 28th day of August 2012 in Ugunja district within Siaya district within Siaya County intentionally touched the breast of **E A O** a child aged 10 years.

3). The prosecution called a total of seven witnesses to prove their case. The appellant was eventually convicted and sentenced to life imprisonment hence this appeal.

Facts

4). The complainant PW1 who was then aged 10 years was heading to Madeya for a hair cut (kinyozi). On the way she met the appellant who told her that he wanted to send her to her father. They then went to the appellant house where the appellant allegedly defiled her.

5). **PW3 D O and F A PW4**, both minors were playing using a bicycle. They told the court that they invited the complainant to play with them but she was going to a kinyozi. In the process the appellant called the complainant and took her to his house. The two then went to the said house but the door was closed from inside.

6). PW4 told the court that she heard the complainant crying but they were unable to see what was going on in the house. However, the complainant later emerged out of the house crying. She told them that she had been defiled by the appellant.

7). **PW2 R A O**, the complaint's mother when she came home in the evening was told by her husband

that the complainant had been defiled and she took her to Ndere hospital but because there was no lab facilities she took her to Ambira hospital the following day.

8). **PW5 assistant chief**, assisted in arresting the the appellant. He handed him to **PW6 P.C Brian Wambugu**, who had also received the complaint and had issued a P3 form to PW2 to be filled. PW6 further produced the complainant's clothings which had blood stains.

9). **PW7 Howard Okengo**, the clinical officers produced the P3 form. He concluded that the hymen was not intact and the vagina walls were tender *inter alia*.

10). The appellant's defence was simple and straight forward. He gave unsworn testimony. He did not explain anything to do with the charges that faced him. In short he did not as such traverse the prosecution case.

Analysis and Determination

11). This being the first appeal, this court is enjoined to reevaluate the evidence afresh. The appellant has mounted four grounds in his petition of appeal. During the hearing both the appellant did file some home grown grounds which vigorously denied the charge.

12). The substance of his appeal however, is that he was never subjected to any medical assessment and that he was never served with any witness statements to prepare for the trial.

13). On the grounds of not being supplied with the witness statements I have perused the court record and I do not find anywhere where he requested for the same and the court denied him. Of course the procedure is essentially to provide for such statements or documents or even copies of exhibits to be relied on by the prosecution. However, in the event that a party or an accused for that matter acquire and allow the matter to progress like in this case to the end without making any such request or demands then he shall have himself to blame. It is in my opinion too late in the day for such an argument to be raised by the appellant.

14). Looking at the evidence therefore, what runs across the strength of the respondent's case is the evidence of the minors. As is the case their evidence ought to be corroborated. Although they were young the trial court found that they were competent enough to give sworn testimony.

The thread that binds their testimony is that they met the complainant on the material day while they were playing. They even suggested to her that she should join them in their game. Apparently the complainant was going to have her hair shaved.

15). Further, they saw the complainant being called by the appellant and being taken to his house. They followed her and found the door locked. Cheeky as the children are they peeped through the window but they could not see anything. PW4 however said that she heard the complainant crying.

16). It is noteworthy also that they saw the complainant coming out of the appellant's house and when they asked her what had happened she was crying and she explained to them what had befallen her. There is no doubt that these minors knew the appellant. Infact in his cross examination there was nothing to suggest that they did not know each other. The whole ordeal took place during daytime. Infact they testified that the appellant was harvesting maize.

17). As earlier stated no plausible defence seemed to have been offered by the appellant on the allegations of those witnesses. The medical treatment notes as well as the P3 clearly indicated that the complainant was defiled.

18). This court clearly finds that the only explanation of the crying by the complainant when coming out of the appellant's house was due to nothing else but what transpired within the 10 or so minutes she was in the appellant's house. The child could not cry if the only thing was the appellant having sent her to her

father.

19). The argument that the appellant ought to have been subjected to medical test holds no water. PW6 confirmed to the court that the appellant was infact arrested after several days. It is not possible therefore to have had him undergone any meaningful medical examination after such several days.

20). The appellant has argued in his submission that there is no provisions in law in respect to section 8 (1) (2) of the Sexual Offences Act which he was charged under.

Respectfully, this is not true. The said quoted section as indicated in the charge sheet clearly establishes such offences regarding minors under the age of 11 years.

In any case the age of the complainant was not an issue during the trial as well as in this appeal.

21). In the premises I do not find any merit in this appeal. The appellant's action does not befit a parent or an adult for that matter. He took advantage of a minor and her innocent trust. The medical notes and the P3 form produced clearly shows penetration and therefore sufficient proof of defilement. The sentence against the appellant was within the law and this court see no need of interfering with the same. This appeal is otherwise dismissed.

Dated, signed and delivered at Kisumu this 12th day of May, 2014.

H.K. CHEMITEI

JUDGE