



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 62 OF 2013

LEONARD OTIENO NDOGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case number 418 of 2012 of the Principal Magistrate's Court at Siaya – R.B. Ngetich Ag. CM)

J U D G M E N T

Introduction

1). The appellant was charged with the offence of Defilement contrary to section 8 (1) (4) of the Sexual Offences Act No. 3 of 2006. The particulars were that on the 20th day of May 2012 at [particulars withheld] in Siaya District within Nyanza Province, intentionally caused his penis to penetrate the vagina of L A O a child aged 17 years.

2). There was also the alternative count of committing 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 20th May 2012 at [particulars withheld] in Siaya District within Nyanza Province intentionally touched the vagina of L A O a child aged 17 years with his penis.

The appellant was convicted and sentenced to 15 years imprisonment. He has filed this appeal citing 3 grounds:

3). The brief facts are that PW1 L A O was a house help of the appellant's mother. On the material day at around 11 p.m the appellant arrived from Nairobi. He found both his mother and PW1 at home. He was then served food by PW1 and after eating he prepared to go and sleep. The appellant's mother advised PW1 to prepare a place for the appellant to sleep.

In the process of cleaning the house which was within the same compound for the appellant to sleep, the appellant forcefully defiled the complainant in the process. He threatened to harm her should she raise any alarm. After defiling her she gave her Kshs. 50/=.

4). The following morning she informed PW2 Richard Onyango Ogola who took action by reporting to the AP's camp and taking her to Siaya District hospital. PW3 produced the P3 form which showed that the complainant had been defiled. The said witness equally produced the P3 form in respect to the

appellant and which indicated that he was HIV positive.

The appellant was then arrested by the police and charges preferred against him.

5). In his defence the appellant denied the offence. He acknowledges that he arrived from Nairobi the same day and he found both the complainant and his mother. He stated that he had disagreement with PW2 over land and that is why he was suspected and fixed.

Analysis and Determination

6). There is no doubt that both the appellant and the complainant met on the material day when the latter arrived from Nairobi. It was conceded by the appellant that it was PW1 who prepared a place for him to sleep. The complainant apparently did not know the appellant before this incident.

7). Equally, the fact that PW1 was pregnant at the time of the incident was not disputed. This therefore concludes the argument in regard to the age of the complainant. Although there was no evidence to show her exact age from the available dates on record it is highly doubtful if she was over 18 years. Consequently, the fact that the age assessment of the complainant was not undertaken does not in any way help the appellants defence.

8). The ingredients of the offence of defilement include:

- a. **unlawful penetration**
- b. **lack of consent from the other person**
- c. **consent was obtained by force or unlawful means**

See section 3 (1) of the Sexual Offences Act No. 3 of 2006.

9). From the evidence on record it was the appellant and his mother who were with the complainant during the incident. There was no other male who would have sex with the complainant.

Equally, the evidence of PW1 that he was forced by the appellant holds water. This is buttressed by the fact that he gave Kshs. 50/= to the complainant, although he said that the said money was given to her by her mother. The appellant did not bother to tell his mother to shed light on what transpired that night. Further, the evidence of PW2 was credible as he had no grudge against the appellant and I do not find any reason for him to have fixed the appellant. In any event the appellant did not lead any evidence showing the land dispute he had with the said PW2.

10). The medical evidence clearly established that there was penetration and discharge found at the complainant's genitalia.

The report was not challenged at all during cross examination. I do find therefore that there was penetration and this is corroborated by the said report.

Consequently, I do find that this appeal is not meritorious at all. The appellant took advantage of a house help. He knew that he was HIV positive and I dare say that his sole purpose was to infect her with the disease. I therefore dismiss the same.

Dated, signed and delivered at Kisumu this 14th day of July, 2014.

**H.K.
JUDGE**

CHEMITEI