



REPUBLIC OF KENYA

High Court at Kisumu

Criminal Appeal 156 of 2011

**SAMUEL DALON OWINOAPPELLANT
VERSUS**

REPUBLICRESPONDENT

**(From original conviction and sentence in Criminal Case number 393 of 2009 of the
Chief Magistrate's Court at Kisumu – M/s R. B. N. Maloba)**

JUDGMENT

The appellant was charged with two offences namely:-

**Count 1: DEFILEMENT OF A GIRL CONTRARY TO SECTION 8 (3) OF THE SEXUAL
OFFENCES ACT NO. 3 OF 2006**

Particulars of offence are that on the 22nd day of May 2010 at [particulars withheld] Bondo District within Nyanza province, unlawfully and intentionally caused his penis to penetrate into the genital organ (vagina) of L.A.O a girl aged fifteen (15) years.

**Alternative Count: INDECENT ACT WITH A CHILD CONTRARY TO SECTION 11(1) OF THE
SEXUAL OFFENCES ACT NO. 3**

Particulars of the offence are that on the 22nd day of May 2010 at [particulars withheld] Bondo District within Nyanza province. Committed an indecent act with a girl namely L.A.O aged fifteen (15) years by touching her breasts and her vagina.

The appellant was found guilty and convicted to twenty five (25) years imprisonment. He has filed this appeal citing several grounds. The substance of the grounds are :-

- a) **There was no medical report to link him with the alleged offence.**
- b) **the court relied on contradictory evidence.**
- c) **The Court failed to appreciate his alibi defence.**

The brief facts of this case are that the complainant who was aged fifteen (15) years was ironing clothes in their house around 7:00 p.m. when she was called by a certain lady (PW6) to her house. When she reached there she found the appellant sitted. The said PW6 forced her to go with the appellant to his house. She in fact escorted both of them to the appellant's house.

On being left alone the appellant proceeded to defile her forcefully. She had injuries on her vagina where blood oozed. She screamed but nobody came to her rescue.

She left the house at around 9:00 p.m. When her mother inquired she told her the whole episode. Her mother called PW6 who admitted that she took the complainant to the appellant's house.

The appellant was then taken to the beach leaders house and later taken to the police.

PW1 the doctor produced the P3 form and according to him there were injuries on the complainant's genital although the same were over 72 hours old. The hymen had been torn and there was whitish substance with foul smell.

PW3 S.O is the complainant's father. He received the information from his wife and he called L. A PW6 who confirmed the complainant's version. He reported the matter to the beach leader and later assisted in the arrest of the appellant.

PW4 Edward Nyambeka is the BMU Chairman. He received information from PW4 and assisted in the arrest of PW6 as well as the appellant.

PW5 PC Johanna Lengandu was the investigating officer. He received the complaint from PW3. After carrying out his investigation he re-arrested the appellant and took the complainant to the hospital for examination.

I note however that the said witness testified on other issues like the appellant threatening to kill the complainant an issue which was never raised.

PW6 Lilian Onyango told the court that on 27th May 2010 a certain boy came and told her to call a certain girl whom she did not know. She actually called the girl who met with the boy but she said she did not know what transpired. Later she was arrested and charged vide criminal case number 1138 of 2010.

The appellant on being put on his defence merely denied the charge. He said that he was arrested on 25th May 2010 while watching video.

This being the summary of the case, this court in line with the authority of **Okeno vs Republic 1972 E.A. 32** is enjoined to :-

“Reconsider the evidence, evaluate it itself and draw its own conclusion in deciding whether the judgment of the trial court should be upheld”.

The appellant did file hand written submissions where he has attacked the proceedings in particular the date of the occurrence of the offence. According to him the charge sheet indicates 22nd May 2010 whereas PW3 talks of 24th May 2010.

I have perused the said evidence and I do not find such discrepancy. PW3 received the report from his wife on 23rd May 2010 at 6:00 p.m. and reported to the police on 24th May 2010.

From the evidence of PW1 there is no doubt that the complainant was defiled. The said doctor clearly found injuries on the complainant private parts.

The evidence of complainant was well corroborated by PW3 and PW4. L.A though she said that the incident took place on 27th May 2010 did admit that the appellant requested her to call the complainant.

In her evidence PW6 said:-

“I went to the girl twice. The first time I did not find her. I went the second time and found her. I told her there was a man calling her”.

She went ahead to tell the court that she knew her since they were neighbours and that she was aged between fifteen (15) and sixteen (16) years. She further said:-

“When I returned from market I found the two in the maize farm. I can see the boy who sent me to call the girl in the dock (Accused identified)”.

Clearly, there was a conspiracy between PW6 and the appellant which they executed and succeeded.

I do not think that for the foregoing reasons this appeal is meritorious. The appellant was clearly identified and the complainant's evidence well corroborated. This appeal is hereby dismissed.

Dated, signed and delivered at Kisumu this 6th day of May 2013.

H.K. CHEMITEI

JUDGE

In the presence of:

.....for state

.....for the appellant.

HKC/aao