



(Appeal against both conviction and sentence of the Senior Resident Magistrate's

Court at Buterein Criminal Case No. 122 of 2003 [B. O. OCHIENG, SRM)

BARNABAS OKHAKO

OMUSULA.....APPELLANT

VERSUS

**REPUBLIC.....RESPONDE
NT**

JUDGMENT

The appellant, **BARNABAS OKHAKO OMUSULA** was charged and convicted of the charge of defilement contrary to section 8 (1) (3) of the Sexual Offences Act No. 3 of 2003.

The particulars of the offence are that on the 8th day of May, 2010 in Butere District within Western Province, intentionally caused his penis to penetrate the vagina of D.A, a child aged 15 years.

When the appellant was arraigned before the lower court, he pleaded not guilty to the charge. After a full trial, the appellant was found guilty and convicted and sentenced to twenty years imprisonment. The appellant was aggrieved by the conviction and sentence and appealed to this court.

The main grounds of appeal are as follows ;-

1. That the charge was defective.
2. That the ingredients of the offence of defilement were not proved.
3. That the complainant's age was not satisfactorily established as 15 years or below.
4. That the medical evidence was scanty, unsatisfactory and contradictory.
5. That the trial shifted the burden of proof and the judgment failed to identify the correct issues and did not contain the points for determination nor gave reasons for the decision.
6. That the appellants defence was not considered.
7. That the prosecution evidence was insufficient, contradictory inconsistent and uncorroborated.
8. That the sentence was harsh.

Mr. Akwala advocate appeared for the appellant. His oral submission expounded his written submissions. Mr. Limo appeared for the State. He stated that he did not support the conviction as the medical evidence was not conclusive.

The case for the prosecution case was that on 8.5.2010 at about 2.00 p.m., PW1, D.A, a 15 year old orphan was on her way from the river. The appellant who is her uncle called her and told her that he wanted to send her to Sabatia. The complainant went to where the appellant was but the appellant told her he had sent somebody else but wanted to give the complainant something. The complainant followed the appellant into the appellant's house. The appellant pushed the complainant into his bedroom, tore off her dress and defiled her. The complainant went home and had a bath and washed her pants. The complainant had pain on the chest and vagina. She reported the matter to her guardian, PW2, **R.A**. A report was made to the village elder, PW3, **GODFREY OMURUNDE**, then to the police. The complainant was issued with a P3 form and treated at Butere District Hospital. The P3 was filled and confirmed that the complainant had been defiled. The appellant was subsequently charged with the present offence.

In his defence, the appellant stated that on the material day he was with two artisans, that is Geoffrey Ndunde and Patrick Wetende who were repairing his father's house. That he was with the said artisans from 7.00 a.m. to 6.30 p.m. The appellant stated that the complainant is a daughter to his eldest brother. He denied having seen the complainant on the material day and denied the offence. He further stated that he was framed up due to a land dispute. He also stated that the guardian who the complainant lived with owed a debt of Kshs.25,000/= to his late father since the year 1999 and the appellant had made demands for the payment of the same.

This being a first appeal, it is the duty of this court to re-evaluate and to re-consider the evidence adduced before the trial magistrate's court so as to reach its own independent determination whether or not to uphold the conviction of the appellant. In reaching its decision, this court is required to put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore cannot be expected to make any determination regarding the demeanour of the witnesses (*see **Okeno v Republic [1972] EA 32***).

The complainant's evidence is that the complainant defiled her, leaving her with pains in the chest and vagina. The complainant had however bathed and washed her pants by the time she made a report to her guardian, PW2. It is observed that the offence took place in broad day light. The appellant was known to the complainant. According to PW2, the complainant made a report to her the following day. PW2 made a report to the authorities and the complainant was escorted to hospital.

The evidence of the Clinical Officer, PW4, **MOSES WANYONYI** is that upon examining the complainant he saw signs of penetration. The PW3 form filled in reflected the complainant's age as 15 years. The Clinical Officer explained during cross-examination that the age is assessed but the estimation not specific. He further said that the complainant had 30 teeth and the age was assessed as between 13 and 16 years. PW8, **TERRY WEKESA**, another Clinical Officer from Butere District Hospital produced the complainant's treatment records and stated that the complainant had lacerations to her vaginal area but had bathed by the time she examined her. The Clinical Officers (PW4 and PW8) found no bleeding and concluded that that was not the complainant's first time to have sexual intercourse.

The defence raised the issue of the complainant not being a virgin or not being the first time to engage in sexual intercourse. The complainant's evidence was that sexual encounter was her first one. The medical evidence on record does not explain whether there are other ways of losing virginity. The evidence however confirms that there was defilement. Issue of first time or not can only go into weighing the complainant's credibility. Likewise, the complainant's evidence cannot be faulted because of her statement that she saw sperms coming out as a whitish discharge. That is the child's understanding of the discharge. The trial magistrate in the judgment has given reasons why he believed the complainant.

The complainant's evidence is corroborated by that of her guardian (PW2) and the medical evidence. A report of the incident was made to the village elders, PW1, **BENSON ODANGO** and PW3, **GODFREY OMURUNDE** and PW7, **PC INVIOLET LUMATI**. There are no reasons why the complainant would frame up the appellant. The land dispute referred to by the appellant was denied by the complainant, her guardian (PW2) and the two elders who testified herein. The Kshs.25,000/= debt that the appellant talked about was over 20 years old at the material time.

The evidence of the actual defilement is that of the complainant only. However the proviso to Section 124

of the evidence Act provides as follows:-

“Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings the court is satisfied that the alleged victim is telling the truth.”

The authorities cited by the appellant’s counsel are therefore distinguishable on the issue of corroboration of the complainant’s evidence.

PW6, JOHN KISINDI, another Clinical Officer at Butere District Hospital gave evidence that he examined the appellant and found him to be infected with venereal diseases including being HIV positive. He however explained that the complainant was examined two days after the defilement and it was then too early to tell if the complainant had been infected with any venereal disease. According to the Clinical Officer (PW8) TERRY WEKESA who treated the complainant, the complainant had no HIV but was given drugs. The Clinical Officer stated that different sexually transmitted diseases take different periods to manifest. There is therefore no conclusive evidence whether the complainant was infected with any sexually transmitted disease. This however does not in my view negate the evidence of defilement in any way.

I have considered the charge sheet in the original file. The same has no defects. The offence is clearly stated and the particulars of the offence are not at variance with the offence charged. I have looked at the typed charge sheet in the record of appeal. The same bears typing errors which the appellant’s counsel has submitted on.

Section 8 (3) of the Sexual Offences Act provides for imprisonment for a term of not less than 20 years. The trial magistrate complied with the law and the sentence cannot be termed as harsh.

After considering the evidence on record in its entirety, I am satisfied that the prosecution case was proved beyond reasonable doubts. The conviction and the sentence are therefore upheld. The appeal has no merit and is dismissed.

Delivered, dated and signed at Kakamega this 11th day of July, 2012

**B. THURANIRA JADEN
JUDGE**