



REPUBLIC OF KENYA

High Court at Kisumu

Criminal Appeal 12 of 2012

DANIEL OMONDI OLARA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case number 58 of 2011 of the Senior Resident Magistrate's Court Bondo)

J U D G M E N T

The appellant was charged with two counts namely defilement contrary to section 8 (1) of the Sexual Offences Act No. 3 of 2006.

The particulars are that on the 11th day of January 2011 at Siaya county within Nyanza province intentionally and unlawfully caused his penis to penetrate the anus of **BOO** a child aged 8 years.

The appellant was equally charged with the alternative count 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 11th day of January 2011 at Siaya county within Nyanza province intentionally and unlawfully touched buttocks and anus of **BOO** a child aged 8 years with his penis.

The appellant was sentenced to life imprisonment. He has filed his appeal citing 10 grounds the summary of which is that the charge sheet was defective, the trial magistrate imported extraneous matters into the case, the standard of proof was lowered and the sentence was excessive.

The brief facts of this case are that on the material day **PW1, BO** the complainant aged 8 years was sent by his mother to fetch water. On his way he was invited by the appellant to the house he was living in where he proceeded to defile him. The complainant said that after the ordeal the appellant gave him water and Kshs. 5/= to buy mandazi. When he reached home due to the pain he was experiencing he told his father who took him to Siaya hospital. He further told the court that this was not the first time as the appellant had defiled him once. The complainant was taken to hospital and the P3 form was filled 27 days later. The appellant was arrested and charged.

PW2, LWO the complainant's mother told the court that on the material day, that is 11-1-2011 she had gone to the market and left the complainant together with other children at home. When she came back in the night he found the complainant sick and in pain. He examined his anus and saw some whitish discharge. She told the court that she told the complainant's father the following day.

PW3 COO the complainant's father told the court that on 14-1-2011 he was informed by a

neighbour that his son had been defiled by the complainant. He arrested the appellant and took him to Wagai DO's office. He further assisted in taking the child to the hospital.

PW4, Jared Obiero Opondo the Clinical Officer produced the P3 form and he found that indeed the complainant had been defiled. He also produced the treatment notes.

PW5, Everline Mbaka also a clinical officer produced a P3 form in respect to the appellant. According to her nothing significant was found upon examining the appellant.

PW 6, Boniface Kerong the investigating officer told the court that he rearrested the complainant on 15-1-2011 after receiving instructions from the OCS. After carrying out his investigations he was satisfied that the appellant had committed the offence.

When put on trial the appellant denied the charge and claimed that when he was arrested the complainant's father demanded to be paid the sum of Kshs. 17,000/= so as to drop the charge.

I have carefully perused the proceedings on record and the duty of this court is to evaluate the evidence afresh with a view of reaching an independent conclusion.

From the evidence on record and in particular the medical treatment notes, there is no doubt that the complainant was sexually assaulted or sodomized. The prosecution opposed the appeal based on the above findings.

The submissions by the appellant acting in person need to be looked afresh. From the evidence on record several inconsistencies can be deduced which needs consideration.

The complainant told the court that he informed his father, he said:

“When I reached home, I told my father. My father took me to hospital in Siaya”.

This contradicts what PW2 the mother said. According to PW2, PW3 the husband did not come home that day but the following day. She said:

“The following day I explained to the father of B. His father went to where Omondi was selling Mandazi”. This must have been on 12-1-2011.

However, PW3 has a different story. He said:

“On 14-1-2011 at 7 p.m. I came from work and my neighbour called Tobias met me on the way and told me a certain young man has had annal sex with my child”.

From there he proceeded to look for Omondi whom he knew as a mandazi vendor.

In my observation therefore, if the defilement was on 11-1-2011 then PW2 must have told PW3 on 12-1-2011. However, PW3 says that he got information from one Tobias on 14-1-2011 at 7 p.m.

I do find that the two testimonies given by PW2 and PW3 contradictory.

Further, what I find interesting also is the time frame taken by the parents to take the child to the hospital. The child was allegedly sodomized on 11-1-2011 as confirmed by the mother PW1.

The treatment notes shows that the child was taken to the hospital on 15-1-2011 the same day the appellant was arrested. Why take such a long time yet at least PW2 knew that the child had been assaulted. The complainant said that the appellant had defiled him before. Why did he fail to inform the parents first as he did on this occasion?

I do find that there were glaring inconsistencies between the evidence of PW2 and PW3. It appears that PW2 did not say the truth when she stated that she informed PW3 the following day. Further, there is no explanation for the period taken to have the child examined and the filing of the P3 27 days later.

These inconsistencies should be in favour of the appellant. The appellant was not far from PW2's home. Infact she should have been the one reporting to the police.

Equally, one Tobias who reported to PW3 concerning the incident perhaps ought to have been called to testify if indeed his evidence was going to aid the prosecution's case.

I do note that the case against the appellant is so weighty that all the loopholes ought to be sealed. With such inconsistencies of evidence explained above the benefit should shift to the appellant.

I shall thus allow the appeal, set aside the conviction and the judgment and order that he be set free unless lawfully held.

Dated, signed and delivered at Kisumu this 5th day of November, 2012.

H.K. CHEMITEI

JUDGE

In the presence of:

Miss Oundo for the state

In person for the appellant

HKC/va