



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KISUMU

Criminal Appeal 45 of 2009

JACTON OTIENO AMOLO APPELLANT

-VERSUS-

REPUBLIC RESPONDENT

Coram

Mwera, Judge

Ms. Oundo for State

Ms. K'opot for appellant

Appellant present in person

George CC.

JUDGMENT

The present appeal arises from the decision of the lower court at Winam where the appellant was charged under S. 8(4) of the Sexual Offences Act, the Act, that on 11.9.2007 in Kisumu he had carnal knowledge of S.A.L, a girl under the age of 18 years. After trial he was convicted and sentenced to 7 years imprisonment.

Mr. K'opot filed this appeal with 6 grounds which he condensed to argue on 2 points only. Counsel told the court that evidence had it that there was a baptism certificate put forth by the complainant that she was below the age of 18 years. Yet that certificate was not produced as an exhibit. Accordingly there was no evidence that the complainant was actually below 18 years of age. Mr. K'opot took up an issue with dates to the effect that the offence was alleged to have taken place on 11.9.2007 at 12.30 pm and a clinical officer examined the complainant on the same day, yet he signed the P3 form on 17.9.2007. And that the treatment notes, made by another medical personnel were not produced along with the P3 to form its basis. Thus the P3 form was an opinion without basis.

It was added that in the defence the appellant stated that although he worked near the home of

complainant he never entered her house. However, in the evening of the material day he met her, not by arrangement, and nothing was said of the alleged defilement, until 11 days later on 22.9.2007 when he was called into the office of a local administrator. That is when he was confronted with allegations of defiling the complainant. That all this pointed to fabricated charges because if a report was made to the police immediately, they took no action. And that while the complainant claimed that she reported the matter on 11.9.2007, a police witness said that a report was made on 12.9.2007. These aspects created doubts that ought to have been resolved in favour of the appellant, because all evidence seen together did not add up.

As for the sentence the court was told that the Act provided for a maximum of 15 years in jail and therefore the 7 years handed down was on the harsher side, for a first offender, young and remorseful appellant.

Ms. Oundo, the learned Senior State Counsel, did not agree with Mr. Kopot. On the issue of sentence she urged this court to set aside the one meted out as being illegal and substitute it with the lawful minimum of 15 years in jail. She went over the dates and said that any discrepancies in them could be seen as minor, causing no injustice at all and curable under the law. That the conduct of the appellant – he disappeared from the area after the incident, pointed to his guilt. And that on the part of the complainant she reported the incident to witnesses who observed her demeanour. It was consistent with the complaint of defilement and all the evidence adduced was clear and cogent. It was not necessary to produce treatment notes along with the P3 form which was filled by a competent person after due physical examination of the complainant.

This being a first appeal, this court now reviews the evidence the learned trial magistrate heard before arriving at the decision now appealed against. Given, this court did not have the advantage to see and hear the witnesses as the learned trial magistrate did.

The complainant (PW1) told the learned trial magistrate that she was born on 19.3.92. She produced her baptism card which the court noted as Exhibit P1. It is part of the lower court record even as it did not bear the writings – Exh P1. At 2 pm on 11.9.2007 while at home one Jackton passed by as PW1 went out to fetch a fruit and returned. Jackton (the appellant) then said something in Kiswahili, to the effect that there was nobody around. So he entered PW1 house, closed the door and grabbed her holding her hands behind. He held her head between his legs and removed her skirt and innerwear. She screamed but he turned her round and inserted his male member in her female organ. He had only unbuttoned his trousers. When Jackton let her go she fell down crying and he left. PW1 called her brother-in-law to report and his mother took her to Kisumu District Hospital for treatment on the same day. She reported the incident and a P3 form was issued to her. She had treatment notes from the hospital which were marked for identification (apparently not produced as an exhibit). The area assistant chief later arrested the appellant who was somebody familiar to the witness. He worked nearby as a kinyozi (barber). PW1 had seen him for 2 months; they were not friends at all. He also lived nearby and they shared a toilet.

Deborah Oketch (PW2), also lived in Manyatta estate. On 11.9.2007 one named Collins, called the witness at 2 pm and told her that her house-help, one S.A (PW1) had phoned him crying to say that “Jack the Kinyozi man” had defiled her. When PW2 called Jack, a person known to her, with the report, Jack (the appellant) denied it. He asked PW2 to bring up the matter in the evening. That evening he was nowhere to be found. Then PW2 left one Elizabeth Awino take over the complaint as the witness went on duty. Elizabeth had taken PW1 to Hospital for treatment. PW2 later learnt that PW1 was issued with a P3 confirming defilement.

In cross – examination PW2 said that she knew the appellant for 13 years and she lived in their plot. After 3 weeks the complainant resurfaced and a local chief arrested him. He worked in a nearby barber shop but lived 1 km away. When PW2 called the appellant on receiving the report from Collins, he answered that he had differed with the complainant but they had resolved the matter.

Elizabeth Auma (PW3) of Manyatta recalled on 11.9.2007 at about 1230 – 1 pm, D (PW2) calling her to go to her house to attend to some problem there. Pw3 proceeded there and found the complainant crying in a phone booth. She said that Jack, the appellant had had forceful carnal knowledge of her. PW3

took PW1 into the house and called Jack from the barber shop. He denied the allegation and said that he had simply played with PW1; he went away. She took PW1 to Kisumu District Hospital and later to the police station where a P3 was issued. Then for 1½ months the appellant was at large. When he reappeared he was arrested.

In cross – examination PW3 said that the complainant was in the telephone booth when PW3 asked her why she was crying. She reported that the appellant, whom the witness found at the barber shop, had defiled her. PW3 knew the appellant. He denied the allegation and dared her to take PW1 for examination. Then he disappeared for 1½ months.

P. C. Fredrick Ojwang (PW4), formerly of Kondele Police Station, recalled 12.9.2007 when he was assigned duties to investigate a defilement case. He received the complainant herein, took her statement and visited the scene. A P3 form was issued. Later PW4 received the appellant from Kondele youths and the area chief and had him charged.

Benard Omollo (PW5), a clinical officer at Kisumu District Hospital, examined the complainant on 11.9.2007, with a history of defilement by a known person. She was 16 years old and after due examination PW5 formed the opinion that injuries sustained were a result of defilement. He then signed the P3 form (Exh P2) on 17.9.2007. The prosecution closed its case and the appellant was heard in defence.

In an unsworn statement, the appellant said that he was a barber living in M estate. He denied the allegation that he defiled the complainant. On 11.9.2009 he opened his kiosk, worked the whole day and in the evening met the complainant's grandmother who asked him whether the complainant had left her keys with him. He answered in the positive, explaining that the complainant had gone to pick a child and had delayed in returning. On the following day the appellant did not see the complainant or her grandmother. Then on 22.9.2009 he was called to the Chief's office and asked about the defilement. He called Rose Akinyi (DW2) who gave evidence that had little bearing on the charge. She could not say if the appellant committed the offence.

In this court's view, the evidence before the learned trial magistrate and the record, is that the incident took place on 11.9.2007. The appellant was arrested on 20.10.2007 and taken to court on 22.10.2007. As to who committed the offence this court finds that from the evidence of the complainant (PW1), D.A (PW2) and E.A (PW3) it is the appellant who committed the offence. S (PW1) was a girl born on 19.3.92 and so she was slightly over 16 years but below 18 years at the time of the incident. She testified so (Exh P1) and so did Benard Omollo (PW5) – the clinical officer. PW1 was clear in her evidence as to how the appellant found her alone in their house, caught her and had carnal knowledge of her. She screamed. When Collins called PW2, PW1 had called him, he told PW2 that she was crying because Jack the appellant had defiled her. Then PW2 told PW3 of the incident. When PW3 went to her house she found PW1 crying in a telephone booth with a story that the appellant had defiled her. He denied it. All the 3 well knew the appellant, a neighbour, who operated a barber's kiosk nearby. Then PW5 examined the complainant on the same day of the incident and found signs/injuries that led him to conclude that she was defiled. He signed the P3 later but no matter. Nothing much turned on the dates in this case. Then the appellant disappeared from the area until he was arrested on 20.10.2007 and taken to court. All in all there was cogent evidence that it was the appellant who defiled the complainant, a girl below 18 years of age and during day. He felt guilty and even went underground for over a month. His defence about the complainant going to pick a child and overstaying there did not displace the credible prosecution case. Therefore conviction was on sound grounds.

The sentence under S. 8(4) of the Act is a prison term of not less than 15 years. It is a minimum sentence the learned trial magistrate ought to have pronounced. He however fell in error to give only 7 years imprisonment. This court is obliged to correct that and pronounce the legal sentence. Thus the lower court sentence is set aside and replaced with the lawful one of fifteen (15) years imprisonment.

The upshot of it all is that this appeal is dismissed in all respects.

Delivered on 2.11.2009.

J. W. MWERA

JUDGE

JWM/hao