



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A)

CRIMINAL APPEAL NO. 50 OF 2014

BETWEEN

STEPHEN OLOO ODHIAMBO..... APPELLANT

AND

REPUBLIC..... RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kisumu (Chemitei, J.) dated 5th March 2012)

in

H. C. Cr. A. No. 31 of 2011)

JUDGMENT OF THE COURT

The **appellant, Steven Oloo Odhiambo (Isaiah)**, was charged with the offence of defilement contrary to **section 8 (2)** of the **Sexual Offences Act no. 3 of 2006**. The particulars are that on the 26th day of October, 2009 in Siaya District of Nyanza Province he unlawfully and intentionally caused his penis to penetrate the vagina of **SAO, PW 4 (the complainant)**, a child aged 4 years.

He also faced an 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 being that on the same day he unlawfully and intentionally touched the vagina of **SAO, PW 4 (the complainant)**.

PW 1, an Early Childhood Development teacher, and mother of SAO testified that on 26th October 2009 at 2pm she had sent SAO who was then aged 4 years and nine months to take some vegetables to her colleague in school. After some time SAO returned home crying and informed her that Isaiah had pinned her to the ground and done bad things to her. Pamela examined the child and saw a tear and bruises on her genitalia. She took the child to Dienya Health Centre and then to Siaya District Hospital, where she was examined and it was established that she had been defiled. **Howard Okeyo, PW 3**, a Clinical Officer at Siaya District Hospital who examined SAO, concluded that there was forceful vaginal penetration, after which Pamela was issued with a duly completed P3 form.

Thereafter, Pamela reported the matter to **Eunice Akinyi Aywoyi, PW 2**, the Assistant Chief, and to

Akala Police Station. She then accompanied the police to the appellant's house where he was arrested. Eunice Aywoyi, confirmed that she had received a report from Pamela and that she had told her to take the child to hospital. After seeing the doctor's report, she had the appellant arrested.

SAO testified that she met the appellant who defiled her in a banana plantation.

In his defence the appellant testified that he was arrested and taken to Akala Police Station where he denied having committed the offence, and was later charged.

Being dissatisfied with the conviction and sentence ordered by the trial court, the appellant appealed to the High Court. In his judgment, *Chemitei, J*, dismissed the appeal, and upheld the conviction and sentence.

Being further aggrieved by the decision of the High Court, the appellant filed a second appeal which is before us.

In his memorandum and submissions that were presented in Court, the appellant raised three grounds of appeal; that penetration was not proved as the P3 form did not show evidence of forceful penetration, since there was no bleeding, inflammation or discharge; that, his rights were violated as the records presented to the court showed previous charges preferred against him and not actual convictions. The final issue was that the child's age was not ascertained, as the mother had indicated that she was 4 years old, while the child had specified her age as 6 years.

In his response Mr. Ketoo, learned counsel for the State opposed the appeal. Counsel submitted that with respect to the complaint that penetration was not proved, it was Pamela's testimony that when she examined the complainant she found a tear and bruises on her genitalia. The P3 form and hospital treatment card showed that the vaginal wall was painful and her hymen was not intact; that there was evidence of forceful penetration. The complainant herself had testified as to having been defiled by the appellant. Consequently, penetration was accordingly proved.

On the issue of violation of his rights, counsel contended that the appellant was required to specifically indicate which of his rights had been violated, and having failed to do so the complaint was unfounded.

Regarding the age of the child, counsel submitted that the age had been ascertained as it was clear from the evidence that, she was 6 years old by the time of her testimony, but that she was 4 years old at the time of the incident.

This being a second appeal and by dint of section 361 (1) of the Criminal Procedure Code, issues of fact do not fall within our remit. What this Court is required to do is to analyse and determine the questions of law, as was stated by this Court in the case of *Mwita v R*. [2004] 2 KLR 60.

As to whether penetration was proved, SAO recounted her ordeal and stated that the appellant had slept on her in a banana plantation and had done bad things to her private parts; that she felt pain, and when he had released her she had gone home and reported to her mother. When Pamela examined her, she saw a tear and bruises on her genitalia. She also noticed that the child's panty was not properly worn as the hole for the legs was at her waist.

At Siaya District Hospital, SAO was examined by the clinical officer who found that the vaginal walls were red and painful, the hymen was not intact, and he concluded that there had been forcible penetration. From the totality of the evidence, there is no doubt that penetration was proved, and that it was the appellant who was responsible for defiling the complainant. We find that this ground is devoid of merit.

On the issue of violation of his rights, we agree with Mr. Ketoo that the specific violation complained of could not be ascertained. But having said that, whatever the nature of the grievance complained of, since it was not raised at an earlier stage, we find it to be an afterthought, and as such, is without merit.

On the final issue that the complainant's age was not ascertained, when she testified, SAO told the court she was 6 years old. According to her mother, at the time of the offence SAO was 4 years and 9 months old. The Hospital Treatment card showed the child was 4 years old, while the P3 form indicated that she was 4 years and 9 months.

We find no discrepancy in the complainant's age. The evidence shows on the date that she testified SAO was 6 years old, meaning that, on the date the offence was committed which was two years earlier, she was 4 years old. Accordingly, the evidence of the complainant's age was consistent, and was properly ascertained, and we find that this ground is unfounded and as such fails.

For the foregoing reasons, we uphold the lower court's findings, conviction and sentence, and dismiss this appeal.

Dated and Delivered at Kisumu this 17TH day of NOVEMBER , 2015 .

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR