REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT KISUMU

Criminal Appeal 173 of 2009

ISACK OJWANG OGOYO ……...……..APPELLANT

AND

REPUBLIC …….....RESPONDENT

Appeal from a judgment of the High Court of Kenya at Kisumu (Karanja, J.) dated 24th June, 2009

in

H.C.Cr.A. No. 77 of 2008)
****

JUDGMENT OF THE COURT

Isack Ojwang Ogoyo, the appellant was charged in the Principal Magistrate's Court at Siaya with the offence of defilement of a girl under the age of 18 years contrary to ***section 8(1)*** of Sexual Offences Act or alternatively with sexual assault contrary to ***section 5(1)(b)*** of the same Act. The particulars of the main charge were that on 25th day of March, 2007 in Siaya District of Nyanza Province he had carnal knowledge of ***S.A*** a girl of the age of 10 years. The particulars of the alternative charge were that on the same day and place he unlawfully and indecently assaulted S.A by touching her private parts. The appellant denied the charges when plea was taken on 3rd April, 2007.

The case was heard on 18th September, 2007 when ***S.A*** (PW2) testified on oath and said that she was at the house of her aunt ***M.O*** (PW1) alone when the appellant came there and asked her to take some bananas to him at his house. When she did so he held and took her to bed and forcefully had sex with her. She reported the incident to her sister A who told PW1 about it. When PW1 asked her about the incident she informed her what the appellant had done to her. PW1 took PW2 to

Yala Hospital where she was treated. Thereafter the incident was reported to the Police Station at Siaya and this led to the arrest of the appellant. Her evidence was confirmed by that of PW1.

Pc. Nelson Mukabwa (PW3) based at A. Police Base received a report of this incident on 29th March, 2007. He arrested the appellant and handed him over to Officer Commanding Station, Yala Police Station for further action. This witness produced a medical report in respect to this incident as evidence in the case under ***section 77*** of the Evidence Act because the Clinical Officer who prepared it was not available at the time the case was being heard.

The appellant denied the offence in unsworn testimony when placed on his defence. He stated that on 28th March, 2007 some people came to his farm and told him that he had defiled a girl. He was then arrested and taken to the Chief's Camp where he met the complainant. He denied defiling the girl.

The Principal Magistrate *(G. K. Mwaura)* was persuaded that the main charge was proved beyond reasonable doubt and he rendered himself thus:-

> ***"The lacerations that were observed are indicative of a forced penetration just as the complainant described to the court. Regarding the complainant's veracity, though she was only 10 years, when she gave evidence, I carried out a voire dire and found out that she is an intelligent child who understands the meaning of an oath. She gave a clear and intelligent sworn narrative of what befell her on that day. She was cross-examined but did not wave*** *(sic)* ***at all. There is no contradictions or consistency*** *(sic)* ***in her testimony. From the foregoing I find no reason to doubt him*** *(sic)* ***at all. I choose to believe this because I believe she told the court the truth. The accused is her neighbour and relative and must have observed that she had been left alone unguarded. I find that he took the opportunity to lure her to his house due to their relationship and defiled her …***
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> ***From the foregoing I dismiss the accused statement as if (sic) can't be true at all. I do not doubt the prosecution case on the main count and find the accused guilty as charged and proceed to convict him accordingly."***

Upon his conviction the appellant was sentenced to serve life imprisonment which is the minimum sentence provided for under the Act. The learned Magistrate made no finding on the alternative count. His appeal to the superior court *(Karanja, J.)* was dismissed because there was medical corroboration of the complaint's evidence and it was the trial court which saw and heard the evidence of the complainant and was therefore in a better position to judge her credibility.

Still dissatisfied with that decision the appellant now comes to this Court by way of a second and final appeal. His home-made memorandum of appeal filed herein on 25th February, 2010 raises three grounds of appeal as follows:-

> 1. *THAT the conviction was not lawful and proper in that no case of defilement was proved i.e. in exhibit P3 form page 17(b), all the tests done were all negative in that it was not medically proved that the appellant committed the said offence.*

2. *THAT had the complainant been injured as alleged she would have received treatment prior to examination, e.g. exhibit 1 P3 form page 164, HIV test negative, winalysis (sic) negative, hence these proved that no harassment as defilement was committed.*

3. *THAT the sentence when upheld proved harsh and excessive considering my age (65 years old).*

The appeal was placed before us for hearing on 15th June, 2010 but the appellant did not argue the grounds of appeal as listed above. Instead he pleaded with the Court to allow him to go home as he was now a saved man. He said further that the allegations against him were false, and that he was an old grandfather aged 65 years old and sickly after he fell down from a tree. He wanted to go home for treatment. ***Miss Oundo***, learned Principal State Counsel opposed the appeal and submitted that although tests carried out on the complainant were all negative, the findings that there was laceration on her vaginal orifice and that the evidence of the complainant was consistent and was believed were most crucial. Penetration which was the central element of the offence charged was proved. In her view, there was no cause for complaint since the superior court thoroughly re-evaluated the evidence on record and reaffirmed the findings of the trial court.

As we stated earlier, this is a second and final appeal and that being the position only matters of law fall for our consideration; see ***section 361(1***) Criminal Procedure Code. Regarding the appellant's complaint about the medical examination conducted on PW1 which were all negative, it is clear to us that these were intended to establish her HIV status or whether she had been infected with any sexually transmitted decease. The examination confirmed that there was evidence of laceration on her vaginal orifice which the learned Magistrate stated:

"Were indicative of a forced penetration just as the complainant described to the court."

The superior court concurred with the trial court on this and said:-

"This court is satisfied that the offence of defilement was indeed committed against the child complainant by the appellant. The medical evidence vide the P3 form proved the fact of defilement."

We think on our own evaluation of the evidence on record that the two courts below were entitled to draw those conclusions. There is no merit in the complaints made against conviction.

On the sentence imposed upon the appellant, we are of the view that that sentence was lawful and this Court lacks the jurisdiction to examine it since it does not fall within the purview of ***section 361(1)(b)*** of the Criminal Procedure Code. In the result this appeal has no merit in its entirety and we order that it be and is hereby dismissed.

Delivered and dated at

Nairobi this 23rd day of September, 2010

J. E. GICHERU

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CHIEF JUSTICE

P. N. WAKI

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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JUDGE OF APPEAL

I certify that this is a

*true copy of the original***.**

DEPUTY REGISTRAR