



Case Number:	Criminal Appeal 6 of 2010
Date Delivered:	23 Jun 2011
Case Class:	Criminal
Court:	High Court at Kisumu
Case Action:	Judgment
Judge:	Samuel Elikana Ondari Bosire, Alnashir Ramazanali Magan Visram, Erastus Mwaniki Githinji
Citation:	MOSES OMONDI ODUOR V REPUBLIC [2011] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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IN THE COURT OF APPEAL

AT KISUMU

(CORAM: BOSIRE, GITHINJI & VISRAM, JJ.A)

CRIMINAL APPEAL NO. 6 OF 2010

BETWEEN

MOSES OMONDI ODUOR ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

*(Appeal from a judgment of the High Court of Kenya at Kisumu (Karanja, J) dated 30<sup>th</sup> November, 2009*

In

H.C. Cr. A. No. 67 of 2009)

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JUDGMENT OF THE COURT

Following his trial for the offence of defilement contrary to section **8(3)** of the Sexual Offences Act, Act **No. 3** of 2006, **Moses Omondi**, the appellant was convicted and thereafter sentenced to **30 years** imprisonment by the Senior Resident Magistrate's Court at Ukwala. The complainant, J.A.O alias M.A,

was on the material date of the offence under the age of 15 years. The particulars of the offence alleged that on 8<sup>th</sup> February, 2009, in Siaya District, within Nyanza Province, had carnal knowledge of J.A.O, a girl of the age of fifteen years.

The appellant's first appeal against conviction was dismissed by the High Court, but on sentence that court thought that the sentence of 30 years was on the higher side, and consequently it reduced the sentence to 20 years imprisonment.

The evidence before the trial court which that court and the High Court accepted, was that the complainant among other girls of her age, were at a certain homestead commemorating the death of one Lillian who had died earlier. There was a live band playing and those in attendance danced to the tune of the music. The dancing went on into the wee hours of the morning of 8<sup>th</sup> February, 2009. As the complainant and two other girls were walking back home, a person caught hold of her from behind and dragged her into a nearby bush. Her companions ran away. She testified that she recognized her attacker as the appellant. She had seen him at the dance and there he had tried to assault her. She was able to observe him at the dance as electric lights were on. He had a T-Shirt on with the word "Speedo" on it. It was her evidence that the person who caught her and pulled her into a bush was the appellant and she was able to recognize him with the aid of moonlight. The person raped her for about an hour and because he was a person she knew well before, she had no difficulty recognizing him. Although she was the only identifying witness, both courts below believed her.

The appellant has not challenged his conviction before us, and that being the case we will confine our decision to consideration of the issue of sentence.

**Section 8 (3)** of the Sexual Offences Act, Act **No. 3** of 2006, provides as follows:-

***"A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."***

The appellant in his memorandum of appeal has raised several grounds for seeking the reduction of his sentence, namely, that he is an orphan, has several siblings whom he is supposed to look after, but because of his incarceration some have dropped out of school for lack of school fees, he has learnt a lot in prison which has reformed his character, including becoming saved, he has acquired some skills, among them tailoring and dress making and if released, he hopes to apply them to earn a living and that he hopes to preach the gospel of Jesus Christ, over and above working hard to earn a living to help both himself and his siblings. Whilst we commend the appellant for reforming and working hard to acquire useful skills and to be converted into Christianity, the offence for which he stands convicted carries a minimum sentence. He was awarded the minimum sentence by the High Court. That being so, our hands are tied.

Besides, this being a second appeal, by reason of the provisions of **section 361 (1) (a)** of the Criminal Procedure Code, severity of sentence being a question of fact, an appeal against sentence

does not lie.

In the result, it is our judgment that the appellant's appeal fails. Accordingly, it is dismissed.

It is so ordered.

Dated and delivered at Kisumu this 23<sup>rd</sup> day of June, 2011.

**S.E.O. BOSIRE**

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**JUDGE OF APPEAL**

**E.M. GITHINJI**

.....

**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR.**



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