REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D.S MAJANJA J.

CRIMINAL APPEAL NO. 2 OF 2019

BETWEEN

JEFITHER OMBOGO KEUYA.....APPELLANT

AND

REPUBLIC .....RESPONDENT

(Appeal from the original conviction and sentence of Hon. D.K Matutu– SRM dated 17th August 2018 at the Principal Magistrate's Court at Kilgoris in Criminal Case No.1144 of 2016)

JUDGMENT

1. The appellant, JEFITHER OMBOGO KEUYA, was charged, convicted and sentenced to life imprisonment for the offence of defilement contrary to **section 8(1) and (2) of the Sexual Offences Act, 2006 ('the Act').** The particulars of the offence were that on the 29th August 2016 at [particulars withheld] in Transmara West District, he intentionally caused his penis to penetrate the vagina of JI, a child aged 7 years.

2. The appellant now appeals against conviction and sentence based on the grounds set out in the petition of appeal dated 3rd January 2019. Mr. Sagwe, counsel for the appellant, submitted that the State did not prove its case beyond reasonable doubt. He pointed out that the issue of penetration was not proved as the child did not testify to the fact of penetration and that the medical evidence did not support the prosecution case. He also submitted that a DNA test was not carried out on the child's clothing to connect the appellant with the offence. He further argued that the precise age of the child was not proved.

3. Mr. Otieno, counsel for the respondent, supported the conviction and sentence on the ground that the State proved all the elements of the offence.

4. As this is a first appeal, I am required to examine the evidence and reach an independent decision as to whether to uphold the conviction and sentence bearing in mind that I neither heard or saw the witnesses testify (see **Okeno v. Republic [1972] EA32**).

5. In order to prove the offence of defilement under section 8(1) of the Act, the prosecution must prove that it is the appellant who caused the act of penetration to a child. Penetration under section 2 of the means *"the partial or complete insertion of the genital organs of a person into the genital organs of another person."*

6. In this case, the child (PW 1) testified as follows;

> "I recall on 28/2/16, after lunch the accused caught me took me to his house. He did bad manners to me. He took me to his bed, he removed my clothes. He removed all his clothes, he was naked. He put his thing here (pointing at her vaginal area). He lay on me. I was crying, the accused held my mouth. The person who did bad manners is Jephither, he lives near our home. He works at sugarcane plantation."

7. Her testimony was clear that she knew the appellant as the person who lived near her house and worked close by. In my view her testimony, standing alone, was sufficient to support a conviction under the proviso of section 124 of the Evidence Act (Chapter 80 of the Laws of Kenya) which provides that court may convict on the basis of the uncorroborated testimony of the victim if, for reasons to be recorded, the court believes or is satisfied the child is telling the truth.

8. In this case, the trial magistrate and the magistrate who later heard the case and wrote the judgment were different. The trial magistrate appreciated this fact when he observed that;

> Only one witness can testify as to the fact of sexual intercourse since the accused and the alleged victim were not found in pari delicto (in the act). The witnesses who rushed to arrest the accused were not called by the prosecution. Was the alleged victim telling the truth? I did not have the opportunity of hearing the alleged victim testify. However, her testimony is clearly captured in proceedings recorded by my predecessor Hon. Munyendo (RM) who has since ceased to exercise jurisdiction by reason of transfer. In the proceedings, the alleged victim says she was defiled by the accused who took her to his bed. I believe the alleged victim when she says she was defiled. Her testimony finds corroboration in the medical evidence adduced.

9. The trial magistrate nevertheless went ahead and considered the corroborative evidence. Such evidence is to be found in the testimony of PW 1's mother (PW 2) who testified that on the material day, she left PW 1 and the appellant and when she returned PW 1 was bleeding from her private parts. She recalled that PW 1 told her what took place and they reported the incident later to the police. The child's father (PW 3) also recalled that on the material evening the appellant came to the home and after leaving she found out that he had sexually assaulted PW 1 and she was bleeding. He too, assisted in reporting to the police. PW 2 admitted that she did not tell PW 3 immediately as she feared that the appellant would run away.

10. The medical evidence by PW 4, a clinical officer at Kurienkuruk Health Centre further corroborates the testimony of PW 1. PW 4 examined her on the day of the incident. He noted bruises on the labia majora, minora and blood stains on the thighs and her under wear.

11. Although counsel for the appellant complained that there was no evidence that the hymen was broken PW 4 explained that he could not examine the child as she was irritable. What is clear though is that the bruises on the genital area could not be explained by any other act other than an act of penetration which had taken place earlier.

12. At this stage, I also reject the appellant's contention that a DNA test was necessary. Indeed, such evidence would only be corroborative as the testimony of PW 1 confirmed the penetration act (see **Geoffrey Kioji v. Republic CA Criminal App No. 270 of 2010**). I would also add that the fact the child referred to the act as *"bad manners"* does not weaken the prosecution case. While it is important for the witness to describe the act that constitutes the offence, the nature of the act of penetration is inferred and proved by what PW 1 stated and the injuries found in the genitalia.

13. The appellant's defence of a frame-up or grudge when looked at from the entirety of the evidence is very thin and an afterthought. PW 1, PW 2 and PW 3 knew the accused. In fact, PW 2 and PW 3 stated that he had come to their home on that evening yet nothing was suggested to them in cross-examination regarding such a grudge.

14. The totality of the evidence is that the appellant was a well known person to PW 1 and the appellant committed an act of penetration.

15. The question of age of a child is one of fact. There is no requirement that a birth certificate be produced. In this case, PW 1 stated that she was 7 years old and in Class 1. PW 2 and PW 3, her parents, confirmed as much and so did the age assessment by PW 4. She was thus 7 years. For purposes of the offence, she was a child and for calculating the sentence under section 8(2) of the Act she was under 11 years. In such a case the sentence of life imprisonment is mandatory.

16. I affirm the conviction and sentence and dismiss the appeal.

Dated and **delivered** at **Kisii** this **15th** day of **March 2019**.

D.S MAJANJA

JUDGE

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions.

Mr. Sagwe for the appellant.