REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CORAM: D.S.MAJANJA J.

CRIMINAL APPEAL NO. 121 OF 2015

BETWEEN

JOSHUA OTUK AKITOPUS..... APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against the original conviction and sentence of Hon. M.Wambani, CM dated 10th September 2016 at the Magistrates Court at Eldoret in Criminal Case No. 394 of 2013)

JUDGMENT

1. The appellant, **JOSHUA OTUK AKITOPUS**, 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*** ("the ***Act***"). The particulars of the charge were that on 21st January, 2013 at [particulars withheld], Eldoret East District within Rift Valley Province, he intentionally and unlawfully caused his penis to penetrate the vagina of SCW, a girl aged 11 years.

2. The appellant appeals against conviction and sentence on the grounds that the prosecution did not prove the offence beyond reasonable doubt. That the case against him was the result of a plan to set him up by the witnesses and that the trial court disregarded his defence. He complained that the medical evidence was a result of a conspiracy between the clinical officer and one of the witnesses.

3. Before I deal with this appeal, I recognise that it is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see ***Okeno v Republic*** **[1972] EA 32**). In order to proceed with this task, I will set out a summary of the evidence as it emerged before the trial court.

4. The evidence against the appellant was that on 21st January, 2015, the child, PW 1, testified that her mother, PW 2 had sent her to PW 3's home to get tomatoes. She found PW 3 who told her to wait for her as she went to get cooking oil. After PW 3 went out, the appellant, who was PW 3's herdsman, came and dragged her to his house. He told her not to scream or he would kill her. He demanded that she remove her clothes. He removed his trousers and inserted his penis in her vagina. PW 1 testified that she heard PW 2 calling her. At this point, the appellant ran away through the window and she went out crying and told her mother to take her home.

5. PW 2 testified that after sending PW 1 to PW 3's home, she did not return so she went to PW 3's home and started calling her out but she did not respond. She found with the child's teacher, PW 4, and daughter in law to PW 3. As they called out she saw the appellant leave through the window and PW 1 came out of the house crying. PW 1 told the teacher what had happened.

6. PW 3 confirmed that the appellant was her herdsboy and that on the material day, PW 1 came to her home to get tomatoes. She left PW 1 alone and when she came back found PW 2 who told her what happened. PW 4 recalled that on the material day, she heard PW 2 calling out PW 1. She saw PW 1 come out of the appellant's house and when she asked PW 1 what happened, PW 1 narrated her ordeal. PW 1 told her it was not the first time and that the appellant had told her he would beat her if she told the mother. The doctor who produced the P3 medical form, PW 6, testified that there were tear on the PW 1's genitalia.

7. In his defence, the appellant stated that the offence was false as he was not present on the material day.

8. Since the issue in this appeal is whether the prosecution proved its case beyond reasonable doubt, under **section 8(1)** of the ***Act***, the prosecution must prove that an accused did an act of penetration with a child. *"Penetration"* under **section 2** of the ***Act*** means, *"the partial or complete insertion of the genital organs of a person into the genital organs of another person."*

9. The child testimony as to the act of penetration was clear and consistent. It was also corroborated by medical evidence which confirmed penetration. The testimony of PW 2 and PW 4 who saw her at a state of distress also fortified and buttressed the fact that the PW 1 had been sexually assaulted.

10. On the issue whether the appellant was the perpetrator, I am satisfied that the appellant was known to PW 1 as he was the herdsman to PW 3 who was a neighbour. PW 1 told PW 4 that the appellant had defiled her before and the incident took place at daytime thus excluding the possibility of mistaken identity. The appellant's alibi was dissipated when PW 2 and PW 4 saw the appellant leave his house though the window and PW 1 emerge from his house having been molested. Further, since the child was from his house, he did not explain what she was doing there and the fact that he ran away through the window pointed to his guilt.

11. The age of the child was proved by the immunization card produced by PW 2 which showed the child was born on 5th March 2001. As the child was aged below 11 years at the time the offence took place, the sentence of life imprisonment under **section 8(2)** of the ***Act*** was warranted.

12. The appeal is dismissed.

DATED and DELIVERED at ELDORET this 25th day of APRIL 2019.

D.S. MAJANJA

JUDGE

Appellant in person.

Ms Mokua, Prosecution Counsel, instructed by the Director of Public Prosecutions for the respondent.