



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CORAM: D.S.MAJANJA J.

CRIMINAL APPEAL NO. 35 OF 2016

BETWEEN

ALPHONCE OCHIENG OTIENDE.....APPELLANT

AND

REPUBLIC..... RESPONDENT

(Being an appeal against the original conviction and sentence of Hon. C. Obulutsa, CM dated 26th February 2016 at the Magistrates Court at Eldoret in Criminal Case No. 7077 of 2014)

JUDGMENT

1. The appellant, **ALPHONCE OCHIENG OTIENDE**, 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 offence were that on 23rd October, 2014 in Eldoret Township within Uasin Gishu County, he intentionally and unlawfully caused his penis to penetrate the vagina of TW, a girl aged 6 years.
2. The appellant appeals against the conviction and sentence on the grounds set out in his petition of appeal, supplementary grounds of appeal and written submissions. The thrust of his appeal is that the prosecution did not prove the offence beyond reasonable doubt and that the trial magistrate erred in rejecting his defence and that there was a grudge between him that the complainant’s mother. Counsel for the respondent countered by submitting that the prosecution proved all the elements of the offence.
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 child, PW.1 gave an unsworn statement in which stated as that on the material day she was outside the when the appellant lured her to his house by offering her a sweet. When she was in the house, she described what happened as follows, “*He did bad manners to me. He put his thing in mine I went and he told me to sit on a chair. He opened his zip and made me lie down. He then put his thing in me.*” After the appellant had finished his felonious act, the gave her 10/- and told to go home. PW 1 went home and told her elder sister (PW 2) what had happened.
5. After a *voire dire*, PW 2 was sworn. She recalled that on 23rd October 2014, she was from school and did not find PW 1 at home. She came back later with a sweet and 10/= and told her she had been at the appellant’s house but told her not to tell anyone. PW 2 only told their mother, PW 3, after 2 days after they were told in school that it was wrong for someone to touch them in their private parts.
6. The children’s mother, PW 3 told the court that she learnt that PW 1 had been sexually assaulted on 25th October 2014 when she heard PW 1 and PW 2 discussing the issue and PW 1 complaining of pain in her private parts. When she inquired further, PW 1 told her that she had been sexually assaulted by the appellant. She reported the incident to the police and took PW 1 to the hospital for examination and treatment.
7. The Investigating Officer, PW 4, testified that the incident of defilement was reported on 29th October 2014. He issued a P.3 Form and arrested the appellant after being led to the appellant’s home by PW 3. A doctor at the Moi Teaching and Referral Hospital, PW 5, examined PW 1 on 28th October 2014 and observed that PW 1 had a torn hymen. She opined that this was the result of penetration.
8. In his unsworn statement, the appellant denied the offence. He stated that PW 1, PW 2 and PW 3 were neighbours and that he was

arrested on 27th October, 2014. He stated that he was PW 3's friend for three years and but when she rebuffed him, she told him that she would teach him a lesson. She blamed her for his predicament.

9. 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.*"

10. I am satisfied that the prosecution proved the act of penetration. PW 1 gave clear and consistent evidence on how the appellant lured her to his home and proceeded to sexually assault her. Her testimony was corroborated by that of PW 2 who saw her that evening with a sweet and 10/= which the appellant had given her and lastly the medical evidence of PW 5 confirmed a tear in the hymen consistent with penetration. I note that PW 3 was only informed of the incident two days later but PW.2 explained why she had kept quiet and only decided to disclose this after she became aware that the act PW 1 told her was bad. I do not find this to undermine the credibility of the prosecution case.

11. The incident took place at daytime, the appellant admitted that the witnesses were his neighbours hence there is no case of mistaken identity. The appellant's defence that he was framed could not withstand the prosecution case as PW 3 flatly denied any affair with the appellant and the testimony of PW 1 and PW 2 was unassailable by a bare denial and blanket statement of an affair.

12. Under the proviso to **section 124** of the **Evidence Act (Chapter 80 of the Laws of Kenya)** PW 1's testimony was sufficient to support a conviction, if the trial magistrate believed, for reasons to be recorded, that the child was stating the truth. The trial magistrate came to the conclusion that PW 1's testimony was credible and well corroborated.

13. The age of a child is a question of fact. The prosecution produced the birth certificate of the child showing that she was born on 15th October 2008 hence she was aged 6 years at the time of the incident. At any rate she was below the age of 11 years. Under **section 8(2)** of the **Act**, the mandatory minimum sentence where the child is aged below 11 years is life imprisonment.

14. I affirm the conviction and sentence. The appeal is dismissed.

DATED and DELIVERED at ELDORET this 23rd day of APRIL 2019.

D.S. MAJANJA

JUDGE

Appellant in person.

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