



**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CORAM: D.S. MAJANJA J.**

**CRIMINAL APPEAL NO. 134 OF 2018**

**BETWEEN**

**CHARLES OМУKHUNYA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from the original conviction and sentence of Hon. F. Makoyo, SRM dated 3<sup>rd</sup> September 2018 at Magistrates Court at Butere in Criminal Case No. 34 of 2017)***

**JUDGMENT**

1. The appellant **CHARLES OМУKHUNYA** was convicted and sentenced to 15 years' imprisonment for the offence of defilement contrary to **section 8(1) and (2)** of the **Sexual Offences Act**. The particulars were that on 20<sup>th</sup> November in Kakamega County, he intentionally caused his penis to penetrate the vagina of SM, a girl aged 15 years old.
2. The appellant now appeals against the conviction and sentence on the grounds set out in his petition of appeal and his submissions. He contends that the offence was not proved beyond reasonable doubt and there was no medical evidence linking him to the offence was fabricated. The respondent counters that all the elements of the offence were proved beyond reasonable doubt.
3. As this is a first appeal, I am required to evaluate all the evidence on record and come to an independent conclusion as to whether to uphold the conviction always bearing in mind that I neither had or saw the witnesses testify. In order to do so, it is important to set out the facts as they emerged before the trial court and they were as follows.
4. After a *voir dire*, the complainant, PW 1 testified on oath that she was 15 years old. She recalled that on 20<sup>th</sup> November 2017, she wanted to go and visit her grandmother but her mother, PW 2, denied her permission but she decided to go. Along the way she met the appellant who told her to go with him and be his wife. She went with him to his house where she made ugali. During the night, he stripped her naked and "*did bad manners*" to her. In the morning, she decided to run away, she boarded a bus and in due course met a lady who took her to a village elder to whom she reported what the man had done to her.
5. PW 1's mother, PW 2, recalled that on the 20<sup>th</sup> November 2017, PW 1 left home but did not come back. She tried looking for her but was unsuccessful. On the morning of 23<sup>rd</sup> November 2017, one of the village elders, PW 3 called her to inform her that PW 1 had been found.
6. The village elder, PW 3, confirmed that on 20<sup>th</sup> November 2017, PW 2 had called him seeking assistance to locate PW 1. Together with other villagers, they searched for PW 1 but did not find her. On the morning of 23<sup>rd</sup> November 2017, PW 1 was brought to his home at about 7.00am by a lady. PW 1 narrated her ordeal to him. PW 3 then called PW 1 to inform her that her daughter had been found. When PW 2 came to take PW 1, PW 1 took them to the home where she had been sexually assaulted. The found the appellant who PW 1 identified the person who had slept with her on the previous night. He tried to run away but was arrested by members of the public.
7. The Investigating Officer, PW 4, recalled that PW 2 came to report that PW 1 had disappeared from home on 20<sup>th</sup> November 2017. He was informed that the child had been found by the village elder and the appellant arrested by members of the public. He issued a P3 medical form to PW 1. He also rearrested the appellant and escorted him to hospital for examination. The clinical officer at the hospital, PW 5, testified that she examined PW 1 on 24<sup>th</sup> November 2017. She examined the vagina and noted that it did not have any bruises on the outer part but the inner part had bruises and a whitish discharge. She also noted that there were epithelial cells indicating penetration. She assessed PW 1's age at approximately 15 years.
8. When put on his defense, the appellant in his sworn testimony, denied the offence. He told the court that on the morning of 23<sup>rd</sup> November 2017, while at home with a friend a group comprising PW 2, whom he knew, came and accused him of defiling PW 1. He told the

court that PW 2 threatened to destroy him. He further stated that he had never met the complainant. He also told the court that as a result of an accident in 2017, he could not have sexual intercourse.

9. In order to prove defilement, the prosecution must establish that the appellant did an act that caused penetration to a child. Penetration under **Section 2** of the **Sexual Offences Act** means, “*the partial or complete insertion of the genital organs of a person into the genital organs of another person.*”

10. PW 1 narrated how she was waylaid and taken to the appellant’s house, stayed overnight and was subjected to an act of penetration. Her graphic testimony of how the act took place leaves no doubt that an act of penetration took place and was accordingly proved. Under the proviso to **section 124** of the **Evidence Act (Chapter 80 of the Laws of Kenya)**, the court may convict a person on the basis of uncorroborated evidence of the victim of sexual offence without corroboration where the magistrate for reasons to be recorded states that he believes the victim. In this case, the trial magistrate did not indicate on what basis he believed PW 1 was telling the truth. However, the testimony of PW 1 is sufficiently corroborated by the testimony of PW 2 and PW 3 who confirmed that the child had been missing during the time she was at the home of the appellant. Secondly, the medical evidence of PW 5 corroborates the act of penetration.

11. The main issue in this case is whether the appellant is the person who committed the felonious act as he was a stranger to PW 1. The incident took place in the evening when PW 1 and the appellant were together for a whole night and given her age I have no doubt that she would be able to recall the appellant and the place she was taken and that is why she was able to take PW 2 and PW 3 to the home of the appellant where he was arrested.

12. In his defense, the appellant alleged that there was a grudge between him and PW 3 and that they were part of a group called *Radio Ingo*. When this issue was put to PW 1, she rejected that allegation. She stated that she had never met him before. Likewise, PW 2 did not know the appellant prior to the date of the incident. In my assessment, I do not find any reason for PW 1 to frame a random person for committing an act of defilement and his defense on that count was dismissed. I also reject his evidence that he could not engage in sexual act as it was supported by any medical evidence to that effect. Moreover, when the question was put to PW 5, who examined him, in cross-examination, she told the court that there was nothing wrong with the appellant. I therefore reject the appellant’s defence and find that it is the appellant who caused an act of penetration.

13. The age of a child is a question of fact and in this case there was sufficient evidence to show that the child was 15 years old. She was in class 5 and knew her age. Likewise, PW 2 also testified that she was 15 years old. The age assessment by PW 5 also confirmed that the child was 15 years old. Further, PW 1’s birth certificate was produced in evidence. There was thus sufficient evidence to confirm that PW 1 was a child and was aged 15 years old. The offence of defilement was therefore proved.

14. The mandatory minimum sentence for defilement of a child aged 15 years old under **section 8(3)** of the **Sexual Offences Act** is 15 years’ imprisonment and although mandatory minimum sentences have been declared unconstitutional, I do not find any reason to depart from that sentence given that the appellant abducted a child and proceeded to force himself on her.

15. The appeal is dismissed.

**SIGNED AT NAIROBI**

**D.S. MAJANJA**

**JUDGE**

**DATED AND DELIVERED AT KAKAMEGA this 26<sup>th</sup> day of SEPTEMBER 2019.**

**W. MUSYOKA**

**JUDGE**

Appellant in person.

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