



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

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

**CRIMINAL APPEAL NO. 142 OF 2018**

**BETWEEN**

**REUBEN OSUNDWA MAKOKHA..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the original conviction and sentence of Hon. T.A. Odera, SPM dated 7<sup>th</sup> September 2018 at the Mumias Magistrates Court in Sexual Offence Case No. 13 of 2017)*

**JUDGMENT**

1. The appellant, **REUBEN OSUNDWA MAKOKHA**, was charged with the offence of defilement contrary to **section 8(1)** as read with **section 8(2)** of the *Sexual Offences Act*. The particulars of the offence were that on 28<sup>th</sup> May 2017 at about 3:00pm in [particulars withheld] Sub-County within Kakamega County intentionally caused his penis to penetrate the vagina of JM, a child aged 10 years.
2. The appellant was convicted and sentenced to serve 20 years imprisonment. On the basis of his petition of appeal and written submissions, he contested the conviction on the ground that the prosecution did not prove the case against him to the required standard. He submitted that the evidence of the witnesses was not corroborated and that the medical examination did not link him to the offence. He also maintained that there was no evidence linking him to the offence and that he was not properly identified as the person who committed the offence. He further attacked the judgment on the ground that the trial magistrate did not consider his defence.
3. The respondent opposed the appeal on the ground that the prosecution proved all the elements of the offence. Counsel for the respondent pointed out that the appellant was well known to the complainant and all the evidence corroborated her version of events.
4. As this is a first appeal, this court is required to appraise all evidence and come to its independent conclusion whether to sustain the conclusion while all the time bearing in mind that it never heard nor saw the witnesses testify (see *Okeno v Republic [1972] EA 32*). In order to proceed with this, I will now set out the facts as they emerged before the trial court.
5. The complainant PW 2, testified that she was 10 years old and that on 28<sup>th</sup> May 2017 she had gone to fetch water with her sisters; PW 3 and PW 4. PW 1 recalled that when they went to the stream, a boda rider came and carried them and took them near a factory where he left PW 3 and PW 4. He then proceeded with PW 2 and told her he was going to show her the nearby airstrip. After some distance, he stopped and dragged her to a bush and proceeded to forcefully penetrate her vagina with his penis. As she screamed, he threatened to strangle her. He then he ran away with his motorbike. PW 1 managed to get up and walk to the nearby Weighbridge gate which was guarded by some askaris.
6. In the meantime, her sisters, PW 3 and PW 4, who were waiting for her, gave up and went home. PW 2 further testified that when she met the askaris at the gate she gave them the mother's phone number. They called her mother, PW 1, who came to the scene.
7. PW 1 recalled that on that day, PW 1 had left the house with the sisters to go and fetch water while she had gone to church. When she came back, she did not find them but found her other daughter, PW 5 who told her that PW 2, PW 3 and PW 4 had gone to fetch water but had not returned. PW 1 then told PW 5 to go look for the girls. PW 5 testified that she went to look for them and on the way she found PW 3 and PW 4 who told her that PW 1 had left with a boda boda rider who had taken her to the airstrip. When she went near the security gate, she found PW 2 lying down in a state of distress. She then went to call PW 1. PW 1 arrived at the scene and found PW 2 with the askaris.
8. PW 2's father, PW 7, received information that his daughter, PW 2, had been sexually assaulted. He quickly proceeded to the scene and found PW 1 laying at the Weighbridge gate. PW 1 narrated what had happened and told him she had been sexually assaulted by a boda boda rider known to her and who was residing at Sunrise estate. He noted that PW 1 was bleeding and her clothes were bloodstained.
9. Together with PW 1, PW 7 took the PW 2 to Matungu Sub-County Hospital where she was initially treated. Although she was discharged

on the same night, they noticed that she was in pain and was leaking stool and urine. They took her to Kakamega County Hospital where she was admitted for a week. Thereafter she was referred to the fistula clinic at Kenyatta National Hospital (KNH) in Nairobi where she was admitted and discharged after a week.

10. PW 7 further testified that when he asked PW 2 about the identity of the assailant, she told him that she knew him and that he had in fact carried her and her mother to church and that she usually saw him at the bus stage. On 4<sup>th</sup> July 2017, he went with PW 2 at Shibale stage and PW 2 pointed at the appellant as the person who sexually assaulted her. On the next day, he alerted the police who managed to follow and arrest him.

11. PW 6, a Clinical Officer at Matungu Sub-county Hospital, confirmed that PW 2 was first seen at the facility on 28<sup>th</sup> May 2017. At that time, she complained of pain and was bleeding from her vagina. The attending nurse noted that the hymen was torn and the panty was blood stained. He further testified that on 29<sup>th</sup> May 2017, PW 2 was brought back to the facility and when he examined her, she was bleeding and her vagina and anus were torn and that her urine and faeces were mixed up and smelly. He therefore referred her to Kakamega hospital for further treatment. PW 8, a doctor from Kakamega County Hospital, testified that PW 2 was brought to the hospital on 29<sup>th</sup> May 2017 and because of her vagina was torn, faeces and urine passing through the same place, she was referred to a fistula expert at KNH for treatment.

12. The final prosecution witness was the Investigating Officer, PW 9, who told the court that when he received the complaint on 5<sup>th</sup> July 2017, PW 2 told him that she knew the suspect who was staying at Shibale Sunrise and she could identify him. On 5<sup>th</sup> July, 2017, PW 7 called and told him that the suspect had been spotted at Shibale. He proceeded there and he followed him and managed to arrest him. He recalled that following the arrest, PW 2 pointed him out as the appellant as the person who had sexually assaulted her.

13. In his unsworn statement, the accused denied the offence. He told the court that on 28<sup>th</sup> May 2017, he was at his business premises of one MO at Mayoni from 3.00pm to 5.00pm. In the evening he left the place and went home. He was arrested on 5<sup>th</sup> July 2017 after PW 7 saw him and a young girl pointed at him saying, “*Ndio huyo*”. He denied that he knew the complainant in this case.

14. In order to prove defilement, the prosecution must establish that the appellant did an act that caused penetration to a child. **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.*”

15. In this case, the fact of penetration is not in doubt. PW 1 narrated how she was taken to a bush and sexually assaulted. Her evidence clear and direct and was not shaken in cross-examination. That evidence was clearly corroborated by the testimony of PW 1, PW 3, PW 4, PW 5, and PW 6 who saw her immediately after the incident and who confirmed that she was bleeding from her private parts. In addition, the blood stained pants, t-shirt and skirt that she was wearing on the material day were produced in evidence further fortifying her testimony.

16. In his submissions, the appellant complained that medical evidence was insufficient to prove penetration. I hold that the medical evidence was merely corroborative of the fact of penetration testified to by PW 2. The clinical officer, PW 6, and the doctor PW 8, confirmed the injuries on her vagina and anus and stated that they were as a result of forceful penetration. This evidence was consistent with PW 2’s narration of what happened and what the other witnesses confirmed. Although the appellant complaint that the fistula expert from KNH was not called. The testimony of PW 6 and PW 8 on the nature of the injuries suffered by PW 2 as a result of the sexual assault was sufficiently proved and failure to call the expert would not diminish the nature and extent of injuries sustained by PW 2.

17. The next issue for determination is whether the appellant caused the act of penetration. PW 2 testified that she knew the assailant, he was a boda boda rider, he had carried her previously and she knew that he lived at Sunrise estate. This incident took place at day time and he is the one who carried her on the motorbike before assaulting her. She informed PW 7 that she knew the person who assaulted here and could identify him. She explained he was a boda boda rider an in fact assisted PW 7 locate him at Shibale market whereupon he was arrested. According to PW 9, when the appellant was arrested, PW 1 confirmed he was that one who sexually assaulted her and in cross-examination he stated that she even started crying when she identified him. This was a case where PW 2 knew the assailant but not his name and was able to identify him.

18. Since the PW 2’s recall was not tested by an identification parade, the appellant submitted that his identification PW 2 was improper. Identification of the appellant was basically a dock identification which our courts have generally held is worthless. This does not mean that the court can never rely on a dock identification. In *Muiruri & Others v Republic* [2002] 1KLR 274, the Court of Appeal noted that the trial court may proceed to convict;

*[I]f satisfied that on the facts and circumstances of the case, the evidence must be true and if prior thereto the court duly warns itself of the possible danger of mistaken identification.*

19. Where the court is sure or certain of the identity, the identification may be accepted. In this case, I am satisfied from the evidence that the circumstances of identification were favourable and the possibility of mistaken identity excluded.

20. The appellant submitted that the prosecution ought to have complied with the provisions of **section 36(1)** of the *Sexual Offences Act* which stipulates as follows:

*Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.*

21. The power of the court to order a DNA or other medical evidence is discretionary. The Court of Appeal has upheld that the principle that the absence of medical evidence is not a decisive as the fact penetration can be proved by oral testimony of the victim or by other

circumstantial evidence (see *Kassim Ali v Republic*, MSA CR APP NO. 84 of 2005 [2006]eKLR and *Dennis Osoro Obiri v Republic NRB CR APP NO. 279 of 2011 [2014]eKLR*). As to whether the examination of the accused is necessary, the Court of Appeal in *Geoffrey Kioji v Republic*, NYR CR. APP. NO. 270 of 2010 (UR), observed as follows:

*Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.*

In light of the provisions of the law and authorities I have cited, I do find that non-compliance with **section 36(1)** of the *Sexual Offences Act* was not fatal to the prosecution case.

22. The appellant complained that his alibi defence was not taken into account. He stated that he was in Mayoni on the date of the incident and could not have committed the offence. The trial magistrate correctly accepted the law as stated in the case of *Sekitoleko v Uganda [1967] EA 531* that as general rule, the burden of proving the guilt of an accused never shifts whether the defence set up is an alibi or something else and the burden of proving an alibi does not lie on an accused. In such a case, the prosecution must disprove the alibi beyond reasonable doubt. The appellant's assertion that he was at Mayoni was an unsworn statement and not supported by any other evidence. When considered alongside the positive evidence of identification by PW 2, his alibi collapses. The totality of the evidence therefore is that the appellant is the person who caused an act of penetration.

23. The final ingredient of the offence of defilement is the age of the child. The age of a child is a question of fact. PW 1's birth certificate produced in evidence showed that she was born on 29<sup>th</sup> April 2007. She was just 10 years at the time the offence was committed and therefore a child. I find and hold that the prosecution proved all the elements of the offence of defilement and I therefore affirm the conviction.

24. On the issue of sentence under **section 8(1)** of the *Sexual Offences Act*, the mandatory minimum sentence upon conviction of the defilement of a child aged less than 11 years is life imprisonment. Although the Court of Appeal has declared mandatory minimum sentence unconstitutional (see *Christopher Ochieng v Republic KSM CA Criminal Appeal No. 202 of 2011 [2018] eKLR*), I do not see any reason to interfere with the sentence of 20 years' imprisonment since the respondent did not cross appeal against that sentence or apply to enhance it.

25. The appeal is dismissed

**SIGNED AT KISII**

**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.