



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL NO. 43 OF 2017

BETWEEN

F O O APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. C. N. Njalale at Senior Resident Magistrates Court at Winam in Criminal Case No. 15 of 2016 dated on 9th June 2017)

JUDGMENT

1. The appellant, **F O O** was charged and convicted of the offence of defilement contrary to **section 8(1) and (2)** of the ***Sexual Offences Act***. The particulars were that on diverse dates during the month of August 2016 at [particulars withheld], Kisumu East District within Kisumu County, he unlawfully and intentionally caused his penis to penetrate the vagina of KA, a child aged 7 years. As the appellant was a child, he was sentenced to three years in a Borstal Institution.
2. The appellant now appeals against conviction and sentence grounded on the memorandum of appeal dated 26th July 2017. Mr Emukule, counsel for the appellant, condensed the grounds of appeal into one ground. He argued that there was no evidence of penetration as the evidence of the complaint and the other witnesses was contradictory. He also submitted that the medical evidence did not establish penetration. Ms Barasa, counsel for the respondent, supported the conviction and submitted that the prosecution proved all the elements of the offence of defilement.
3. The evidence emerging from the trial court was as follows. After a *voire dire*, the child, PW 1, testified on oath. She recalled that on 21st September 2016 while she was on holiday, the appellant called her to his parents' house and while they were inside, he removed his clothes and her clothes and proceeded to sexually assault her. Thereafter he beat her and threatened her not to tell her parents.
4. On the same day, PW 1's mother, PW 2, recalled that after she had her household chores, she was told by her other children that PW 1 was in the verandah. When she went there, she found PW 1 without her skirt and pants scratching her private parts. PW 1 was reluctant to tell her what happened so PW 2 informed her husband, PW 3. When PW 3 started beating PW 1, she narrated what had taken place and also told him that the appellant had defiled her five times before whereupon PW 2 fainted.
5. PW 4, a police constable, confirmed that the incident was reported at Kondole Police Station on 21st September 2016. He issued the P3 form. PW 4 recalled that when he interviewed PW 1, she told him that she had been sexually assaulted by the appellant several times before during the school holidays.

6. PW 5, the medical officer, produced the P3 form prepared by another doctor. He testified that after examining PW 1, the doctor concluded that there was penetration on the ground that there were remains of a hymen present although no vaginal lacerations were detected.

7. When put on his defence, the appellant gave sworn testimony and denied that he committed the offence. He admitted that he knew PW 1's family and that they were neighbours and that her mother was sick and was in the house. He recalled that PW 1 often visited their house. He told the court that PW 1 was lying and that there was no way he could have sexually assaulted PW 1 while his mother was in the house.

8. This being a first appeal, it is the duty of this 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 an opinion on their demeanour (see *Okeno v Republic [1972] EA 32*).

9. The main issue agitated by Mr Emukule is that the prosecution did not prove penetration. In order to prove defilement, the prosecution must show that the accused did an act that amounted to penetration of 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. In her testimony, PW 1 gave clear testimony on how the accused inserted his penis into her vagina. Her testimony on what took place was unshaken in cross-examination. The fact that she told her parents what took place and narrated the same incident to PW 4 enhances her credibility. Under **section 124** of the **Evidence Act (Chapter 80 of the Laws of Kenya)**, an accused person shall not be liable to be convicted on the basis of the evidence of the victim unless such evidence is corroborated but the proviso to that section makes an exception in sexual offences and provides that the accused may be convicted on such evidence if the court is satisfied that complainant is telling the truth and records the reasons

11. In light of the provision I have cited, it was not necessary for PW 1's testimony to be corroborated but the evidence of PW 5 established that there were remains of the hymen which were indicative of penetration. Likewise, the trial magistrate held that having observed PW 1's demeanour, she was satisfied that she was telling the truth. There is no basis on the record for me to depart from this finding.

12. Mr Emukule submitted that the testimony of PW 1 from her narration showed that she was defiled five times which was inconsistent with what she had told the court and the other witnesses initially. In my understanding, the evidence is that prior to the incident of 21st September 2016, the appellant had defiled PW 1 several times before. What she told PW 2, PW 3 and PW 4 is that the appellant had defiled her five times before. The evidence is clear though is that on the material day, penetration took place.

13. The appellant's defence could not withstand the weight of the prosecution evidence. The parties were neighbours and knew each other and nothing was put to the witnesses in cross-examination to suggest that they were lying or had a grudge with the appellant or his family.

14. As regards the sentence, the appellant, who was below the age of 18 years and therefore a child within the meaning of the **Children Act** and in terms of **section 191** thereof, he was properly sentenced to three years in a Borstal institution. He had defiled PW 1 previously and on the material day he had used physical violence to threaten her. A custodial sentence was deserved.

15. I affirm the conviction and sentence.

16. The appeal is dismissed.

DATED and DELIVERED at KISUMU this 30th day of January 2017

D.S. MAJANJA

JUDGE

Mr Emukule, Advocates for the appellant.

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