



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISUMU**

**CRIMINAL APPEAL NO. 45 OF 2017**

**BETWEEN**

**ISSA WAKA KHAONJA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence of Hon. M. Agutu, RM dated 15<sup>th</sup> August 2017 at Chief Magistrate's Court at Kisumu in Criminal Case No. 19 of 2016)*

**JUDGMENT**

1. The appellant, **ISSA WAKA KHAOYA**, was charged with the offence of defilement contrary to **section 8(1) and (3)** of the **Sexual Offences Act**. The particulars were that on 8<sup>th</sup> July 2016 in Kisumu East District within Kisumu County, he intentionally and unlawfully caused his penis to penetrate the vagina of CC, a child aged 13 years. He was also faced an alternative count of committing an indecent act with a child contrary to **section 11(1)** of the **Sexual Offence Act** based on the same facts. After a full trial, the appellant was convicted of the principal charge and sentenced to 20 years' imprisonment. He now appeals against conviction and sentence.
2. The respondent, through its counsel, submitted that it could not support the conviction and sentence as there was lack of evidence of positive identification of the appellant as the perpetrator of the felonious act. Despite this concession, I am obliged to re-evaluate the evidence adduced so as to reach an independent conclusion as to whether or not to uphold the appellant's conviction bearing in mind that I neither heard nor saw the witnesses testify (see *Njoroge v Republic [1987] KLR 19*).
3. After being sworn, the complainant (PW 1) testified that on 9<sup>th</sup> July 2016 she had an argument with other children who accused her of stealing money so she decided to run away from home where she was living with her aunt (PW 3). Since it was late at night she got stranded. She met a lady by the name *Atieno* who offered to assist her. She took her to the appellant's home and left her there. During that night, the appellant proceeded to sexually assault her. She remained in that house for about a week until she was found by good Samaritans.
4. PW 3 testified that when she returned home in the evening of 9<sup>th</sup> July 2016, PW 1 was missing. She tried looking for her but in vain until 19<sup>th</sup> July 2016 when she was called and told that PW 1 had been found in Obunga. PW 1 was taken to Kisumu East District Hospital where she was examined by PW 3, a doctor, on 18<sup>th</sup> July 2016. He concluded that there was evidence of penetration from the fact that the hymen was torn but not bleeding.
5. The investigating officer (PW 4) confirmed that PW 3 reported that PW 1 was missing on 9<sup>th</sup> July 2016 as recorded in the Occurrence Book. She recalled that neighbours reported the matter at Obunga Police Post and brought PW 1 to the Police Station. The accused was also arrested.
6. In his sworn defence, the appellant denied that he committed the offence and told the court that he met PW 1 at Obunga Police Post. At the time she was unknown to him.
7. In order to prove defilement, the prosecution must show that an 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."
8. In this case, there is sufficient evidence to show that the PW 1 was subjected to penetration. This issue is whether it is the appellant who did the act that caused penetration. Although PW 1 identified the appellant while giving evidence in the dock, the prosecution did not lead any evidence as how PW 1 identified the appellant as the person who sexually assaulted her prior to giving evidence. The appellant was a stranger to her. How and where the appellant was found and arrested and his connection to PW 1 was not proved in evidence. The investigating officer, did not, for example confirm that the appellant was staying in the same place PW 1 was found. The people who led to

the appellant's arrest were never called to give evidence on the circumstances that connected the appellant to PW 1.

9. The identification of the appellant was clearly a dock identification which is essentially worthless. This is a case where the police ought to have done more investigation given the fact that there was even evidence of child prostitution.

10. I have no option but to allow the appeal for the reasons I have set out. The appellant is set free unless otherwise lawfully held.

**DATED and DELIVERED at KISUMU this 28<sup>th</sup> day of February 2018.**

**D.S. MAJANJA**

**JUDGE**

Appellant in person.

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