



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL NO. 54 OF 2017

BETWEEN

JOHN LUBANGA "MJOMBA"APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. C. N. Njalale, RM at the Senior Resident Magistrates Court at Winam in Criminal Case No. 1208 of 2014 dated on 4th June 2017)

JUDGMENT

1. The appellant, **JOHN LUBANGA 'MJOMBA'** was charged with the offence of defilement contrary to **section 8(1)** as read with **section 8(2)** of the **Sexual Offences Act** ("the Act"). The particulars of the offence were that on diverse dates between 11th and 13th August 2014 in Kisumu East District of Kisumu County, he intentionally caused his penis to penetrate the vagina of SAO, a child aged 11 years. He also faced an alternative charge of committing an indecent act with a child contrary to **section 11(1)** of the same **Act** based on the same facts.

2. The appellant was convicted and sentenced to serve 20 years' imprisonment. He now appeals against conviction and sentence based on the petition of appeal dated 12th October 2017. He contends that the prosecution did not prove the offence beyond reasonable doubt. That there were contradictions in the prosecution evidence notably the date when the incidents are alleged to have taken place. He also contends that the medical evidence was insufficient to sustain a conviction.

3. The respondent supports the conviction and sentence. Counsel for the respondent submitted that the prosecution proved all the elements of the offence and that PW 1's testimony was corroborated by the other witnesses. He also submitted that the medical evidence proved that there was penetration.

4. 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 or hear the witnesses testify as to form its own opinion on their demeanour (see **Okeno v Republic [1972] EA 32**).

5. The summary of the prosecution evidence is that the appellant used to give the complainant (PW 1) and other girls money to buy mandazi and he would tell the complainant to go back to his house after buying mandazi. PW 1 testified that on 11th August 2014, she went to his house at around 5:00pm and appellant began touching her back, thighs and buttocks. He then told her to go home and return to his house the following day. On 12th August 2014, PW 1 went to the appellant's house. She testified that on arrival at his house, the appellant placed her on his sofa removed her clothes. She told the court as follows;

He removed his trouser and he slept on top of me. He put his penis in mu dudu that is what I use to urinate and had sex with me. I felt pain. I did not make noise as he told me not to scream. When he was through he gave me 100/-.

6. On 13th August 2014, PW 1 went to the appellant's house and she narrated what happened as follows;

I went to his house and he directed me to his bedroom while in the bedroom he told me to remove my skirt and pant which I removed. He also removed his trouser and the pant. He slept on top of me after making me lie on the bed. He removed his penis and put (it) in my vagina and had sex with me. The door of his house was locked by him. I did not scream as I feared as he had told me not to tell my parents.

7. PW 1's mother, PW 2, testified that when she returned home on 11th August 2018 at about 7.30pm, she noticed PW 1 was not feeling well and when she inquired from her what happened, her brother, PW 5 interjected and asked PW 1 to tell the truth about what happened. PW 1 opened up and narrated to PW 2 about what had happened. PW 2 decided to inspect her daughter and she found that the complainant had

whitish substance on the thighs and on her vagina.

8. PW 1's father, PW 3, testified that he was away from home for work and he returned on 18th August 2014. When he arrived at Kibos, he saw PW 1 walking strangely and when he inquired from PW 2 what had happened and she told him that she had pain on her thighs due to vaccination. On 19th August 2014, PW 5 informed him that he had heard some children saying that the complainant used to go to the appellant's house. PW 3 asked PW 1 why she used to go there and she narrated to him what happened. After receiving this information, PW 3 instructed PW 1 to take him to the appellant's house where they found him and caused his arrest by the area chief.

9. PW4, the doctor who produced the medical report filled by another doctor, testified that the doctor who conducted the examination was of the opinion that there was evidence of penetration as the hymen was broken although PW 4 noted that that the time of the physical examination, no obvious injury or tears were noted and the genitalia were normal.

10. In his defence, the appellant denied the offence. His testimony dwelt on his arrest on 11th August 2014. His witness, DW 2, testified that he would have known if the appellant did such an act on the dates he is alleged to have defiled PW 1 as he shared the same house.

11. The main issue for determination in this case is whether the prosecution established a case of defilement against the appellant beyond reasonable doubt. In order to prove defilement, the prosecution must show that the appellant 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.*"

12. PW 1 gave lucid and detailed testimony on how the appellant had sexual intercourse with her twice between 11th and 13th June 2014. From the record, her testimony was clear and unshaken in cross-examination and I have no doubt that what the appellant did to her amounted to penetration. Further, the appellant was not a stranger to her and had interacted with her sufficiently to exclude the possibility of mistaken identity. Under proviso to **section 124** of **Evidence Act (Chapter 80 of the Laws of Kenya)**, her testimony is not required to be corroborated if the magistrate concludes, for reasons to be recorded, that the child is telling the truth. The trial magistrate assessed the PW 1's demeanour and concluded that she was telling the truth.

13. The appellant complained that there was a contradiction in the dates given by PW 1 and the other witnesses. I have considered the evidence and PW 1 was clear that she was the sexual assault took place on the course of 3 days. On the first day, that is, 11th June 2014, she was subjected to indecent assault and on the two next days she was defiled. Her parents only came to know of what had happened much later and they took her to hospital on 19th June 2014. Like the trial magistrate, I do not think that the contradiction goes to the root of the fact that PW 1 gave clear testimony on how she was sexually assaulted as her testimony of events taken together with the other evidence is consistent.

14. The law is that the prosecution does not need to call all the witnesses to prove a fact. The investigating officer, would only come and testify how he carried out the investigations. As I have stated, the testimony of PW 1 was sufficient to support a conviction and as such calling the investigating officer would be neither add or subtract from the totality of the evidence.

15. In light of what I stated, the medical evidence would only be corroborative but in this case, it was not particularly helpful since PW 1 went to the hospital several days after the act of penetration hence the evidence was not necessarily dispositive of penetration. On the other hand, the testimony of PW 2, PW 3, PW 5 confirm that PW 1 reported the incident and were able to see her in a state of distress consistent with having been sexually assaulted.

16. The appellant denied the offence in his unsworn statement. Although DW 2 told the court that the appellant could not have engaged in such an act without his knowledge, the evidence on record shows that the appellant had two houses and it is possible that he committed the felonious act in the house he did not share with DW 2. Further the testimony of the complainant was solid and when asked to take PW 2, PW 3 and PW 5 to the house of the person who defiled her she took them with ease and identified the appellant to them. When all this evidence is considered alongside the defence evidence, it is overwhelming. Moreover, there is no evidence of a grudge between the appellant and PW 1's family. I therefore conclude that the prosecution proved its case beyond reasonable doubt.

17. The final question is that of age of the complainant. For purposes of the offence of defilement, there is no question that PW 1 was below the age of 18 years. The proof of age is a question of fact. PW 2 produced the birth certificate which showed that the PW 1 was born on 23rd May 2002 making her 15 years old. Although, the charge sheet referred to **section (2)** of the **Sexual Offences Act**, the sentence imposed was within the bracket provided by **section 8(3)** of the **Act** and was thus within the law.

18. I affirm the conviction and sentence.

19. The appeal is dismissed.

DATED and DELIVERED at KISUMU this 28th day of February 2018.

D.S. MAJANJA

JUDGE

Mr Ngala, Advocate instructed Ms Nanzushi, Advocate for the appellant.

Mr Muia, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.