



REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL APPEAL NO. 78 OF 2016
(CORAM: D. S. MAJANJA J.)

BETWEEN

BENJAMIN OCHIENG ISIONGO..... APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against the original conviction and sentence dated 3rd August 2016 in Criminal Case No. 641 of 2015 at Ukwala Law Courts before Hon. C. N.Wanyama, RM)

JUDGMENT

1. The appellant, **BENJAMIN OCHIENG ISIONGO**, was charged and convicted of the offence of defilement contrary to **section 8(1) and (3)** of the **Sexual Offences Act**. The particulars of the offence were that on 10th December 2015 within Siaya County, he intentionally caused his penis to penetrate the vagina of MA, a child aged 15 years. He was sentenced to 20 years' imprisonment. He now appeals against the conviction and sentence.

2. In his petition of appeal, the appellant complained that the prosecution did not prove its case because the evidence was not corroborated. He submitted that the evidence of PW 2, PW 3, PW 4 and PW 5 was all hearsay and could not be relied upon to support the conviction. He contended that the medical evidence was produced by a doctor who did not examine the complainant and that he was not examined at all. He also complained that his defence was not considered by the trial magistrate.

3. The respondent opposed the appeal. Counsel for the respondent submitted that the prosecution all elements of the offence of defilement and that the testimony of PW 1 was sufficiently corroborated.

4. As this is a first appeal, the duty of the court is to subject the evidence on record to a fresh review and scrutiny and come to its own conclusion while bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see **Okeno v Republic [1972] EA 32**).

5. The prosecution case was as follows. After a *voire dire* the complainant, PW 1, was sworn. She recalled what happened on 10th December 2012 at about 11.00am as follows;

[I] had gone to the posho mill when I arrived at the junction I met Babu the accused. I did not speak to him, he greeted me 3 times. I did not reply. He followed me from behind and removed the flour from my head. He held and asked why I had not replied to the greeting. He pulled me to the road He said if I scream he will kill me. he put the flour down, he fell on me on the ground and held my throat, he took me to near a river and removed my clothes, removed his clothes and inserted his penis into my vagina. He strangled me that I did not scream he finished and took a stick and said he will finish with me. I managed to run away from him. I was naked. He chased me hear another deserted home

6. PW 1 recalled that she went to a neighbour's home. The neighbour, PW 2, told the court that on the material day at about 12 noon as he was preparing lunch, PW 1 came to his home crying. She narrated to him what the appellant had done to her. PW 1 gave him her mother's telephone number and he called her. PW 1's mother, PW 3 testified that she received a call from PW 3 informing her that her daughter had been sexually assaulted. She went there immediately and took PW 1 to Ndere Health Centre where she treated. She also went to report the matter to Ugunja Police Station and was referred to Ambira Hospital where PW 1 was examined.

7. The investigating officer, PW 4 confirmed that she was at the Police Station when PW 3 came with PW 1 and reported the incident of defilement. At the time, PW 3 had been treated. She took witness statements and caused the appellant to be arrested. The appellant was

arrested on 12th December 2015 at 3.00am by administration police officers including PW 5. PW 4 also produced PW 1's birth certificate which indicated that she was born on 12th January 2000.

8. PW 6, a clinical officer, at Ambira Hospital recalled that he examined PW 1. He confirmed that she had been examined and treated at Ndere Health Centre 2 to 3 hours after the incident where it was observed that she had shoulder pain caused by a blunt object. The genital examination revealed reddened painful labia majora and minora. There was no hymen and there was a whitish discharge at the vaginal entry. PW 6 concluded that there was forceful vaginal penetration. PW 6 also produced the P3 form prepared by the clinical officer who examined the appellant. He confirmed that the appellant did not have any injuries and was in a good mental state.

9. In his unsworn statement, the appellant denied knowledge of the offence. He gave an account of his arrest by administration police officers on 12th December 2015 at 3.00am and the fact that he was examined at Ambira Hospital.

10. 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 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.*"

11. PW 1 gave graphic testimony of how the appellant accosted her and forcefully proceeded to insert his penis into her vagina. Her testimony was clear and consistent as to what took place. It was unshaken in cross-examination. The incident took place at daytime and the appellant was person known to her. All this evidence was sufficient and was not required to be corroborated in law under the proviso to **section 124** of the **Evidence Act (Chapter 80 of the Laws of Kenya)**. However, there was ample corroborative evidence. First, the fact that she reported the incident immediately to PW 2, who saw her in a state of distress, corroborated her testimony and enhanced her credibility. Second, the medical evidence corroborated the blunt injury she suffered as a result of being assaulted and the forceful penetration. The medical report was produced by PW 6 who examined PW 1.

12. The appellant's defence was a mere denial and there was no evidence of any grudge or any reason why PW 1 would lie or frame the appellant. The totality of the evidence is the appellant is the one who caused the act of penetration. I affirm the conviction.

13. The age of the child is a question of fact. PW 1's birth certificate was produced and it indicated that she was born on 13th January 2000 meaning that on 10th December 2015, she was 15 years old. The sentence imposed is the minimum provided under **section 8(3)** of the **Sexual Offences Act** when the apparent age of the child is 15 years.

14. In his submissions, the appellant raised several procedural issues. First, he complained that the language of the trial was not indicated and as such his right to a fair trial was violated. I have looked at the proceedings and I note that the trial proceedings were translated in Dholuo which is the language he stated that he understood. He fully participated in the trial and did not raise any complaint on the language used during the proceedings hence I find this ground unmerited.

15. Secondly, the appellant complained about the manner in which the *voire dire* was conducted as the questions put to PW 1 were not recorded but only the answers. On this issue, I am content to adopt what the Court of Appeal stated in **Patrick Kathurima v Republic CA NYR CR App. No. 131 of 2014 [2015]eKLR**, that, "*The trial magistrates' failure to reflect on the record the questions put to H.W. during the voir dire examination was not therefore per se fatal to the prosecution case.*"

16. Lastly, the appellant complained that he was not furnished with witness statements. Although the testimony of PW 1 was taken after plea was taken, thereafter the trial magistrate ordered that statement be furnished. The issue was not raised at all in the subsequent proceedings and the appellant fully participated in the trial. I do not find any prejudice and I dismiss this ground.

17. I affirm the conviction and sentence. The appeal is dismissed.

SIGNED IN NAIROBI

D. S. MAJANJA

JUDGE

DATED, SIGNED and DELIVERED at SIAYA this 19th day of February 2018

T. W. CHERERE

JUDGE

Appellant in Person

Ms Odumba, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the State

Court Assistants: Laban O. Odhiambo, Ishmael Orwa