



REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL APPEAL NO. 17 OF 2016
(CORAM: D. S. MAJANJA J.)

BETWEEN

JOHN OCHICHI OKOTH APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence dated 11th December 2013 in Criminal Case No. 807 of 2012 at Siaya Law Courts before Hon. M.S.Kimani, RM)

JUDGMENT

1. The appellant, **JOHN OCHICHI OKOTH**, was charged with the offence of defilement contrary to **section 8(1) and (2)** of the *Sexual Offences Act*. The particulars of the offence were that on 27th September 2012 in Gem District within Siaya County, he intentionally caused his penis to penetrate the vagina of VA, a child aged 8 years. He also faced an alternative charge of committing an indecent act with a child contrary to **section 11(1)** of the *Sexual Offences Act* on the same facts.
2. The appellant was convicted and sentenced life imprisonment on the principal count. The thrust of the appellant's appeal is that the prosecution failed to prove its case beyond reasonable doubt. She contended that the medical evidence presented did not conclusively prove his guilt. He filed written submissions in which he amplified his arguments.
3. The respondent supported the conviction and sentence. Counsel for the respondent submitted that the prosecution proved all elements of the offence of defilement. She noted that PW 1 gave clear evidence and that she knew the appellant.
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. In her unsworn testimony, the complainant (PW 1) stated that she was 9 years old attending class 3. She recalled the appellant had asked her grandfather to allow her to go to his home and collect groundnuts. When PW 1 got to the appellant's house, he shut the door and threw her on the bed. She stated as follows:

He came and partially removed by inner wear and did bad manners to me. He removed his penis

form his long trousers. He unzipped and thereafter told me to have sex with him. The accused had sex with me. I felt pain and cried. He asked me to go to our home after giving me the groundnuts. The accused warned me not to tell anyone lest he would cut me using a panga and throw me in the bush.

6. PW 1 told the court that she went back home and did not tell anyone. She decided to tell her mother, PW 3, what had taken place on 29th September 2012 because she had difficulties in walking as she was in pain. PW 3 recalled that on 29th September 2012, PW 1 was looking seriously sick and when she asked her what had happened, she stated that the appellant had sexually assaulted her. She noticed that the PW 1 had been walking with her legs apart. She examined her vagina and noticed it was swollen. She also told PW 3 that she did not inform her of the incident because the appellant had threatened her.

7. The matter was reported to the Assistant Chief, PW 2, on 30th September 2012. He went to the PW 1's house where. She narrated to him what happened. PW 2 inspected PW 1's private parts and noticed puss and the fact that she was in a lot of pain. He arrested the appellant and took him and PW 1 to the Children's office. He then took the appellant to the police station.

8. When PW 1 was taken to the hospital, she was examined by a clinical officer on 29th September 2012. She had inflamed labia with obvious lacerations and a perforated hymen. There was a yellowish discharge from the vagina. The urine and the high vaginal swab revealed that there were pus cells. In her P3 form report dated 30th September 2012, she confirmed that there was penetration. The P3 form was produced by the doctor in charge of the hospital, PW 4.

9. The investigating officer, PW 5, confirmed that defilement incident was reported on 30th September 2012 at the Police Station. After recording the statements, he issued the P3 form. He confirmed that the appellant was arrested by PW 2. He also produced PW 1's birth certificate which showed that she was born on 5th September 2004.

10. In his unsworn statement, the appellant denied that he committed the offence as he could not recall what happened on 27th September 2012. He claimed that on 30th September 2012, he was called by PW 3 to do some work at her homestead whereupon he was arrested by PW 2. He claimed that he was framed because he had a land dispute with PW 1's grandfather.

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 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.*"

12. The incident in this case took place at daytime. The appellant was a person known to PW 1 as they were neighbours. She gave a graphic description of what took place on that fateful day. Like the trial magistrate, I am satisfied that the use of the words, "*bad manners*" within the context of what happened could only imply penetrative sex. The fact of penetration was corroborated by the medical evidence of PW 4. I am satisfied that the prosecution proved that the appellant is the one who committed the act of penetration against PW 1.

13. PW 5 produced the birth certificate which showed that the child was born on 3rd December 2010 hence at the time of the offence she was aged 3 years. Since the child was below 11 years of age, the sentence of life imprisonment imposed was the minimum under **section 8(2)** of the *Sexual Offences Act* and as such it was proper and legal.

14. 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