



REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CRIMINAL APPEAL NO. 115 OF 2016

(CORAM: D. S. MAJANJA J.)

BETWEEN

PETER OBARE AMARA APPELLANT

AND

REPUBLICRESPONDENT

(Being an appeal against the original conviction and sentence dated 15th September 2016 in Criminal Case No. 115 of 2016 at Siaya Law Courts before Hon. C. A. Okore, SRM)

JUDGMENT

1. The appellant, **PETER OBARE AMARA**, 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 24th May 2015 at [particulars withheld] Sub-location within Siaya County, he intentionally caused his penis to penetrate the vagina of MA, a child aged 20 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**. He was sentenced to 20 years' imprisonment. He now appeals against the conviction and sentence.

2. In his petition of appeal, the appellant attacked the conviction on the ground that the age of the complainant was proved. That the trial magistrate did not give consideration to the appellant's defence and that the evidence relied on was insufficient, inconsistent and could not form the basis of a conviction. The appellant buttressed his case by filing written submissions.

3. The respondent opposed the appeal. Counsel for the respondent submitted that the prosecution proved that the appellant lured the complainant who knew him and proceeded to sexually assault her. She submitted that her testimony was adequately corroborated and that offence proved to the required standard.

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. The complainant, PW 1, recalled that although she could not recall the date, on the date of the incident she went to fetch water when she met the appellant who was a neighbour. The appellant told her to go to his house to collect the sugar cane, she had asked for earlier. When she went to his house, he was home alone. She narrated what happened as follows:

The accused put me on his bed and removed my pant. He took a piece of cloth and tied my mouth so that I don't scream. He then spread my legs as I lay on my back. He then removed his trouser and short and then lay on top of me. He pushed my dress upwards and held my mouth. He then inserted his penis inside my vagina. I tried to resist but he continued to have sex with me. He finished and warned me not to tell anyone. And that if I tell anyone he would harm me.

6. Thereafter PW 1 went home at about 5.00pm and told her sister what the appellant had done to her. Her sister then informed her aunt, PW 2. PW 2 testified that on 30th May 2015, she returned home in the evening when her daughter informed her that PW 1 had been defiled. PW 1 then narrated to her the ordeal. PW 2 reported to the village elder and then took PW 1 to Siaya District Hospital and then reported the incident to the police where she was issued with a P3 form.

7. The investigating officer, PW 3, testified that PW 2 reported the incident of PW 1's defilement on 4th June 2015 after PW 1 had been treated. He produced an age assessment report prepared by Dr Agwanda stated that PW 1 was aged between 12- 15 years old. He issued her with a P3 form which was completed by PW 4, a clinical officer at Siaya Referral Hospital. She noted that PW 1 had a broken hymen and her

vagina was tender when touched. The High Vaginal Swab revealed epithelial cells. She concluded that there was penetration.

8. In his sworn defence, the appellant denied that he had defiled PW 1 though he stated that he knew her as they hailed from the same village. He could not recall where he was on 24th May 2015. He stated that he had a grudge with PW 2 as she is the one who took his wife and gave her to her brother and she promised to punish him.

9. 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.*"

10. The primary evidence of penetration by the appellant was the testimony of PW 1. As I have outlined elsewhere in the judgment, her testimony was clear and consistent as to what took place. It was unshaken in cross-examination. Although the incident took place in the evening, the appellant was not a stranger to PW 1. She is a person she knew as a neighbour, a fact admitted by the appellant in his defence. All this evidence is 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)** which states as follows:

Provided that where in a criminal case involving a sexual offence the only evidence is that of a child of tender years who is the alleged victim of the offence, the court shall receive the evidence of the child and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the child is telling the truth.

11. In this case, not only was the trial magistrate satisfied that the child was telling the truth, there was sufficient corroborative evidence. PW 1 informed PW 2 what had taken place and the medical examination confirmed that there was penetration. When all this evidence is considered alongside the appellant's defence, it crumbles as it was mere denial and when the general suggestion of the grudge was put to PW 2, she denied it.

12. The age of the child is a question of fact. I note that the report by the doctor who conducted the age assessment was not called nor was the report produced in accordance with **section 77** of the **Evidence Act** hence it was inadmissible. However, the P3 form shows that PW 4 estimated the age of PW 1 to be 15 years. It is not in dispute that PW 1 was a child as she was still in primary school hence the offence was proved. The sentence imposed is the minimum provided under **section 8(3)** of the **Sexual Offences Act** where the apparent age of the child is 15 years.

13. 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