



REPUBLIC OF KENYA
IN THE HIGH COURT AT SIIAYA
CRIMINAL APPEAL NO. 128 OF 2016
(CORAM: D. S. MAJANJA, J.)

BETWEEN

STEPHEN ODHIAMBO AGUTU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against the original conviction and sentence dated 28th September 2016 in Criminal Case No. 79 of 2016 at Ukwala Law Courts before Hon. C.N.Wanyama, RM)

JUDGMENT

1. The appellant, **STEPHEN ODHIAMBO AGUTU**, was charged with the offence of defilement contrary to **section 8(1) and (4)** of the ***Sexual Offences Act***. The particulars of the offence were that on 14th February 2016 at [particulars withheld] Village, Ugenya District of Siaya County, he intentionally caused his penis to penetrate the vagina of BAO, a child aged 16 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 also charged with the offence of incest contrary to **section 20(1)** of the ***Sexual Offences Act*** where it was alleged that on 14th February 2016 at Kimira Village, Ugenya District within Siaya County, he intentionally touched the vagina of Brenda Auma Odhiambo, who in his knowledge was his daughter, with his penis.
3. In the third count, the appellant was charged with being in possession of Narcotic Drugs contrary to **section 3(1)** as read with **section 3(2)** of the ***Narcotic Drug and Psychotropic Substances Act***. It was alleged that on 19th February 2016 at [particulars withheld] Village, Ugenya District within Siaya County he was found in possession of 2 rolls and 10 grams of bhang not in medical preparation form.
4. The appellant was convicted on the 1st and 2nd counts and sentenced to 15 and 20 years' imprisonment respectively, both sentences to run concurrently. He was acquitted on the 3rd count. He now appeals against the conviction and sentence on the 1st and 2nd counts.
5. In his petition of appeal, the appellant complained that the prosecution did not prove its case. He contended that the trial magistrate failed to consider his defence and that the essential exhibits were not produced in evidence. In additional grounds of appeal, he complained that the medical evidence did not implicate him and the evidence relied upon was contradictory and inconsistent. The appellant also filed

written submissions in which he amplified the grounds of appeal.

6. The respondent supported the conviction and sentence. Counsel for the respondent submitted that the prosecution all elements of the offence of defilement and the fact that PW 1 was the appellant's daughter.

7. 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***).

8. The prosecution case was as follows. The complainant (PW 1) testified that she was 16 years old attending primary school in class 8. She testified that the appellant was her father. She recalled that on 14th February 2016, she was doing household chores and when she went to get the cows, the appellant held her by force pushed her into a bush, tore her panty and inserted his penis into her vagina. He told her that the money he paid for school fees could not go unpaid. She went to school, told her head teacher who then informed the assistant chief. She also testified that on 18th February 2016, the appellant, after sending her three siblings to the market, tore her panty, strangled her and warned her not to scream and then he inserted his penis into her vagina. She informed her aunt, PW 2.

9. PW 2 recalled that on the night of 14th February 2016, PW 1's mother, PW 3 came and told her that the appellant had defiled PW 1. She told her to take PW 1 to hospital. Since PW 3 was afraid of taking PW 1 to hospital, she went to PW 1's school and sought permission from the head teacher to take PW 1 to hospital. She took PW 1 to Ukwala Hospital on 15th February 2016 and reported the matter to the Children's office then to the Police.

10. PW 3 testified that on 14th February 2016, she had left PW 1 at home to do household chores. When she returned home in the evening, she did not find the chores done. The younger children told her that she had gone to get the cows and had not returned. PW 1 returned to the house crying and she told her that the appellant had pushed her into the sugar cane farm and threatened to kill her and then proceeded to sexually assault her. PW 3 went to PW 2's house and informed her what the appellant had done. She also testified that the appellant defiled PW 1 on 18th February 2016. She confirmed that the appellant was PW 1's father.

11. The Clinical Officer who examined PW 1 and filled the P3 form, PW4, recalled that she examined PW 1 on 19th February 2016. PW 1 complained of neck injuries and the high vaginal revealed epithelial cell which she noted was evidence of penetration. PW 6, the investigating officer, recalled that on 19th February 2016, PW 1 and PW 3 reported the appellant had defiled PW 1 on 14th February 2016. He recorded their statements and proceeded to arrest the appellant with the assistance of administration police officers. He issued a P3 form and produced PW 1's birth certificate which confirmed that she was 16 years old.

12. In his sworn defence, the appellant denied the offence. He told the court that PW 1 had been not returned home since 7th February 2016 and only returned on 13th February 2016. The appellant was concerned so he caned and she ran away to her mother's house and slept there. The appellant testified that on 14th February 2016, while the rest of the family, including PW 1, went to church, he remained home and went to look for collect some money owed to him. He returned home at about 7.30 pm and slept. Nothing happened on that day until 19th February 2016 when he was arrested by the police. He admitted in cross-examination that PW 1 was his daughter.

13. The main issue for determination in this case is whether the prosecution established a case of defilement against the appellant beyond reasonable doubt. In his submissions the appellant complained that the trial magistrate ought to have conducted a *voire dire* as PW 1 was a child of tender years. The case of ***Kibageny arap Kolil v R [1959] EA 92*** and followed in subsequent cases by the Court of Appeal establish that, 'a child of tender years' means a child under the age of 14 years under ***Oaths and Statutory Declarations Act (Chapter 15 of the Laws of Kenya)*** which deals with the competence of

children to testify in court proceedings. In this case, PW 6 produced PW 1 birth certificate which confirmed that she was 16 years old. It was thus not necessary to conduct a *voire dire*.

14. The appellant was charged with both defilement and incest. Incest is defined under **section 20(1) of the Sexual Offences Act, 2006** which states as follows:

20. (1) Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:

Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person. [Emphasis mine]

15. An “*indecent act*” under **section 2(1) of the Act** is defined as an unlawful intentional act which causes, “(a) *any contact between any part of the body of a person with genital organs, breasts or buttocks of another, but does not include an act that causes penetration.*” “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.*” Under **section 8** of the **Sexual Offences Act**, defilement is an act that causes penetration.

16. It is clear from the provisions I have outlined that both incest and defilement are co-extensive offences although incest is proved either by establishing penetration or an indecent act in addition to proving the relationship between the accused and child. It was therefore improper for the prosecution to charge the appellant with both offences. Since the allegation of defilement involved the appellant’s daughter, he ought to have charged with incest. The facts set out in the charge were clear and the appellant knew the offence he was facing, I do not find any prejudice occasioned to him.

17. At this stage I wish to point out that PW 1, PW 3 and the appellant all confirmed PW 1 was the appellant’s daughter. Likewise, the age of the child as I have alluded to elsewhere in the judgment was proved. The question is whether the prosecution proved an indecent act or penetration.

18. PW 1 gave clear testimony of how the appellant forcefully pushed her into a bush and proceed to insert his penis into her vagina on the 14th February 2017. Her testimony on that account was unshaken in cross-examination. All this evidence was sufficient to support a conviction 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)** if the trial magistrate was convinced she was telling the truth for reasons to be recorded. The trial magistrate was convinced that PW 1 was truthful and that there was no reason to lie. In the proceedings, the trial magistrate also recorded that PW 1 was uncomfortable giving testimony.

19. The aforesaid notwithstanding, there was corroborative evidence. First, PW 3 confirmed that she left that PW 1 at home on the material day to do household chores but she returned without having done anything. Second, it is clear that both PW 1 and PW 3 were under threat or feared the appellant and that is why they could not report the incident immediately to the authorities. PW 3 however informed PW 2 who took the initiative to follow up the matter. But before the first incident could be dealt with PW 1 testified that the appellant sexually assaulted her again on 18th February 2016. The medical examination done on 19th September 2016 confirmed that there was penetration. The appellant’s defence, when considered alongside the prosecution case, could not stand. The totality of the evidence is the appellant is the one who caused the of penetration. I accordingly affirm the conviction.

20. As regards the sentence, under **section 20(1) of the Sexual Offences Act**, the minimum sentence is 10 years’ imprisonment and the maximum is life imprisonment. The terms of 20 years’ imprisonment imposed on the appellant given that the appellant was violent and penetration was proved cannot be said to be harsh or excessive to warrant interference. The sentence is therefore affirmed.

21. 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