



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT SIAYA**

**CRIMINAL APPEAL NO. 157 OF 2016**

**CORAM: D. S. MAJANJA J.**

**BETWEEN**

**SYLVESTER OKOTH OLUOCH.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an appeal against the original conviction and sentence of Hon. G. Adhiambo, SRM dated 11<sup>th</sup> November 2016 in Criminal Case No. 448 of 2016 at Ukwala Senior Resident Magistrates Court )*

**JUDGMENT**

1. The appellant, Sylvester Okoth Oluoch, was charged, tried and convicted of the offence of defilement contrary to **section 8(1)** as read with **section 8(3)** of the *Sexual Offences Act* (“the Act”). The particulars of the charge were that on diverse dates between the year 2014 and 9<sup>th</sup> July 2016 while in Ugunja District within Siaya County he intentionally caused his penis to penetrate the vagina of JA, a child aged 15 years, on diverse dates. He was also faced an alternative charge of committing an indecent act with a child contrary to **section 11(1)** of the Act based on the same facts.

2. In his petition of appeal, the appellant complained that the trial magistrate erred in law and fact in relying on the prosecution evidence which was contradictory and lacked credibility and that trial magistrate erred in finding that the prosecution proved its case beyond reasonable doubt.

3. 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 so as to form its own opinion on their demeanour (see *Okeno v Republic* [1972] EA 32).

4. The complainant (PW1) testified that on 9<sup>th</sup> July 2016, the appellant, who was her boyfriend, went to her home at around 9:00pm and wanted to engage in sexual intercourse with her but she declined. The appellant remained in the house as PW 1 did her homework but fell asleep on her bed. At around mid-night, PW 1’s sisters, PW 3 and MA came knocking because they wanted to spend the night with her. PW 1 refused to open the door as the appellant was still in her room. The two went to report to their aunt, PW 2, who came and ordered PW 1 to open the door. Once inside they discovered the appellant hiding under the bed but he managed to escape. PW 1 testified that before that day she and the appellant had engaged in sexual intercourse.

5. PW 2 testified that after the incident she interrogated PW 1 and discovered that the two had been engaging in sexual intercourse. She decided to report the matter to the police. PW 2 produced PW 1’s birth certificate which indicated that she was born in 2001 and was thus aged 15 at the material time.

6. An administration Police Constable (PW 4) testified that after PW 2 reported the matter, he went to the house where PW 1 and the appellant had been sleeping and recovered the appellant’s clothes. PW 4 then arrested him and took him to Ugunja Police station. The investigating officer, PW 5, testified that when the appellant and PW 1 were taken to Ugunja Police Station, she escorted them to Ambira Sub-County Hospital where they were both examined and P3 forms filled. PW 5 testified that recorded the witness statements and charged the appellant with the offence of defilement.

7. PW 6, a clinical officer at Ambira Sub-County Hospital, produced the P3 medical examination report prepared by his colleague. From the medical examination conducted the complainant did not have any form of body injury. The hymen was not intact, the vaginal walls were non-tender and urinalysis only revealed presence of epithelial cells. PW 6 reached the conclusion that there was earlier vaginal penetration but the results were inconclusive of recent penetration.

8. The appellant denied offence in his defence. He stated that on the material day he had gone to give PW 1 some books but her aunt, PW 3, came knocking before he could leave. PW 1 opened the door and because he was afraid of her aunt he got out of the room running and on the following day he was arrested.

9. The main issue for determination in this case is whether the prosecution established beyond doubt that the appellant defiled PW 1. The medical evidence produced in court was inconclusive on the issue of penetration and would only be corroborative of PW 1's testimony. PW 1 testified that even though they did not engage in sex on the day the appellant was found in her room, they had engaged in consensual sex on three occasions before, that is on 3rd June 2006, 6th June 2006 and on 2nd July 2016, as the appellant was her boyfriend. PW 1 did not contest this evidence and in recognition of their relationship, PW 1 asked the court to forgive her and the appellant for the offence.

10. **Section 8(1)** of the *Act* criminalises sexual intercourse with a child. It states that,

*“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”* It is clear that the presence or otherwise of consent is irrelevant. Further, it was confirmed that the appellant was 20 years old when he committed the offence and it matters not that he was PW 1's boyfriend.

11. Much as I sympathise with the appellant, the law is unyielding on this issue. The sentence prescribed is a mandatory minimum sentence and my hands are chained to the statute. The conviction and sentence are affirmed and the appeal dismissed.

**SIGNED AT KISUMU**

**D. S. MAJANJA**

**JUDGE**

**DATED and DELIVERED at SIGNED at SIAYA this 20th day of April 2018**

**J. A. MAKAU**

**JUDGE**

Appellant in Person

Mr Okach, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the State

Court Assistants: L. Odhiambo and B. Ochieng