IN THE HIGH COURT OF KENYA AT KISII

CORAM: D.S MAJANJA J.

CRIMINAL APPEAL NO. 26 OF 2017

BETWEEN

OBWOGE MAERA NYAATA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence of Hon. J.K C.R.T Ateya, RM dated 13th April 2016 at the Principal Magistrate's Court at Ogembo in Criminal Case No. 798 of 2015)

JUDGMENT

1. The appellant was charged, convicted and sentenced to 25 years imprisonment for the offence of defilement contrary to **section 8(1)** and **(3)** of the ***Sexual Offences Act***. The charge against the appellant stated as follows:

> *On the 9th day of May 2015 at about 10.00 am at [particulars withheld] Village, Nyabera Sub-location in Gucha South Sub-County within Kisii County, he intentionally caused his penis to penetrate the vagina of INA a child aged 13 years.*

2. The thrust of the appellant's case is that the prosecution failed to prove the elements of the offence beyond reasonable doubt. He complained that this was a case of mistaken identity as he was not properly identified. The State took the position that all the elements of the offence were proved.

3. Before I proceed to consider the grounds of appeal, I remind myself the duty of the first appellate court. It is to re-appraise the evidence afresh and reach an independent decision as to whether to uphold the conviction bearing in mind that I neither heard or saw the witnesses testify (see ***Okeno v Republic*** **[1972] EA 32**). In doing so, I shall outline the evidence before the trial court.

4. The prosecution case was that on 9th May 2015, PW 3 was going to church with her children among them the complainant, PW 1 and her son PW 2. Both PW 1 and PW 2 gave sworn testimony after a voire dire. PW 3 recalled that as they were going to church, they left PW 1 behind. PW 1 followed her and she saw the assailant whom she identified as the appellant walking ahead of her. She met him but left to go to a nearby toilet. As she came out of the toilet, the appellant held her by the neck and dragged her to the nearby sugarcane field, put her down, removed her panties and skirt and also his trousers and put his penis into her vagina. He held her neck so that she could not scream. Thereafter, he left her to crawl back to the church.

5. PW 2 recalled that he saw the appellant grab PW 1. He went to inform PW 3 what he had seen and when he returned he found PW 1 lying on the ground bleeding profusely from her private parts.

6. PW 3 recalled that she was called by PW 2 to go outside and found PW 1 bleeding profusely from the mouth and private part. PW 1 narrated to the ordeal. She took PW 1 to Nduru Hospital for treatment and reported the matter to the police station.

7. The children's father, told the court that on the material day, he received a call from PW 3 about the incident. He found that PW 1 had been taken to the hospital, Because of the seriousness of the injuries the PW 1 had been transferred to Kisii Referral and Teaching Hospital. He went to see PW 1 who told him that the person who attacked her was short, dark and fat and he had shaved his head. PW 4 reported this the police. He also told the court that he knew the appellant as they lived in same neighbourhood.

8. The Clinical Officer, PW 7, gave an account of the injuries sustained by PW 1. She noted that PW 1 had a perennial tear and rectal vagina fistula as a result of the penetration. She had been taken to the hospital on 9th May 2015 and was later operated on to repair the perennial tear and vagina fistula. He concluded that the injuries were as a result of penetrative sexual assault.

9. The investigating officer, PW 7, told the court that on 9th May 2015 at about 2.40 pm, PW 3 reported that PW 1 had been defiled and

taken to hospital. After booking the report he went to the scene and saw a pool of blood in a sugarcane field. On the next day, he took photos. He issued the P3 form after visiting PW 1 at Kisii Referral Hospital where the child had been referred. He organized for an identification parade to be done by PW 6 who testified that PW 1 and PW 2 positively identified the appellant.

10. In his defence the appellant denied that he was the assailant.

11. In order to prove the offence of defilement, the prosecution must establish that the victim was a child, that she was subjected to an act of penetration by the accused. *"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. There is no doubt that the offence of defilement was proved. The testimony of PW 1 was clear and consistent on how she was sexually assaulted. Her evidence was corroborated by that of PW 2 and PW 3 who saw her in a state of distress immediately after she had been attacked. The medical evidence produced by PW 7 left no doubt that she had been subjected to a violent act of penetration. The question for resolution is whether the appellant is the person who perpetrated the felonious act.

13. The appellant was a stranger to both PW 1 and PW 2 and the incident took place in broad daylight and both PW 1 and PW 2 were able to see the appellant clearly and recall his features. PW 1 described the assailant to PW 1. PW 2 was able to see him clearly as he was walking on the road. Given that the incident took place took place during the day and both PW 1 and PW 2 saw him for some time and PW 1 interacted with him during the assault I have no doubt that these were circumstances for positive identification and both witnesses would be able to identify him at a properly conducted identification parade.

14. The approach by the police to put the suspect in an identification parade to confirm that the identification by the complainant finds support in the case of ***Nathan Kamau Mugwe v Republic*** **NRB CA CRA No. 63 of 2008 [2009] eKLR where it observed as follows;**

> ***James swore he saw the appellant from the time they met and negotiated the fare and was with him from the place of hiring upto the place where he was attacked and tied up. The appellant was sitting next to him on the front passenger seat. The trial Magistrate and the first appellate court were satisfied that James had ample time to see the appellant during the period the two were alone in the vehicle and also at the beginning of the journey. James had no difficulty in identifying him at a properly conducted identification parade.... We think the identification of the appellant was, in all the circumstances of the case, sound and even if the two courts below had excluded the evidence of Mwendo with regard to the parade, they would have inevitably come to the conclusion that the appellant had been properly and correctly identified as the person who had hired James at Cheers Makuti Bar and subsequently robbed him in the company of another person……. As to the complaint in ground six that the witnesses had not given to the police a description of the appellant before the parade, we do not think that failure to describe the person to be identified necessarily renders an otherwise valid parade worthless. Even in*** *Gabriel KamauNjoroge v Republic (1982 – 1988) 1 KAR 1134****, the Court did not go so far as to say that a witness must be asked to give a description of the person to be put on the parade for identification. All the Court said was that the witness "SHOULD" be asked. That is obviously a sensible approach. It is not impossible to have a situation in which a witness can tell the police that though he cannot give a description of the person he had seen during the commission of an offence, yet if he (witness) saw that person again, he would be able to identify him. It would be wrong to deprive such a witness of an opportunity of a properly conducted parade to see if he can identify the person. Again, the police themselves may, through their own investigations, come to know that a particular suspect may have been involved in a particular crime though the witness or witnesses to that crime have not given a description of the suspect. Once again it would be wrong to deny the police the opportunity to put such a suspect on a parade to see if the witnesses can identify him. In either of the two cases, the parade cannot be held to have been invalid merely because the witnesses had not previously given a description of the suspect. The relevant consideration would be the weight to put on the evidence regarding the identification parade. We reject the contention that because James had not given to the police a description of the appellant, his evidence with regard to the identification parade ought to have been rejected. [Emphasis mine]***

15. In this case, PW 1 in her own testimony was able to describe the appellant and she gave that description to PW 4 who reported to the police. I have considered the manner in which the identification parade was conducted particularly the testimony of PW 5 and the identification parade forms. I am satisfied that the rules for carrying out an identification parade were scrupulously adhered to. The appellant voluntarily accepted to participate in the parade and he asked his uncle to be present. He was satisfied by the manner in which the parade was carried out by signing the forms.

16. There is also the evidence of PW 3 who testified that she was able to see the appellant whom she did not know. Her recollection was not tested at the identification parade hence it was a dock identification. Her evidence, though, corroborates that of PW 1 and PW 2 as he saw the appellant walking in her direction as she was going to church that morning. Based on the totality of evidence, I am firmly convinced that identification of the appellant was positive and free from the possibility of error.

17. The age of a child is a question of fact. PW 3 and PW 4 both testified that PW 1 was born on 18th April 2002 which was supported by the clinic attendance card showing her date of birth. I therefore find and hold that PW 1 was aged 13 years at the time the offence was committed. Under **section 8(3)** of the **Act**, the minimum mandatory sentence was 20 years imprisonment. However, the attack was violent and left the child with tears in her private parts that required surgery. The sentence of 25 years' imprisonment was deserved.

18. The conviction and sentence are affirmed. The appeal is dismissed.

DATED and **DELIVERED** at **KISII** this **20th** day of **DECEMBER 2018**.

D.S MAJANJA

JUDGE

Appellant in person.

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions.