REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL NO. 74 OF 2014

BETWEEN

FRANCIS STINDO OTANGA …………..……..……........APPELLANT

AND

REPUBLIC …...……………….……….………..... RESPONDENT

(Being an appeal from the original conviction and sentence of Hon.M.C. Nyigei, RM dated 14th August 2014 at Senior Principal Magistrate's Court at Maseno in Criminal Case No. 535 of 2012)

JUDGMENT

1. The appellant, **FRANCIS STINDO OTANGA,** was charged with the offence of defilement contrary to **section 8(1)** and **(3)** of the ***Sexual Offences Act***. The particulars were that on 28th April 2012 at [particulars withheld] area in [particulars withheld] Location within Vihiga County, the appellant intentionally caused his penis to penetrate the vagina of AZ, a child aged 16 years. He was also faced an alternative count of committing an indecent act with a child contrary to **section 11(1)** of the ***Sexual Offence Act*** based on the same facts. After a full trial, the appellant was convicted of the principal charge and sentenced to 20 years' imprisonment. He now appeals against conviction and sentence.

2. In his petition of appeal filed on 20th August 2014, the appellant contended that the case was one of mistaken identity and that the learned trial magistrate failed to consider the medical evidence which was did not connect him to the offence. The appellant filed written submissions to support his grounds of appeal. The respondent, through Ms Barasa, opposed the appeal and submitted that the prosecution proved every element of the offence of defilement beyond reasonable doubt.

3. This being a first appeal, it is the duty of this court to re-evaluate the evidence adduced so as to reach its own independent conclusion as to whether or not to uphold the appellant's conviction bearing in mind that it neither heard not saw the witnesses testify (see ***Njoroge v Republic*** **[1987] KLR 19**).

4. The key witness, AZ (PW 1), testified that she was 16 years old and that on 28th April 2012 at about 6.00pm, she was alone going to the posho mill. She met the appellant, who was her uncle, and since it was raining he gave her Kshs. 5/- to buy a paper bag to carry her maize. He escorted her to the posho mill but it had no fuel so they both went back. As they crossed the river, the appellant offered to assist her. When she put the maize down, she described what happened as follows:

> *As I placed the maize down bending, he held me by [the] throat and pulled me down to napier grass nearby. He tore all my clothes and I was left with petticoat. I wore blouse and skirt. He tore [the] skirt and removed my pant, biker and started defiling me. He pushed me and held me by*

shoulder and led me to the river but I escaped and went and called [PW 2] who was coming down so I met her. It was 6.30pm going to 7.00pm when she appeared I told her Francis had defiled me. I was naked. She started screaming. I reported to my mother. He took my phone Nokia 1280. I reported to Itumbi AP Camp that very night. They referred us to Emuhaya Hospital.

5. PW 2, who was PW 1's aunt, recalled that she was going out to fetch rain water when she heard PW 1 screaming. She saw PW 1 coming up the hill in a soiled petticoat and t-shirt without her panty or biker. PW 1 told her that the appellant had defiled her. PW 2 further testified that they both reported the incident to PW 1's mother. The owner of the posho mill, PW 3, testified that at about 6.00pm, he had closed the posho mill and while he was going to another shop he met the appellant and PW 1 carrying to paper bags of dry maize. He told them that he had no fuel. He later met PW 1 with her mother. She was wearing the soiled petticoat.

6. PW 1's mother, PW 4, recalled that she had sent PW 1 to the posho mill on the material day at about 5.00pm. At about 6.00pm, PW 1 returned wearing a soiled petticoat accompanied by PW 2. After being informed about what had taken place, she reported the incident to the police and took PW 1 to be examined and treated at Emuhaya District Hospital. PW 4 identified the appellant as her brother-in-law.

7. PW 5, a clinical officer, examined PW 1 on 30th April 2012. He noted that the hymen was torn and that there was vaginal bleeding. He concluded that there was forced penetration. PW 6, the investigating officer, testified that the appellant was brought to Luanda Police station on 30th April 2013 by AP officers. He investigated the matter by taking witness statements. He confirmed that PW 4 brought a black skirt, black biker, t-shirt, white panty and petticoat to the police station which he produced in evidence.

8. In his sworn defence, the appellant gave an account of his arrest on 30th April 2012. He testified that he was told that he was being arrested for cutting down trees. After his arrest, he met his sister in law, PW 4, and PW 1 at the police station before being put into the cells. He told the court that he was being framed by PW 4 because he had married her house-help and had reported her for being in a compromising position with another man.

9. 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. I have evaluated the evidence presented before the subordinate court and find that the prosecution proved the elements of defilement. PW 1 gave a vivid description of how the appellant forcefully had sexual intercourse with her. Although PW 1's account need not have been corroborated by reason of the proviso to **section 124** of the ***Evidence Act (Chapter 80 of Laws of Kenya)*** which provides that a court can convict an accused person in a prosecution involving a sexual offence on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief, there was ample corroborative evidence. Her account was consistent with that of PW 2, whom she met in a distressed state immediately after the incident. In addition, the soiled clothes which were seen by PW 2 and PW 3 and which were produced in evidence lend credence to the PW 1's testimony. The medical examination carried out by PW 5 confirmed that her hymen was broken and that she had vaginal bleeding which was evidence of forceful penetration.

11. I note from the proceedings the trial magistrate used the term *"defiled"* as the act which took place between PW 1 and the appellant. The essence of the offence of defilement is penetration and PW 1 ought to have been given the opportunity to describe what took place and for the trial magistrate to record the precise words the child used to describe the act which the appellant did so that the court may determine whether the act amounts to penetration within the meaning of the ***Sexual Offences Act***. In ***Samson Aginga Ayieyo v Republic*** **KSM CA Crim. App. No. 165 of 2006 [2006]eKLR**, the learned magistrate recorded that the child stated she had been defiled. The Court of Appeal stated as follows, regarding the necessity of recording the precise words of the child;

“Defiled” is a technical term. It is quite improper to use such term or any other technical term when recording the evidence of a witness unless the witness himself or herself has used it. The correct approach is to use the words used by the witness.

Despite what I have noted and having reviewed all the evidence, I am satisfied that the prosecution proved that penetration took place.

12. As to whether the appellant was the person who committed the offence, the evidence is also clear that the appellant and PW 1 knew each other as they were relatives. This fact was admitted by the appellant. The incident took place in the early evening and they were both seen by PW 3 at the posho mill and immediately after the incident, PW 1 named the appellant to PW 2 as the perpetrator. The prosecution presented a seamless account of the evidence from the time PW 1 left home to the posho mill to the time she was defiled, reported the incident to the police station and was taken to hospital. The prosecution evidence against the appellant was overwhelming and leaves no doubt that it is the appellant who committed the felonious act and there can be no case of mistaken identity. His defence that he was being framed cannot withstand the sheer weight of direct evidence led by the prosecution pointing to him.

13. The final ingredient of the offence of defilement is the age of the child. Proof of age is a question of fact. PW 1 testified that she was 16 years old. Her mother, PW4 confirmed her age and the notification of birth was produced by PW 6 showed that she was born on 10th December 1995.

14. Since the child was 16 years old, **section 8(4)** of the ***Sexual Offences Act***, which provides for a minimum sentence of 15 years’ imprisonment where the child is between 16 and 18 years, is applicable. Although the charge sheet referred to **section 8(2)** of the ***Sexual Offences Act***, I do not think this error was prejudicial as it only related to the penalty applicable. The trial magistrate did not explain why she enhanced the minimum sentence by 5 years. I accordingly allow the appeal to the extent that I set aside the sentence and substitute it with 15 years’ imprisonment.

15. The conviction is affirmed. The appeal is allowed only to the extent that the sentence is reduced to 15 years’ imprisonment from the date of conviction and sentence.

DATED and DELIVERED at KISUMU this 25th day of May 2017.

D.S. MAJANJA

JUDGE

Appellant in person.

Ms Barasa, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.