



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
CRIMINAL APPEAL NO. 05 OF 2017

BETWEEN

EDWARD OBAGA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against the original conviction and sentence by Hon. G.A.Mmasi,

Ag SPM dated 14th April 2014 at the Senior Principal Magistrate's

Court at Vihiga in Criminal Case No. 74 of 2014)

J U D G M E N T

1. The appellant EDWARD OBAGA was charged with the offence of defilement contrary to section 8(1) and (2) of the Sexual Offences Act. The particulars of the charge were that on 17th January, 2014 at [particulars withheld] within Vihiga County, he intentionally and unlawfully penetrated with his penis, the vagina of AAO, a girl aged 8 years. He was convicted and sentenced to life imprisonment and as a result has lodged this appeal.

2. As this is a first appeal, I am obliged to review the evidence, analyse the same and reach on independent conclusion bearing in mind that I did not see or hear the witnesses (**See Njoroge v R [1987] KLR 19**)

3. The principal witness, AAO (PW1), was duly sworn after a *voire dire*. She told the court that on 17th January, 2014 at about 7.00pm she was going to the river to fetch water where the appellant held her, took her to the bush, stripped her skirt and pant and proceeded to have sexual intercourse with her. Although she screamed, no one could hear her. After he ordeal she went home informed her mother (PW 2) that she had been assaulted by the person who carried jerricans to fetch water.

4. PW 2, recalled that on the material day, PW 1 came home from school and then went to fetch water from the river. After some delay PW 1 came home looking sick and she went to sleep. PW 2 had tried to enquire what happened initially but she could not talk. PW 2 decided to wake her and when she inspected her private parts, she noticed that her vagina was reddish and swollen. In response to her questions, PW 1 told her that she had been defiled by the, "*fat short man who fetches water from the river.*" PW 2 called a village elder who arrested the accused.

5. PW 3, a cobbler at the village, told the court that a village elder came to see him and asked about the appellant. The appellant came to see him but denied he had defiled PW 1. He testified that PW 1 identified the appellant as the person who defiled her where whereupon he was arrested.
6. PW 4, the Clinical Officer at Vihiga District Hospital, examined PW1 on 17th January, 2014. PW 1 complained of abdominal pains and when she examined PW1's hymen was broken. Although she did not detect any bruises or tears on the vagina, a high vaginal swab revealed some pus cells. PW 4 concluded that there was penetration.
7. PW 6, the investigating officer, confirmed that a report of defilement had been booked in the Occurrence Book when he reported to work at Mbale Police Station on 18th January, 2014. He recorded statements and charged the appellant.
8. In his unsworn statement, the appellant denied the offence. He told the court that on the material day he had gone to buy cooking fat at a shop when he was arrested and beaten by members of the public.
9. The appellant contested the conviction and sentence mainly on the ground that the prosecution did not prove its case, that the medical evidence did not link him to the offence and that her defence was not given consideration. The respondent opposed the appeal and submitted that the prosecution had proved its case beyond reasonable doubt.
10. In order to succeed in a case of defilement, the prosecution must prove the element of penetration of a child. Under the proviso to section 124 of the Evidence Act (Chapter 80 of the Laws of Kenya), the testimony of a child is sufficient and need not be corroborated if the court believes the child is telling the truth.
11. PW 1 gave clear testimony of how the appellant, waylaid her and sexually assaulted her in the bushes. The trial magistrate noted that, "*despite her age, she (PW1) struck me as a brave and intelligent child who understood the importance of telling the truth on oath and she was articulate in her response.*" In my view, the record bears this statement out and her evidence was reliable and could support the conviction without further corroboration.
12. If any corroboration were required, it is to be found in the testimony of PW2, who saw her in a state of distress after the incident and saw the state of her genitalia.
13. I also find that the circumstances were favourable to positive identification. The incident took place in broad daylight. Apart from the fact that PW 1 was not a stranger, there was sufficient interaction between PW 1 and the appellant. PW 1 identified that appellant as the person who assaulted her to PW 2 and pointed him out in the presence of PW 3. To my mind, all this evidence was sufficient to prove penetration and the fact that the appellant was the one who did the felonious act. I therefore confirm the conviction.
14. The age of the child was also proved by PW 1's testimony, her mother's (PW2's) testimony and the immunization card produced by PW 5. For purposes of the offence the fact that she was a child was not disputed. As she was 8 years old, the sentence fell under section 8(2) of the Sexual Offences Act which mandates a sentence of life imprisonment.
15. The appellant complained that he was not furnished with statements to enable him prepare his defence but the record shows that on the date of plea, the trial magistrate ordered that he be supplied with statements. He did not raise the issue or complaint that the order had not been complied with later in the proceedings. I dismiss his claim that his rights were violated.
16. The appellant also complained that the proceedings were conducted in a language he did not understand. It is apparent from proceedings that the language used was English. The appellant participated in the proceedings and even made his defence. He did not raise any objection throughout the hearing of the case negating any argument that he did not understand the proceedings.

17. From the foregoing it is clear that his appeal lacks merit. The conviction and sentence are affirmed. The appeal is dismissed.

Dated and delivered at Kakamega this 29th day of August, 2017

D. S. MAJANJA

JUDGE

Appellant in person.

Mr Ng'etich, Senior Prosecution Counsel instructed by the Office of Director of Public Prosecutions for the respondent.