



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KISUMU

CRIMINAL APPEAL NO. 69 OF 2016

BETWEEN

B N O.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence

of Hon. S. Opande, SRM dated 23rd November 2016

at Senior Resident Magistrate's Court at Tamu in

Criminal Case No. 18 of 2015)

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to **section 8(1) and (2)** of the ***Sexual Offences Act***. The particulars were that on 12th July 2015 within Kisumu County, he intentionally caused his penis to penetrate the vagina of FA, a child aged 10 years. He also faced a second charge of committing an indecent act with a child contrary to **section 11(1)** of the ***Sexual Offences Act*** based on the same facts. He pleaded not guilty and after a full trial he was convicted on the principal count and sentenced to life imprisonment. He now appeals against the conviction and sentence.

2. Since this is a first appeal, I am called upon to review the evidence on record and reach an independent conclusion as to whether to uphold the conviction bearing in mind that I did not see or hear the witnesses. I shall therefore set out the facts before the trial court before proceeding with this task.

3. The complaint, PW 1, aged 10, gave evidence after a *voire dire*. She recalled that on the 12th July 2015, the appellant, who was her uncle and who she referred to as *Baba Mzee*, called her and told her he wanted to give her sugarcane. After he lured her into the sugarcane plantation, he removed her clothes and his trousers and proceeded to have sexual intercourse with her. PW 1 testified that her sister, PW 2, saw what happened and went to report the incident to their mother.

4. PW 2 also gave sworn testimony after a *voire dire*. She recalled that on the material day, she saw the appellant hold PW 1 and take her to the sugarcane plantation. She told the court that she followed them and saw the appellant laying on PW 1. When the appellant saw PW 2, he asked her what she was looking

at. He told her to leave while throwing stones at her. She immediately ran away and reported to her mother what she had seen.

5. PW 1's mother, PW 3, recalled that on the material day while she at the river, she saw PW 2 running towards her. PW 2 informed her that the appellant was sleeping with PW 1. After learning of the incident they went to look for PW 1 whom they found at home in bed. PW 1 told her that the appellant, *Baba Mzee*, had removed her panties and proceeded to sexually assault her. She took the child to the police and then to hospital.

6. The Clinical Officer, PW 4, who examined the PW 1, testified that on 12th July 2015, PW 1 was brought to Muhoroni Sub-County Hospital on allegation that she had been defiled by a person known to her. She told the court that she examined PW 1 18 hours after the incident and prepared the P3 medical report. She noted that the external genitalia were normal but both labia had fresh bruises and were swollen and reddened on both sides. She also observed that the hymen was freshly lacerated. The High Vaginal Swab had blood and pus cells which indicated penetration but no spermatozoa were found. She classified the degree of injury as harm.

7. The Investigating Officer, PW 5, confirmed that the incident was reported on 13th July 2015 at about 4.25pm while he was at Muhoroni Police Post by PW 2 accompanied by PW 1 and PW 2. He booked the incident, recorded their statements and issued the P3 form. He also obtained PW 1's birth certificate which showed that she was born on 21st October 2005. He also told the court that PW 1's father led him to the appellant's house where he was arrested.

8. The accused elected to make an unsworn statement in which he denied committing the offence. He stated that on 10th July 2015 was in working in the shamba with other people when PW 3 approached him and told him that she wanted to have a relationship with him. PW 3 approached him again on 11th July 2015 and warned him of dire consequences if she did not accept her proposal. On the next day, 12th July 2015, PW 3 called him and demanded cash which he did not have. On the following day he was at home when his mother informed him that PW 3 had told her that he had defiled a child. He stated that he was arrested on 14th July 2015 at 8.30pm while at home.

9. The appellant appeals against the conviction and sentence based on his Petition of Appeal dated 15th December 2016. In summary the grounds are that the trial magistrate failed to appreciate the background of the matter and the glaring contradictions in the prosecution case. The appellant also challenged the sentence on the grounds that the trial magistrate failed to take into account the mitigation and as a result the sentence was harsh and excessive. The appellant also filed written submissions to support his case.

10. The respondent's counsel supported the conviction and sentence and submitted that the prosecution had proved all the elements of the offence of defilement. Ms Barasa pointed out that the complainant gave clear and credible evidence which was further corroborated by the testimony of PW 2 and PW 4.

11. The key issue in this appeal is whether the prosecution proved its case beyond reasonable doubt. 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 ***Sexual Offences Act*** means, "*the partial or complete insertion of the genital organs of a person into the genital organs of another person.*"

12. The key evidence was that of PW 1 who gave clear evidence of how the appellant lured her into the sugarcane plantation, removed her clothes and his own trousers and proceeded to lay on her while inserting his penis into her vagina. The act was witnessed by PW 2 who immediately went and informed her mother what she had seen. The fact of penetration was confirmed by the examination of the vagina done by PW 4 which showed injury on the vagina. The appellant contended that since spermatozoa penetration was not proved. I hold that lack of spermatozoa does not imply that there was no penetration. Penetration as defined above at para. 11 above is an essential element of defilement thus the Court of Appeal observed in ***Mark Oiruri Mose v Republic KSM CA Criminal Appeal No. 295 of 2012[2013]eKLR*** that;

In any event the offence is against penetration of a minor and penetration does not necessarily end in release of sperms into the victim. Many times the attacker does not fully complete sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ.

13. The appellant was not a stranger to PW 1 and PW 2 as he was their uncle and he was named to PW 3 who also confirmed that he was relative. The appellant's defence that he was being framed was properly rejected by the trial magistrate in light of the evidence. Nothing was suggested to PW 3 in cross-examination that she was framing the appellant. All the witnesses were subjected to cross-examination not only by the appellant but also his advocate and they remained resolute and consistent in their testimony. The totality of this evidence is that the prosecution proved that the appellant committed an act which amounted to penetration.

14. The appellant pointed out that there some contradictions in the prosecution evidence. Before the trial court, the court the PW 1 stated that the appellant was dressed in black trousers and a green shirt and in cross-examination, she stated that he wore brown shorts and a light blue shirt. In my view, description of the clothes when weighed against the totality of the evidence, that is, she knew the appellant and the PW 2 also saw him makes his mode of dress immaterial in the circumstances. Further, the clothes were not produced as exhibits and shown to the witnesses to identify them particularly in view of the fact that PW 1 and PW 2 were children.

15. Another point of contradiction pointed out by the appellant is that the date and time the offence took place. This issue was raised in cross-examination. What is clear from the evidence of PW 1, PW 2 and PW 3 is that the incident took place in the afternoon of 12th July 2015. From the P3 form, the incident was initially reported on the same day in the afternoon and she was first seen at Muhoroni Hospital on the same day. Although the P3 form was issued on 13th July 2015, it shows clearly that the incident took place on 12th July 2017 at 3.45pm. As I found elsewhere in this judgment, the testimony of PW 1, PW 2 and PW 3 was consistent and on how the events took place and I find do not find any inconsistency in that regard.

16. The final ingredient of the offence of defilement is the age of the child. Proof of age is a question of fact. In this case the child's birth certificate was produced which showed she was 10 years old when the offence was committed. As she was clearly below 11 years old, **section 8(2)** of the **Sexual Offences Act** attracts a life sentence. The sentence, being mandatory, was neither harsh nor excessive.

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

DATED and DELIVERED at KISUMU this 20th day of November 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.