

REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL APPEAL NO. 47 OF 2016

BETWEEN

COSMAS OLOO ORUKO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against the original conviction and sentence of Hon. M. Obiero dated 24th April 2016 in Bondo Principal Magistrates Court Criminal Case No. 653 of 2015)

JUDGMENT

1. The appellant, **COSMAS OLOO ORUKO**, was charged with the offence of defilement contrary to **section 8(1) and (3)** of the *Sexual Offences Act*. The particulars of the offence were that on the 10th July 2015 at around 5:30am at [particulars withheld] village in Bondo within Siaya County, he intentionally caused his penis to penetrate the vagina of MA, a child aged 15 years.

2. MA (PW 1) testified that on the material day at about 5.30 am, as she was going to school, she was confronted by a stranger who grabbed her by the neck, dragged her into a bush and proceeded to sexually assault her. In her evidence, she stated that the assailant was a stranger though she was able to describe him by the clothes he was wearing as there was moonlight.

3. PW 2, a school matron, confirmed that on one material morning, PW 1 was found having been sexually assaulted and was taken to Usenge Police Station where she was issued with a P3 Form. PW 3, a student also found PW 1 that morning and she narrated her ordeal to him.

4. PW 4, the Police Officer, confirmed that investigations were done by another officer who had left the station. According to the statement recorded, PW 1 stated that she was able to identify the assailant.

5. The Clinical Officer, PW 5, examined PW 1 on the same day and also confirmed that her genitalia had visible bruises consistent with sexual assault.

6. From the evidence, it is not in doubt that PW 1 was assaulted. The main question is by whom. The incident took place at night and as the courts have stated time and again, such evidence ought to be examined carefully particularly in the case of identification of a stranger. In this case, although PW 1 could give a description of the assailant, the description was not tested through an identification parade. The identification was therefore a dock identification. Moreover, no evidence was given of his arrest within the *locus in quo* nor was other corroborative evidence found to implicate him.

7. The conviction is unsafe. I allow the appeal. The appellant is set free unless otherwise lawfully held.

DATED AND SIGNED AT SIAYA THIS 22ND DAY OF DECEMBER 2017.

D. S. MAJANJA

JUDGE

Appellant in person

Ms Odumba, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the State.

Court Assistants: L. Odhiambo and L. Atika