



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL NO. 120 OF 2015

BETWEEN

GEORGE OMOLLO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. C.N. Njalale, RM dated 29th July 2015 at Principal Magistrate's Court at Winam in Criminal Case No. 505 of 2014)

JUDGMENT

1. The appellant, **GEORGE OMOLLO**, was charged with the offence of defilement contrary to **section 8(1) and (3)** of the *Sexual Offences Act, 2006* in the subordinate court. The particulars of the charge were that on 30th March 2014 at *[particular's withheld]* Village within Kisumu County, he intentionally and unlawfully caused his penis to penetrate the vagina of SO, a child aged 15 years. He also faced an alternative count of committing an indecent act with a child contrary to **section 11(1)** of the *Sexual Offences Act, 2006* based on the same facts.
2. The appellant was convicted and sentenced to 20 years' imprisonment. He now appeals against conviction and sentence based on the grounds set out in the Petition of Appeal accompanied by the supplementary grounds and written submissions. The thrust of his arguments are that he was convicted on conflicting evidence of the medical expert and that the prosecution witnesses were not trustworthy and gave inconsistent evidence. He also submitted that his defence was not considered by the trial magistrate. Ms Osoro, counsel for the respondent, submitted that the prosecution proved all the elements of the offence hence the conviction was sound and that the sentence was appropriate in the circumstances.
3. Before I deal with the substantive issues raised in the appeal, I will deal with two procedural issues raised by the appellant in the supplementary grounds. The appellant claims that his right to a fair trial was violated as he was not given witness statements prior to the hearing. On 15th July 2014, according to the record, the trial court directed that the appellant be furnished with witness statements at his own cost. Although the matter was mentioned several times after that direction, when the matter came up for hearing the issue of witness statements was not raised again by the court, prosecutor or defence. I would only fault the learned magistrate for ordering that witness statements be provided to the appellant at his own cost when such an obligation falls on the State under **Article 50(j)** of the Constitution. In *Simon Githaka Malombe v Republic* NYR CACRA No. 314 of 2010 [2015]eKLR, the Court of Appeal held that the State must provide witness statements free of charge. As the appellant did not raise the issue further and proceeded with the

hearing including cross-examination of the witnesses, I cannot say that his rights were violated or that he suffered prejudice.

4. The appellant also contended that the proceedings were conducted in a language he did not understand. From the record, it is clear that the witnesses spoke in Dholuo, Swahili or English and although the record of the court attendance does not indicate that there was an interpreter, the record shows that the accused cross-examined each witness in Dholuo leaving no doubt that the appellant understood the proceedings and that the proceedings were indeed translated. Moreover, the appellant did not raise the issue at all and proceeded to give his unsworn defence at the close of the prosecution case. This ground is devoid of merit.
5. I now turn to the substance of this appeal. As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**). In order to accomplish this task, it is necessary to set out the evidence that emerged before the trial court.
6. The complainant (PW 1), aged 15 years, gave sworn testimony. She narrated what took place on the evening of 30th March 2014 as follows;

I was on the way to the river to bath. When I reached the river, I started removing my clothes I saw our neighbour coming. When he reached, he informed me to sleep with him so that he can give me money He told me he'll give me 50/=. I tried to refuse but he promised to give me the 50/= I allowed him to take me to the bush, while in the bush, he told me to remove my inner pant so that he can sleep with me.

He told me to lie on the grass so that he can lie on top of me..... He removed his trouser and inner wear. He removed the trouser but only slid the inner pant down he then removed his penis and put it in my vagina and had sex with me.

7. After the incident PW 1 told the court that she took the bath and went home. She informed her mother what had taken place but her mother told her to wait for her father (PW 2) to come home. PW 2 testified that when he came home in the evening of 31st March 2014, PW 1 told him what had transpired the previous evening with the appellant. PW 2 took PW 1 to Kobonyo AP Post and reported that the appellant had been having sexual intercourse with his daughter. He was advised to take PW 1 to hospital for examination.
8. PW 4, an administration police constable, testified that on 9th April 2014 at about 1.00pm, PW 1 accompanied by PW 2 came to report that PW 1 had been defiled by the appellant. He recorded the complaint and referred them to Central Police Station in Kisumu. Later on he confirmed that he received an arrest order for the appellant dated 7th April 2014. He proceeded to the appellant's home, in the company of other officers, where they found him and arrested him. PW 5, a police officer, stationed at Kisumu Central Police Station, testified that PW 1 and PW 2 came to the Police Station on 3rd April 2014 and recorded their complaint. She issued a P3 form for the PW 1 to be examined. She also issued an arrest order for the appellant to be taken to the Administration Police officers to arrest the appellant.
9. A doctor at Jaramogi Odinga Oginga Referral Hospital, PW 3, testified that she examined PW 1 on 3rd April 2014 which was four days after the incident. She examined PW 1 and concluded that her genitalia were normal and cervix intact and that there was not discharge of blood or venereal infection. She noted in her report that PW 1 had been seen on 31st March 2014 and a high vaginal swab taken which showed the presence of pus cells. In her opinion the presence of pus cells implied that penetration had taken place. In the P3 form she classified the nature of injury as harm.
10. The appellant denied the charges against him and elected to make an unsworn statement. He gave

an account of his arrest on 9th April 2014 by police officers and told the court that in 2013, PW 2 had taken his daughter to his brother in law and when he asked for her, PW 2 chased him with a panga and told him never to make such inquiries again. He stated that he reported the matter to the Assistant Chief who promised to follow up the issue only for him to be arrested by administration police officers who demanded Kshs. 3,000/- to let the matter rest.

11. In order to prove its case under **section 8(1)** of the **Sexual Offences Act**, the prosecution must show that the appellant 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.*”
12. As regards the issue of penetration, PW 1 gave a clear account of what had taken place by the river. She reported the matter to her mother who then told her to report to her father. PW 1 knew the appellant as a neighbour and in fact, she recalled that she had had sexual intercourse with the appellant twice before when he paid her cash. In her judgment, the learned magistrate cautioned herself against convicting the appellant based on the testimony of a single witness but found that PW 1, “*truthful and her evidence was not shaken during cross-examination by the accused person.*” In the circumstances, the learned magistrate was entitled to convict the appellant based on the testimony of PW 1 under the proviso to **section 124** of the **Evidence Act (Chapter 80 of the Laws of Kenya)** without any corroborative evidence.
13. As regards the medical evidence, PW 3 confirmed that she examined PW 1. Since four days had elapsed after the incident, the medical examination did not establish penetration. Although the appellant in his submissions suggested that the medical records were not valid, such suggestions were displaced by the fact that the doctor who examined PW 1 testified. Nevertheless, despite the unsatisfactory nature of the medical evidence, the conviction could still be sustained as such evidence would only be corroborative in light of the proviso to **section 124** of the **Evidence Act**. In this respect I accept the dicta of the Court of Appeal in **Geoffrey Kioji v Republic, NYR Crim. App. No. 270 of 2010 (UR)** where it stated that;

Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, 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.

14. The appellant argued that as there was no discharge found in the vagina or that the cervix was intact or that some pus cells were found indicating some form of infection, penetration was not proved. As I have held, all the prosecution needed to prove was penetration. 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.

15. In his unsworn statement, the appellant did not say anything about the events of 30th March 2014 but alleged that there was a grudge between him and PW 2. When the question of the grudge was put to PW 1 in cross-examination, she denied that there was such a grudge. However, when he was given an opportunity to cross-examine PW 2, he did not suggest to him that in fact that there

was a grudge. In the circumstances, the learned magistrate was right to dismiss his defence particularly in light of all the other evidence implicating him.

16.As regards the age, PW 1 testified that she was 15 years old and at the time attending primary school in Class 7 while PW 2 produced her birth certificate which showed that she was born on 15th December 1999. I therefore find and hold that this was sufficient evidence to prove that PW 1 was aged 15 years old. Since the age of the child fell within **section 8(3)** of the ***Sexual Offences Act***, the sentence imposed was within the law.

17.The prosecution proved all the elements of the offence of defilement. I affirm the conviction and sentence.

18.The appeal is dismissed.

DATED and DELIVERED at KISUMU this 30th day of August 2016.

D.S. MAJANJA

JUDGE

Appellant in person.

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