



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL NO. 46 OF 2015

BETWEEN

WILLIAM ODHIAMBO OWITI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. J. Sala, RM dated 5th December 2014 at the Principal Magistrates Court at Winam)

JUDGMENT

1. In the subordinate court, the appellant, **WILLIAM ODHIAMBO OWITI** was charged with the offence of defilement contrary to **section 8(1) and (2)** of the ***Sexual Offences Act, 2006***. The particulars of the charge were that on 8th June 2014 at Kisumu East District within Kisumu County, he intentionally caused his penis to penetrate the vagina of CDO, a child aged 2 years 11 months. He also faced an alternative charge of committing an indecent act with a child contrary to **section 11(1)** of the ***Sexual Offences Act*** based on the same facts. After a full trial he was sentenced to life imprisonment. He now appeals against conviction and sentence.

2. In his petition of appeal, the appellant faulted the trial magistrate for failing to observe that he could understand the English language used in court, that he was not allowed to cross examine the prosecution witnesses, that the trial magistrate disregarded his submissions and was partial. He augmented the grounds of appeal with written submissions in which he argued that the evidence of PW 1 was based on hearsay as she did not witness the incident while the doctor's evidence was immaterial as she examined the victim four days after the defilement. The appellant concluded by stating that the trial magistrate failed to consider his defence.

3. Ms Osoro, who appeared for the respondent, opposed the appeal and submitted that the prosecution proved all the elements of the offence of defilement. She submitted that penetration was proved, the age of the child established and the appellant was positively identified. That the prosecution had proved all the aspects of the offence of defilement.

4. It is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanor (see ***Okeno v Republic [1972] EA 32***).

5. The prosecution case was supported by the evidence of five witnesses and it was as follows. On 8th June 2014, PW 1 had returned home from church, she left her two children, JO and CDO, playing outside

and went to the house of her neighbour, PW 2. She suddenly heard her JO wailing. She rushed outside to establish what was happening. She found the CDA laying on the ground crying in pain. She asked JO what had happened and JO pointed at a man who was walking away and said "*that person*" had inserted something into CDA. PW 1 testified that the man was walking away while adjusting his long trousers and belt.

6. PW 1 saw PW 4 approaching and called him out and told him to arrest the man that had been pointed out by JO. In the meantime, she examined CDA and realised that her under garment and skirt were stained with blood and she was anxious. She took CDA to hospital where she was treated and admitted for four days. PW 1 later recorded her statement at Kondele Police Station and was issued with a P3 form.

7. PW 2 recalled that she was with PW 1 in her house when they heard JO wailing. She followed PW 1 outside and found JO pointing at the appellant saying it was him. She also examined CDA and confirmed that her vagina torn and bleeding. PW 2 told the court that PW 4 arrested the appellant.

8. PW 4 testified that on that day at around 3.30pm he was walking home from Chiga Shopping Centre when he noticed two women and children ahead of him screaming. The women were shouting and telling to arrest a man who was walking in his direction. The man became violent but he was able to subdue him. He frog-matched to where the women and children were. They told him that the man had defiled CDA. A crowd began to gather and they escorted the appellant to Chiga AP camp.

9. PW 4, a doctor, examined the CDA and established that she had been defiled. PW 4 produced the P3 form and a Post Rape Care Form detailing the injuries inflicted on CDA which included torn genitalia with oozing blood. PC Mildred Durgat (PW 5) issued recorded the statement of PW 1 and issued her a P3 form.

10. In his sworn statement the appellant denied that he committed the offence. He stated that the CDA's father came and found that he had apprehended the person who had defiled CDA. They pulled him aside and the man produced a note of Kshs. 1000/- and gave to PW 1. They let the man go and instead arrested him instead.

11. In order to secure a conviction for the offence of defilement under **section 8(1)** of the **Sexual Offences Act**, the prosecution must establish that the person has committed an act which causes penetration with 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. It is noteworthy that CDA did not testify. The learned magistrate attempted to conduct a *voire dire* but the child could not even talk. He therefore declared her a vulnerable witness within the **Sexual Offences Act** and allowed PW 1 to give evidence on her behalf. No doubt the learned magistrate intended that the child would testify through PW 1 as an intermediary. **Article 50(7)** of the Constitution permits the use of intermediaries in criminal cases and it provides as follows;

[7] In the interest of justice, a court may allow an intermediary to assist a complainant or an accused person to communicate with the court.

13. The role of an intermediary was appreciated in **M.M v Republic NRB CA Criminal Appeal No. 41 of 2013 [2014]eKLR** as follows;

In our understanding, the evidence to be presented is not that of the intermediary himself or herself but that of the witness relayed to court through the intermediary. The intermediary's role is to communicate to the witness the questions put to the witness and to communicate to the court the answers from the victim to the person asking the questions, and to explain such questions or answers, so far as necessary for them to be understood by the witness or person asking questions in a manner understandable to the victim, while at the same time according the victim protection from unfamiliar environment and hostile cross-examination; to monitor the witness' emotional and psychological state and concentration, and to alert the trial court of any difficulties.

14. Was the failure of the CDA to give evidence either directly or through an intermediary fatal to the prosecution case? In **M.M v Republic (Supra)**, the Court of Appeal held as follows;

*In cases like this where the victim is too young to give evidence, **section 33** of the Sexual Offences Act allows the trial Court to rely on either the evidence of the surrounding circumstances, or under **section 31 (4)**, to give evidence through an intermediary or both.*

In the absence of the complainant's testimony, there was independent evidence of the complainant's mother, that of the father and the clinical officer that linked the appellant to the defilement of the complainant. From what we have said, we conclude that it was in error for the two courts below to treat the evidence of the complainant's mother as that of an intermediary, the steps leading to such appointment having not been followed. It was sufficient to rely on her direct evidence as an independent eye witness.

*Any requirement that insists on a child victim of defilement, irrespective of his or her age to testify in order to found a conviction would occasion serious miscarriage of justice. What fair hearing would a child victim aged six (6) months, like that in the case of **Robinson Tole Mwakuyanda v Republic.HC. Cr. Appeal No.227 of 2007**, get if the courts were to insist on the evidence of such a child, who on account of his/her tender age cannot speak.*

15. The child was too young to testify and in light of the principles I have cited, I find that the failure of the child to testify was not fatal to the prosecution case as the trial court could rely on the evidence of surrounding circumstances. PW 1 and PW 2 confirmed that when they saw the child after she had been assaulted her private parts had be injured and she was bleeding. They took her to hospital where she was admitted for four days. The examination by PW 4 confirmed that there was indeed penetration.

16. The next issue is whether the appellant is the one who defiled CDA. From the testimony of PW 1 and PW 2, PW 1's daughter, JO, pointed out the appellant who was walking away so soon after committing the felonious act. PW 1 saw him adjusting his zip and belt. Both PW 1 and PW 2 called PW 3 who arrested the appellant so soon thereafter. This incident took place at daytime and the sequence of events leave no doubt about appellant's identity and complicity. The appellant was given an opportunity to cross-examine each witness but he did not ask any questions. I find the appellant's defence and afterthought as he did not suggest to PW 1, PW 2 and PW 3 in cross-examination that he was being framed or set up. If anything, his defence put him in the vicinity of the incident. I therefore find and hold that the prosecution proved that the appellant was the person who defiled CDA.

17. The age of a child is a question of fact. PW 5 produced the birth certificate which showed that she was born on 15th July 2011. She was 2 years 11 months at the time the incident took place. The learned magistrate confirmed that the child was of such tender years that she could not communicate to the court. Her age fell below 11 years which is the bracket under **section 8(2)** of the **Sexual Offences Act** which attracts a mandatory life sentence.

18. The appellant complained that the proceedings were conducted in English which is a language he did not understand. A perusal of the record shows that at each stage the learned magistrate recorded that PW 1, PW 2 and PW 4 spoke in *Dholuo* while PW 3 and PW 5 spoke in English which was translated in *Dholuo*. The appellant's sworn defence was in *Dholuo* and at no time did he raise the issue that he did not understand the prosecution case. Likewise, and as I stated earlier, the appellant was given an opportunity to cross-examine each witness but he declined. In the circumstances, I reject his allegation that his rights to a fair trial were violated.

19. The conviction and sentence were sound and are affirmed.

20. The appeal is dismissed.

DATED and DELIVERED at KISUMU this 5th 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.