



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL NO. 64 OF 2012

BETWEEN

ISHMAEL SEWE OUKO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. S. Ongeru, RM dated 16th May 2012 at the Senior Principal Magistrates Court at Maseno in Criminal Case No. 194 of 2008)

JUDGMENT

1. The appellant, **ISHMAEL SEWE OUKO**, faced a charge of defilement contrary to **section 8(1) and (2)** of the ***Sexual Offences Act, 2006***. The particulars of charge were that on 24th March 2008 at around 6.00pm in Kisumu West District, he caused his genital organ namely his penis to penetrate the genital organ namely the vagina of BA, a girl aged 11 years. He also faced an alternative charge of an indecent act with a child contrary to **section 11(1)** of the ***Sexual Offences Act, 2006*** based on the same facts. The appellant was convicted and sentenced to life imprisonment. He now appeals against conviction and sentence.

2. Before I consider the issues raised in this appeal, I must restate the principles applicable in considering a matter such as this. The duty of the first appellate court is to review the evidence, evaluate it and reach an independent conclusion as to whether to uphold the conviction. In so doing, the court must make an allowance for the fact that it never saw or heard the witnesses testify (see ***Okeno v Republic [1973] EA 32***). The facts that emerged at the trial were as follows.

3. The complainant (PW 1) testified on oath that on 21st March 2008, while she was at [particulars withheld] selling sugarcane, the appellant approached her and bought sugarcane for 5/= but promised to pay her later. On 24th March 2008 at about 6pm, the appellant returned and when she requested to be paid, he told her to follow him to his house, which was not very far, to collect the money. She followed him and when they arrived, he shut the door, held her by the mouth, carried her to the bed, forced her to remove her panties and proceeded to have sexual intercourse with her. He finally released her at about 11.00pm. She went home and told her mother (PW 2) what had transpired.

4. PW 2 confirmed that PW 1 was selling sugarcane on the material day but she did not return home. She went to the market and was told that PW 1 had been seen with the appellant. She went to report to the Chief's camp at about 10pm and was told to return home. When she returned home, she found PW 1 who told her what happened. PW 1 took her to the appellant's house but he was not there. PW 2 took PW 1 to Nyahera Hospital where she was examined and treated. PW 2 noticed that she did not have her panties

and when she asked her, PW 1 told her that she had left them in the appellant's house. PW 2 reported the matter to Maseno Police Station thereafter.

5. PW 3, a clinical officer, produced the medical report (P3 form) filled by another officer. According to the report, the officer examined PW 1 on 24th March 2008. He examined PW1's private parts and noted that the vagina was swollen with lacerations and there was a white discharge. The clinical officer opined that the lacerations and swollen vagina suggested forceful penetration.

6. PW 4, an administration police officer, confirmed that PW 2 reported that PW 1 was missing at 10.30pm at Nyahera AP Post and that she returned the following day at 11.00pm to confirm that PW1 had been found. When he went to arrest the appellant, he was accompanied by PW 1 and PW 2 who showed him the place and identified the appellant. While at the house, he recovered black panties under the appellant's bed which PW 1 identified as hers.

7. The appellant elected to give an unsworn statement. He denied the charges and stated that although he knew PW 1, who used to sell sugarcane at the market, he did buy sugar cane from her or defile her. He stated that on the material night he went home after work to sleep and was arrested the following day by AP officers after he was identified by PW 1 and PW 2.

8. The learned magistrate was convinced that the appellant had committed the offence and convicted him. Counsel for the respondent, Ms Osoro, supported the conviction and sentence and urged that the prosecution had proved all the elements of the offence of defilement. She submitted that the appellant was a person well known to PW 1 hence there was no case of mistaken identity.

9. 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.*"

10. In his submissions, the appellant contended that the trial was vitiated as the learned magistrate did not conduct a *voire dire*. It is true that the Court did not conduct a *voire dire* but the law is that this does not necessarily render the trial a nullity. The law governing reception of the evidence of a child of tender years is to be found at **section 19** of the **Oaths and Statutory Declarations Act (Chapter 15 of the Laws of Kenya)** which provides:

19(1) Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with [section 233](#) of the Criminal Procedure Code ([Cap. 75](#)), shall be deemed to be a deposition within the meaning of that section.

10. Since PW 1 was estimated to be aged 11 years, she a child of tender years. The procedural prerequisite before reception of evidence of child of tender years under **section 19** of the **Act** has been considered by the Court of Appeal in several cases among them **Johnson Muiruri v Republic [1983] KLR 445** and **Kinyua v Republic [2002] 1 KLR 256**. The authorities show that if, after the *voire dire* examination, the trial court is satisfied that the child understands the nature of the oath, the court proceeds to swear the child and receives the evidence on oath. But if the court is not so satisfied, the unsworn evidence of the child may be received if, in the opinion of the court, the child possessed of sufficient intelligence and understands the duty of speaking the truth.

11. The authorities go further and establish that failure to follow the prescribed procedure does not necessarily vitiate the trial. In **Patrick Kathurima v Republic CA NYR CR App. No. 131 of 2014 [2015]eKLR**, the Court of Appeal observed as follows;

The trial magistrates' failure to reflect on the record the questions put to H.W. during the voir dire examination was not therefore per se fatal to the prosecution case. The sustainability or otherwise of the prosecutions' case solely depended on whether the evidence on which it was anchored met the thresh hold of proof beyond reasonable doubt.

12. Following the principles, it is clear that since the *voire dire* examination was not carried out, I hold that the proper approach is consider PW 1's testimony as unsworn testimony, evaluate it with the rest of the evidence to see whether a conviction can be sustained.

13. In this case, apart from PW1's unsworn testimony, there was other sufficient corroborating evidence to confirm that the appellant defiled PW 1. She went missing on the material night and when she returned home, not only did she narrate to PW 2 her ordeal but showed her the appellant's house. A medical examination conducted that very night, confirmed that PW 1 has been sexually assaulted. Additionally, when PW 1 and PW 2 went with PW 4 to arrest the appellant, PW1's black panties were found under the appellant's bed. All this evidence leaves no doubt that there was penetration. Moreover, the appellant was well known to PW 1. The appellant had approached her a few days before he lured her to his place under the guise of paying her for the sugar cane he had purchased. PW 1 also identified him after he was arrested in the house where the incident took place. The appellant, in his unsworn statement put him at the scene of his incident and he confirmed that he knew her. The appellant's denial was, considering the prosecution evidence, mere moonshine.

14. The appellant raised other procedural issues in his submissions. His complaint that **section 200** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)** was not complied with has no basis as the case started *de novo* before Hon. Ongeru. He also complained that he was not given witness statements yet the record shows that before the trial an order was made directing that the appellant be provided with witness statements. He did not raise the issue further before the Court to show that the order was not complied with.

15. The final issue is that of age of the complainant. In **Moses Nato Raphael v Republic NRB CA Criminal Appeal No. 169 of 2014[2015]eKLR** the Court of Appeal held that;

As long as there is evidence that the victim is below 18 years, the offence of defilement will be established. The age, which is actually the apparent age, only comes into play when it comes to sentencing. The contradictions in respect of the child's age cannot therefore assist the appellant avoid criminal culpability.

16. It is not in doubt that the PW 1 was a child hence the offence of defilement was committed. The issue then is what was the apparent age of the child for purposes of sentence. The charge sheet stated that PW 1 was aged 11 years old while in her testimony, she stated she was 13 years which means she was 12 years when the offence took place. The age assessment in the P3 form stated that she was 12 years. The learned magistrate did not make a finding on the issue of age given the variation between the charge sheet and the evidence. The learned magistrate therefore imposed a life sentence based on the charge sheet.

17. I give the appellant the benefit of doubt and hold that there is sufficient evidence that PW 1 was 12 years old at the time the offence was committed. Under **section 8(3)** of the **Sexual Offences Act**, a person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than 20 years.

18. I affirm the conviction but reduce the sentence to 20 years' imprisonment running from the date of the conviction.

DATED and DELIVERED at KISUMU this 30th day of November 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.