



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL NO. 9 OF 2015

BETWEEN

ISMAEL WESONGA OLANGO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. L. Gitari, CM dated 6th June 2014 at the Chief Magistrates Court in Kisumu in Criminal Case No. 20 of 2012)

JUDGMENT

1. The appellant, **ISMAEL WESONGA OLANGO**, was charged with the offence of defilement contrary to **section 8(1) and (2)** of the ***Sexual Offences Act, 2006*** in the subordinate court. He was convicted and sentenced to serve 25 years' imprisonment. The charge against him stated that on 18th November 2013 at *[particulars withheld]* within Kisumu East District, Kisumu County, he intentionally and unlawfully caused his genital organ to penetrate the genital organ of BAM, a child aged 11 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 has appealed against conviction and sentence and since this a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether 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***).

3. The complainant, BAM (PW 1) gave unsworn testimony. She recalled that on 18th November 2012, her mother had left her at home in the morning to go to church. As she was preparing food, she went to the appellant's house to go and borrow a knife. She described what happened to her as follows;

When I told him I had gone to borrow a knife, I stood there. I was suddenly hit on the head. When I woke up I found my clothes aside. It was the private clothes, a bike and a panty. They were on the floor and I was lying down. The accused was there sitting on the chair..... I took my clothes and put them on. I left the house. I was feeling bad and the was paining

4. As she was going home, she met PW 4, who was a neighbour and whom she told that she was feeling pain in her stomach and her private parts were bleeding. PW 4 told her to go home and wait for her mother, PW 2. PW 2 arrived home that evening and found PW 1 in pain. When she asked PW 1 what had happened, she was initially reluctant to disclose what had transpired but she did inform her later that the appellant had had defiled her. When PW 2 went to confront the appellant, he confirmed that PW 1 had

been in her house. The appellant followed her back to his and when PW 1 told him to tell the truth, PW 2 collapsed after PW 1 told her what had happened to her. PW 4 came and took PW 2 to hospital and while at hospital, the doctor told her to bring PW 1. PW 1 was also taken to the hospital that night and was treated.

5. On 19th November 2013, PW 1 accompanied by PW 2, went to report the incident at Kisumu Police Station. The investigating officer, PW 5, confirmed that they arrived at the station at 8.40am and made the report. He recorded the witness statements and issued the P3 form to enable PW 1 to be examined at the hospital. PW 3, a clinical officer at Kisumu District Hospital, examined PW 1 on the same day and confirmed that PW 1 had been treated on the previous day and that her abdomen was tender and painful. He observed that the hymen was perforated and concluded that penetration had taken place. PW 5 recalled that on 23rd November 2012, PW 1, PW 2 and the appellant came to the police station to inform him that the case had been compromised. PW 5 nevertheless arrested him and charged him with the offence.

6. The appellant elected to give sworn testimony in his defence. He told the court that on the material day, a child came to watch cartoons in his house at about 4.00pm. He then left to go to the Mosque for prayers and when he returned, the young girl's brother came to inform him that PW 1 was being beaten because she had been warned by her mother not to go to his house. Later PW 2 came to his house crying and told her that the girl had been raped by him. He was shocked by the allegation and asked to see the girl but she was not there. He said that the complainant and her mother wanted money to resolve the case and then he went with them he was arrested.

7. The learned magistrate was convinced that the prosecution proved the offence and convicted the appellant. The appellant lodged this appeal and contested the conviction and sentence on several grounds set out in the petition of appeal dated 17th February 2015 and written submissions. The thrust of the appellant's submission is that the prosecution did not prove its case and that the evidence relied on was inconsistent and contradictory and could support a conviction. The respondent's position is the prosecution proved all the elements of the offence beyond reasonable doubt.

8. 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.*"

9. In her unsworn testimony, PW 1 explained how she was sexually assaulted. Although she was reluctant to testify at first and attempts were made to withdraw the case, I accept the learned magistrate assessment that the events did not affect the credibility of PW 1's testimony. Although her testimony did not require any corroboration under the proviso to **section 124** of the **Evidence Act (Chapter 80 of the Laws of Kenya)** so long as learned magistrate was satisfied she was telling the truth, there was sufficient corroborative evidence to support her testimony. First, there is the testimony of PW 4 who saw her leave the appellant's house in pain. Second, the testimony of PW 3 confirmed that penetration had taken place.

10. The appellant pointed to several inconsistencies and contradictions in the testimony of PW 1. For example, PW 1 stated she was hit by the appellant but did not suffer any injuries. That she claimed she was bleeding yet, the medical examination did not reveal any bleeding. That the time which the incident took place was not clear or established from the testimony as PW 1 stated that the incident took place at 3.00pm while PW 3 told the court that it took place at 2.00pm. Finally, the appellant pointed to the fact that there was a contradiction between the time PW 1 and PW 3 stated that PW 1 was treated.

11. The Uganda Court of Appeal in ***Twehangane Alfred v Uganda, Crim. App. No 139 of 2001 [2003] UGCA 6*** (adopted in ***Eric Onyango Ondeng' v R NRB CA Criminal Appeal No. 5 of 2013[2014]eKLR***) observed that it is not every contradiction that warrants rejection of evidence. As the court put it:

With regard to contradictions in the prosecution's case the law as set out in numerous authorities

is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.

12. As I see, the evidence was consistent on the material facts that PW 1 was sexually assaulted by the appellant in his house. She was seen in a state of distress by PW 4 that afternoon. PW 1 admitted that she was hit on the head and but was not injured to the extent of leaving a scar. She could not be expected to tell the precise time but all the evidence points to the fact that it was in the afternoon. When her mother was told what happened, she fainted and was taken to hospital by PW 4 who testified that it is that doctor who told her to bring the child. PW 1 was treated on 18th November 2012 and was again examined on 19th November 2012 when she was issued with the P3 form.

13. The evidence is also clear that it is the appellant who committed the felonious act. He was a neighbour to PW 1 and PW 2 and they knew each other. In his defence, the appellant admitted that a child came to his place to watch TV. There is no doubt that it is PW 1 who came to his house as she was seen by PW 4 leaving his house. Although the appellant hinted that he was being framed by PW 1 and PW 2, nothing was put to them in cross-examination to suggest that they framing him. The evidence points to the fact that his attempts to resolve the case failed. I find that the appellant's defence does not hold any water considering the prosecution evidence I have outlined.

14. The age of a child is a question of fact. In ***Moses Nato Raphael v Republic* NRB CA Criminal Appeal No. 169 of 2014[2015]eKLR** the Court of Appeal stated;

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.

There was no dispute that PW 1 was a child for purpose of the offence. In her *voire dire* she stated that she was 12 years old and in Class 7 when she testified. PW 2 testified that she was born in February 2001 while PW 5 produced the birth certificate showing she was born on 10th February 2001. At the time the offence was committed that PW 1 was 11 years and 10 months.

15. In ***Hadson Ali Mwachongo v Republic* MSA CA Criminal Appeal No. 65 of 2015 [2016]eKLR**, the Court of Appeal held that a year under **section 2** of the ***Interpretation and General Provisions Act (Chapter 1 of the Laws of Kenya)*** defines a "year" to mean a year reckoned under the British Calendar;

*Thus a person who is, for example, 10 years and 6 months is deemed to be 10 years old and not 11 years old. That approach entails not taking into account the period above the prescribed age **so long as it does not amount to a year**. Back to the Sexual Offences Act, a victim who is days or months above 11 years will be treated as 11 years old so long as he or she has not attained 12 years of age. On the same reasoning, the victim in this case who was 15 years, 6 months and 13 days old must be treated to be 15 rather than 16 years old.*

16. Since the child was 11 years and 10 months old, she was under the ***Sexual Offences Act*** considered to be 11 years old. Her age of the child fell within the bracket which attract the life sentence. The life sentence imposed was lawful and it is affirmed.

17. The appeal is dismissed.

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

D.S. MAJANJA

JUDGE

Appellant in person.

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