REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL NO. 82 OF 2014

(FORMERLY KISII HCCR APPEAL NO. 1 OF 2009)

BETWEEN

DUNCAN ODEMBA OTIENO ….....…..... APPELLANT

AND

REPUBLIC …...…….. RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 302 of 2008 at the Senior Resident Magistrate's Court at Homa Bay, Hon. C.A.S. Mutai, SRM dated on 2nd January 2009)

JUDGMENT

1. The appellant **DUNCAN OTIENO ODEMBA** was charged with the offence defilement contrary to **section 8(1)** and **(2)** of the ***Sexual Offences Act, 2006***. The charge before the court alleged that on 26th October 2007 at [Particulars Withheld] Village in Suba District, he had unlawful carnal knowledge of RA, a girl aged eleven years. 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.

2. The evidence emerging from the trial court was as follows. After a *voire dire*, the PW 1 gave sworn testimony to the effect that on the evening of 26th October 2007, the appellant came to her grandmother's home where she served him drinking water. He told her grandmother that he was a relative and requested her to permit PW 1 to assist him carry some chairs. He left with PW 1 and when they got a top a nearby hill, he forcibly had sexual intercourse with her causing her to bleed. He left her to go home but along the way she sought refuge in a nearby home with the assistance of a man who found her. He grandmother later came to collect her, took her to hospital at Sindo where she was admitted for a week for treatment. After treatment she reported the matter to Magunga Police Station.
3. PW 2, the complainant's grandmother, testified that on the material day the appellant came to her place and introduced himself as the son of Onane, a relative. He requested for PW 1's assistance in carrying some chairs at Ndhiwa. PW 2 permitted him to go with PW 1 but she did not return by 7.00pm so she went to look for her. She went to Onane's place but Onane denied that he knew the appellant but they proceeded to search for him and found him at a homestead of one Ombuko where he was arrested. As she was going to Magunga, she met a man who said he had seen PW 1 and they proceeded and found her at the home of a teacher where she was sleeping. She had blood stained clothes. She took her to Magunga Police Station and thereafter to Sindo for treatment

where she was admitted for one week.

4. PW 3, the Suba District Medical officer, confirmed that PW 1 was admitted to hospital from 26th to 29th October 2007 after complaining of pain and bleeding in the genital area. PW 3 produced the medical report in which he stated that PW 1 had lacerations and tears around the vaginal walls.

5. When put on his defence, the appellant elected to give sworn testimony. He denied that he had committed the offence and that he was arrested on the night of 26th October 2007 after spending the day at Nyandiwa Market. In cross-examination he stated that he knew Onane who he used to work for. He denied that he saw PW 2.

6. The learned magistrate convicted the appellant and sentenced him to life imprisonment and he now appeals against the conviction and sentence. The grounds of appeal set out in the petition of appeal may be summarised as follows;

a. That he was convicted on the basis of contradictory evidence and hearsay evidence.
b. That the medical evidence did not connect him to the offence.
c. That the age of the complainant was not proved.
d. That failure to call the investigating officer was fatal to the prosecution case.
e. That his rights were violated when his was brought to court after 7 days instead of the constitutionally mandated 24 hours.

7. The appellant supplemented the grounds of appeal with written submissions. Mr Oluoch, counsel for the State, opposed the appeal. He submitted that the prosecution had proved the elements of the offence and that the testimony of PW 1 was corroborated by that of PW 2 and PW 3 although corroboration was not necessary under **section 124** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)***. Counsel submitted that the issue of violation of fundamental rights of the appellant was raised belatedly.

8. In considering the grounds of appeal outlined above this court is enjoined to follow the principle established in ***Okeno v Republic*** [**1972] EA 32** where the Court of Appeal held that the first appellate court is enjoined to conduct an independent evaluation of all the evidence and reach an independent conclusion as to whether to uphold the conviction taking into account that it neither heard nor saw the witnesses testify.

9. 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."*

10. The issue of penetration is not in doubt. PW 1's testimony was clear, precise and consistent as to what had happened to her. This fact was corroborated by PW 2 who saw her a few hours after the incident with and the testimony of PW 3 who confirmed that her genitalia had lacerations which is an indication that she had been sexually assaulted.

11. The substantial issue in this appeal is whether it is the appellant who committed the act of defilement. The appellant submits several material witnesses; Onane, Ombuko and the teacher where PW 1 was found, were not called to give evidence and as such the conviction was based on hearsay evidence. I would also add that the investigating officer was not called to testify.

12. The issue whether it is necessary to call any particular number of witnesses to prove any fact is dealt with in **section 143** of the ***Evidence Act*** which states, *"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for proof of any fact."* But where essential witnesses were not called, the court is entitled to draw an inference that if their evidence had been called, it would have been adverse to the prosecution case (see ***Bukenya and Others v Uganda*** **[1972] EA 549**).

13. According to the record, the learned magistrate declined to grant an adjournment to enable the prosecution call the investigating officer. Ordinarily it is the investigating officer who would provide an explanation why certain material witnesses would be called. Even where such an explanation is not forthcoming, the court must look at the evidence as a whole and determine whether it meets the standard of proof required to support a conviction.

14. I have evaluated the evidence and I find that although PW 1 did not previously know her attacker, she was present when the appellant identified himself as a nephew of Onane. There was no case of mistaken identity as she was with him for a sufficiently long time upto the time she was assaulted. Likewise, PW 2's testimony corroborated by that of PW 1. Although, the appellant referred to a grudge in his defence, he did not raise this in the cross-examination of PW 1 and PW 2. I therefore find that it is the appellant who committed the act of defilement.

15. The proof of age is a question of fact. In sexual offences proof of age in necessary on two grounds. First, to establish the offence of defilement which is committed if the victim is below the age of 18 years and second, to establish the penalty applicable. In this instance, there is no doubt that PW 1 was a child. In her *voire dire*, PW 1 stated that she was 9 years old, PW 2, her grandmother stated that she was 8 years old and according to PW 3, the estimated age of PW 1 recorded in the P3 form was 8 years old. The appellant did not put any question to the witnesses to suggest that PW 1 was neither a child nor a person below the age of 11 years. In my view, the age of the child was proved to be within the bracket that attracts a life sentence upon conviction.

16. I agree with learned counsel for the State that the issue of violation of fundamental rights and freedoms was brought belatedly. It was not raised at the trial and while such a violation is regrettable, it was held by the Court of Appeal in ***Julius Kamau Mbugua v Republic*** **Criminal Appeal No. 50 of 2008 [2010]*e*KLR** that such violations do not have any bearing on the innocence or guilt of the accused and may be vindicated by filing a separate petition under **Article 22** of the Constitution.

17. In the petition of appeal, the appellant's first two grounds of appeal relate to another conviction and sentence for burglary and stealing which was not part of this appeal and whose record was not before the court. I have considered the proceedings before the subordinate court and there is nothing in the record to show that that case had anything to do with the present appeal.

18. I affirm the conviction and sentence. The appeal is dismissed.

DATED and DELIVERED at HOMA BAY this 16th day of February 2015.

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Oluoch, Senior Assistant Director of Public Prosecutions, instructed by the Office of Director of Public Prosecutions for the respondent.