



REPUBLIC OF KENYA

IN THE HIGH COURT

AT HOMA BAY

CRIMINAL APPEAL NO.80 OF 2014

(FORMERLY HCCRA NO. 198 OF 2011)

BETWEEN

ERICK OTIENO MEDA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 17 of 2010

at the Principal Magistrate's Court at Oyugis, Hon. C.L Yalwala, RM

dated on 7th January 2011)

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to **section 8(1) and (2)** of the ***Sexual Offences Act***. The charge against him was that on 6th June 2010 at East Kamagak Location in Rachuonyo District, he intentionally and unlawfully committed an act causing penetration of his penis into the vagina of EAO, a child aged 10 years. The accused also faced an alternative charge of indecent act with a child contrary to **section 11(1)** of the ***Sexual Offences Act*** based on the same facts.
2. The accused was convicted and sentenced to life imprisonment. He now appeals against conviction and sentence on the grounds set out in the petition of appeal namely that the learned magistrate relied on contradictory evidence and that he was framed. That the testimony of the child (PW1) was not corroborated and that the age of the child was not proved. The appellant also filed written submission to supplement the petition.
3. Mr Oluoch, counsel for the State, opposed the appeal. He submitted that the prosecution proved all the elements of the offence through the testimony of PW1 which did not require corroboration but was nevertheless believable and corroborated by the testimony of her mother PW2 and the medical evidence. He submitted that the appellant's defence of alibi was properly dismissed in light of the prosecution testimony.
4. As this is a first appeal, I am required to review the evidence, evaluate it and reach an independent conclusion as to whether to uphold the conviction. In so doing, I am alive to the fact that I never saw or

heard the witnesses testify.

5. The evidence before the court was as follows. PW1, after a *voire dire*, testified on oath that she was 10 years and that on 6th June 2010 while at the posho mill at Sikri, she met the accused, whom she referred to as Jalemo. He told her to go to his place where she washed utensils and made tea. She testified that:

[He] locked the door. He told me not to scream. He then removed my under pant and also removed his pants. He laid me on the bed and laid on me. He defiled me by having intercourse with me. After that he let me go back home.

6. PW1 went home and reported the incident to her mother (PW2). PW2 confirmed that on 6th June 2010 she sent PW1 to the posho mill but she did not come back on time. When she came back, PW1 told her she had met one Jaote who greeted her and showed her his home. It is only two days later that PW1 told her what happened when she developed diarrhoea. She also testified that Jaote came to see her and told her that she had seen her daughter at Riat while in motor vehicle and that he had sent his regards. When she confronted PW 1 with this information that the appellant had given her, PW 1 told her what happened. PW2 examined PW1's genital area but did not see anything abnormal. She took PW1 to hospital and obtained a P3 form upon reporting the matter to the police. PW2 also testified that PW1 was 10 years old and that the appellant had two nicknames; Jaote and Jalemo.

7. PW3, a police officer, testified that the appellant, PW1 and PW2 were brought to the police station on 14th June 2010 from the chief's office at Kachieng after the appellant had been arrested. She investigated the matter and charged the accused. PW7, the medical doctor, examined PW1 on 14th June 2010 and filled the P3 form. He observed that the hymen had been recently breached and that there was no obvious bleeding or abnormal vaginal discharge nor did the swab show any abnormality. He concluded that PW1 had recent sexual penetration. He estimated PW1's age to be 10 years.

8. When put on his defence, the appellant gave unsworn statement. He stated that on the date when he was said to have committed the offence he was away at his maternal uncle's funeral at Awasi from where he returned on 13th June 2010. He stated that on 14th June 2010, he was assaulted and taken to the chief's office where on the allegation that he had defiled PW1 on 6th June 2010. He was later taken to the police station and arraigned in court.

9. The appellant called two witnesses. DW2, his aunt, testified that the burial of the appellant's uncle was on 6th June 2010 and that the appellant was there that he greeted her on the material day and on the next day when he was leaving. DW3, the appellant's sister-in-law testified that on 6th June 2010, she saw the appellant at his uncle's funeral. She stated that he came on 5th June 2010, stayed for the burial and left on 9th June 2010.

10. The learned magistrate was satisfied that on the basis of the evidence, the prosecution had proved its case. 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.*"

11. As regards the first element of penetration, the testimony of PW1 was clear and consistent as to the fact that she had sexual intercourse. The fact that she had sexual intercourse was corroborated by the medical evidence of PW 7. Her mother saw her in a distressed state although she was told what happened two days later. PW 1 told PW 2 what happened only after she was confronted with what the appellant had told her. I therefore find and hold that penetration was proved.

12. Did the appellant commit the offence? In his defence he raised an alibi. The duty of the court in such circumstances was to consider it vis a vis the prosecution evidence. The appellant stated he was at a funeral and he was there with DW1 and DW2. DW1 and DW2 gave contradictory testimony regarding the period of time he was at the funeral. DW1 said she saw him and he left on the next day while DW2

said she saw him and he remained there until Tuesday which was 9th June 2010 while the appellant stated he left the funeral on 13th June 2010. The alibi was therefore discredited.

13. On the other hand, the fact that he stated that he saw PW1 when he met PW2 tends to confirm PW1's testimony that they were together. The testimony of PW1 as regard the sexual encounter was credible and by reason of **section 124** of the *Evidence Act (Chapter 80 of the Laws of Kenya)* it was not required to be corroborated although there was sufficient corroborative evidence. I therefore find that the accused is the person who defiled PW1. I therefore affirm the conviction.

14. Finally, as regards the age, the same was proved by the age assessment conducted by PW7 who certified that she was 10 years old. PW1 testified that she knew her age and her mother confirmed the same. PW1's age was therefore proved.

15. The mandatory sentence for defiling a person under the age of 11 years is life imprisonment. The penalty is mandatory and in view of the proof of age I have no reason to interfere. The sentence is also affirmed.

16. The appeal is dismissed.

DATED and **DELIVERED** at **HOMA BAY** this 20th day of March 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.