REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL NO. 72 OF 2014

(FORMERLY KISII HCCRA NO. 224 OF 2011)

BETWEEN

KENNEDY ODHIAMBO OURU …….....APPELLANT

AND

REPUBLIC ……....……RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 1648 of 2010 at Chief Magistrates Court at Homa Bay, Hon. O.J. Ong'ondo, RM dated on 4th May 2011)

JUDGMENT

1. The appellant was convicted of the offence of defilement contrary to **section 8(1)** and **(3)** of the ***Sexual Offences Act, 2006***. The particulars of the charge were that on the night of 28th and 29th August 2010 at unknown time, in [Particulars Withheld] Sub Location, Homa Bay District he intentionally committed an act that caused penetration with his genital organ namely his penis into the genital organ namely the vagina of VAO, a child aged 13 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 appellant now appeals against conviction and sentence on the grounds set out in the petition of appeal filed on 17th October 2011. In summary the appellant contends that the trial magistrate did not summon the key witnesses, that is, the assistant chief and the investigating officer and that his rights were violated during his arrest arrested. The appellant argues in his written submissions that he was not given witness during the trial and as such he was denied a fair trial. He also complains that there was no medical link between himself and the complainant and that the age of the victim was not proved.

3. Mr Oluoch, learned counsel for the respondent, opposed the appeal on the ground that PW 1 gave clear and convincing testimony of how the appellant defiled her. In the course of committing the act he left behind his cap and iron bar that several witnesses confirmed to be his. In the circumstances, he was properly identified as the person who defiled the complainant. Counsel further submitted in light of **section 124** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)***, any deficiency in the medical evidence was not fatal to the prosecution case. He urged the court to dismiss the appeal.

4. As this is a first appeal, I am obliged to review and evaluate the evidence afresh and reach

an independent conclusion as whether to uphold the conviction. In so doing an allowance should be made for the fact that I neither heard nor saw the witnesses testify (see ***Pandya v Republic*** **[1957] EA 336 and** ***Kariuki Karanja v Republic*** **[1986] KLR 190**).

5. The facts of the case emerging from the testimony were as follows. The complainant, PW1, after a voire dire, testified that she was staying with her grandmother who was old and blind. On the night of 28th and 29th August 2010, while she was asleep, someone broke into the house through the window, started strangling her, pulled her out of the house and into the hills nearby. She testified that it was moonlight and she recognized the person as Ken who used to live nearby. The appellant sexually assaulted her. When she went home, she met her cousin and narrated to him what happened. They found a cap and an iron rod near the window which the appellant had used to gain ingress in the complainant's house.

6. PW2, an uncle to the complainant, recalled that on the morning of 29th August, 2010, PW1's grandmother came to inform him that PW1 was missing. She said she heard her scream but when she tried to call her there was response. At about that time a clan elder called him and told him that a cap and iron bar had been found near the window of the house where the complainant was staying. He immediately went to PW1's home saw the cap and iron bar. He also saw PW1 who told her that it is the appellant who defiled her. Her clothes were covered in mud. He took PW 1 to report the incident at Rangwe Police Station and also to Rangwe Dispensary where she was treated.

7. PW 3, a local community policing member, received a report of the defilement and on that morning he went to the home of PW 1 where he found the iron bar and cap near the broken window. He knew the cap belonged to the appellant and had even seen him with it on the material day. He also saw PW 1 in dirty and wet clothes and she also narrated to him her ordeal. He took the cap and the iron rod to the appellant's mother who confirmed that the items belonged to the appellant.

8. PW 4, an aunt to PW 1, testified that she heard her mother in law, PW 1's grandmother, calling her in the morning of 29th August 2010 and asking for the PW 1. She responded that she was not there so they went to PW 1's home where she saw a broken window, a cap and an iron bar. She identified that the items as belonging to the appellant. At about 7 am, PW 1 arrived home and narrated to her the ordeal in which she named the appellant as the perpetrator.

9. PW 5, a clinical officer, testified and produced a report on behalf of his colleague. He noted that the examination of PW 1 was carried out on 29th August 2010. The examining clinical officer noted that the complainant's clothes were soiled in mud, there was tenderness on the head and back and that the genitalia was swollen and tender. There was redness and a foul smelling discharge. The laboratory tests confirmed the presence of spermatozoa, epithelial and pus cell. The clinical officer concluded that there was penetrative intercourse.

10. PW 6, the investigating officer, recalled that on 29th August 2010 at about 7.00 am he received PW 1, PW 2 and PW 3 at Rangwe Police Post. They had come to report an incident of defilement concerning PW 1 which had occurred on the night of 28-29th August 2010. He noted that PW 1's clothes were soiled. He took over the investigations and recorded statements. He stated that the appellant was arrested by members of the public who assaulted him. He also received a cap and iron bar and PW 1's clothes which were produced as exhibits.

11. When placed on his defence, the appellant elected to given an unsworn statement. He stated that he was arrested on 18th August 2010 and he did not know why he was arrested and taken to the chief. He complained that he was beaten without being told why. He denied that he knew anything about the charges facing him.

12. Before I consider the evidence I will consider two procedural complaints raised by the appellants. The first is that the appellant was not given the witness statement at the trial. According to the trial record, the appellant did not raise the issue of statements at all. He participated in the

proceedings, cross-examined witnesses and ultimately made his defence. He was therefore not prejudiced at all.

13. The appellant also complained that he called for witnesses to be summoned but that the witnesses were not summoned. According to the record, the accused applied for summons to be issued against 3 witnesses. The learned magistrate issued the order on 15th November 2010. When the witnesses appeared in court on 20th April 2011, the accused stated that he did not know those people and proceeded with his defence. He cannot complain that his witnesses were not summoned when he disowned them.

14. The appellant also contended that the court did not summon key witnesses like the assistant chief and the investigating officer. The investigating officer testified as PW 6. As regards the Chief, I find that the appellant had the opportunity to ask the court to issue summons just as he requested regarding the other witnesses. From his defence, he was taken to Chief after arrest by members of the public and the Chief would therefore not shed light on the key elements of the charge of defilement.

15. I now turn to the evidence. 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."*

16. As regards the first element of penetration, the testimony of PW1 was clear and consistent as to the fact that she had sexual intercourse. After she was defiled she immediately reported the matter to PW 2, PW 3 and PW 4 who saw her that morning and who confirmed that he clothes were muddy and that she was distressed after the ordeal. Moreover, the report was made to the police and she was examined at the hospital that very morning. Her testimony was credible enough to sustain a conviction by reason of the proviso to **section 124** of the ***Evidence Act*** which provides that it was not necessary that her testimony be corroborated as long as the learned magistrate was satisfied that she was telling the truth and recorded the reasons.

17. Mr Oluoch drew the court's attention to the fact that the medical report was produced under the provisions of **section 77** of the **Evidence Act**. I note that the medical testimony by PW 5 was given on behalf of another clinical officer who was not called as a witness. PW 5 testified that clinical officer who examined by PW 1 and the appellant was away on leave and had been transferred to Ndhiwa District Hospital. He had worked with him for a period of five years and was familiar with his handwriting. He then produced the P3 medical report. In my view, the procedure adopted accords with **section 77** of the ***Evidence Act*** which provides as follows;

> *77. (1) In criminal proceedings any document purporting to be report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.*
>
> *(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.*
>
> *(3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.*

18. I accordingly find that the medical evidence was properly admitted and accepted by the court. The medical evidence corroborated the fact that the PW 1 had been defiled.

19. The key issue in this appeal is whether the appellant was identified as the person who defiled

the appellant. On the issue of identification, the guidance of the Court of Appeal in **Wamunga v Republic [1989] KLR 424 at 426**, is instructive:

> *[I]t is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.*

20. I have carefully reviewed the evidence in this regard and I find that PW 1 testified that she identified that appellant because there was moonlight and she recognized him as a person she knew who lived less than 500 metres from her home. She gave the name of the appellant to the people she made the initial report. The evidence identification was corroborated by the finding of a cap and iron bar at the broken window which he used to gain ingress into the house where he forcefully took PW 1. Those items were positively identified as his by PW 1, PW 3 and PW 4 who had seen with the cap and iron bar prior to that date. This evidence coupled with the broken window clearly corroborates the testimony of the PW 1 regarding his identity.

21. Another fact that leaves no doubt as to his identity is that during cross-examination he asked the PW 1 the colour of his pants. When she responded that the pants were light blue, he confirmed the colour voluntarily. The evidence of identification was watertight as he was unable to explain how his personal items found their way to PW 1's home near the broken window. I find and hold that the appellant committed the offence.

22. The issue of age is a question of fact. In this case PW 1 testified that she was 13 years old and in Standard 6. PW 2 confirmed her age and the fact that she was in standard 6. According to the P3 Form her estimated age was 13 years old. There was no suggestion that the complainant was an adult or that she was any other age. I therefore find that the evidence supports the fact that PW 1 was 13 years old.

23. I therefore find the prosecution proved its case against the appellant. The sentence of 20 years imprisonment imposed was the minimum sentence under **section 8(3)** of the ***Sexual Offences Act***. I affirm the conviction and sentence.

24. The appellant's unsworn statement dealt with the manner of his arrest and in his appeal he states that his arrest violated his constitutional rights. In this regard I would do no more than state what the Court of Appeal stated 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.

25. The appeal is dismissed.

DATED and **DELIVERED** at **HOMA BAY** this **30th day of April 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.