



REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL NO. 124 OF 2014

BETWEEN

DICKENS OMONDI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 108 of 2011 at the Principal Magistrate's Court at Ndhiwa, Hon. B.O. Omwansa, RM dated on 13th October 2011)

JUDGMENT

1. The appellant was originally charged with the offence of rape contrary to **sections 3(1)(a) and (b) and (3)** of the ***Sexual Offences Act, 2006***. After hearing but before the close of the prosecution case, the prosecutor applied to amend the charges on the ground that the complaint was below the age of 18 years. The appellant opposed the application but the same was allowed. The prosecution filed amended charges of defilement and the trial commenced afresh.
2. The appellant was tried and convicted for the offence of defilement contrary to section **section 8(1) and (4)** of the ***Sexual Offences Act***. The particulars of the charge were that on 4th June 2011 at [Particulars Withheld] Village in Ndhiwa District within Homa Bay County, he intentionally and unlawfully caused his penis to penetrate the vagina of CAO, a child aged 17 years, 10 months and 2 days. He was sentenced to 15 years imprisonment. He now appeals against the conviction and sentence on the following grounds set out in the petition of appeal filed on 10th October 2014.
 - a. That the trial court failed to observe the birth certificate of the complainant produced in court to ascertain the age of PW 1 which showed that she was 19 years old
 - b. That the trial court grossly violated his rights by permitting the amendment of the charge after the close of the prosecution case without his consent.
 - c. That the court failed to find that the investigations officer did investigate the case as he never visited the alleged scene of crime to even take the alleged knife that was used to threaten PW 1.
3. The appellant supported the ground of appeal with written submissions in which he stated that the age of the PW 1 ought to have been determined from the P3 form which showed that she was an adult and it was the only reliable evidence to determine the age. He also contended that he was identified by mistake as PW 1 had not known him prior to the incident and that an identification parade was not conducted to ascertain his identity.
4. Mr Oluoch, learned counsel for the respondent, submitted that the appellant was not prejudiced by

- the amendment as the the trial commenced *de-novo*. He submitted that the issue of age was proved by production of the birth certificate. He also submitted that the production of the knife was unnecessary in the circumstances as the essential elements of the offence of defilement were proved.
5. 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.
 6. The prosecution case was that on 4th June 2011 at about 12.00pm, PW 1 had gone to the forest to collect firewood. She heard a man calling her and when she turned she saw a man she had never seen before. The man got hold of her and pulled her to a nearby home. He had a panga and he told her that if she raised alarm she would face dire consequences. In the house, he threw her on the bed, removed her clothes and forcibly had sexual intercourse with her. He never talked to her and after the ordeal she went home but did not find her parents. She then went to Karibuni Cottage, a girls' rescue centre, where she found PW 2 and narrated her ordeal.
 7. PW 2 testified that on 4th June 2011, at about 1.00pm, PW 1 came to Karibuni Cottage looking shocked and traumatized. She narrated to her what had happened. PW 1 asked her to go back and collect the clothes she was wearing and advised her not to take a bath. She took PW 1 to Ndhiwa Police Station to report the matter and accompanied her with a police officer, PW 5, to Ndhiwa Sub-District Hospital. At the hospital, PW 1 was examined and treated. PW 4, a clinical officer at the hospital, confirmed that PW 1 was attended to at the hospital. When he examined her on 6th June 2011, he found bruises on her vaginal walls and a bit of blood. He did not detect any spermatozoa in the urine but there were red blood cells and numerous epithelial cells. He concluded that there was penetration. He prepared and signed the P3 form.
 8. PW 3 testified that he was PW 1's father and that on the day the incident occurred he had gone with his wife for a funeral. He returned in the evening and was later informed by PW 1 that she had been defiled. PW 1 narrated to her the incident. He testified that he accompanied two officers with PW 1 to the place where PW 1 had been sexually assaulted. He confirmed that PW 1 identified the appellant as the person who defiled her. He denied that he knew the appellant prior to that day.
 9. PW 5 confirmed that on 4th June 2011, she was assigned to investigate a case of defilement. She recorded witness statements and issued the P3 form. PW 6, another police officer, testified that on 5th June 2011 at about 10.00am together with another officer, proceeded to Rangenya with PW 1 and her father. They were shown a house where they found the appellant who was identified by PW 1 whereupon he was arrested.
 10. When put on his defence, the appellant gave a sworn statement. He stated that he had gone to visit a friend on 3rd June 2011 at about 5.30 pm. He spent the night there and on the following day, 4th June 2011, they started burning charcoal upto about noon. They broke for lunch and returned at about 1.00pm they went to finish the uncleared work until 3.30 pm when they went to take care of the goats. On 5th June 2012 they went to unbake the charcoal until midday. Thereafter he left for his home. He stated that he was arrested at home and informed that he had sexually defiled a woman. He denied that he had anything to do with the offence. He also stated that PW 1's father told him that he would never see the light of day.
 11. 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.*"
 12. The testimony of PW 1 was clear and consistent as to what happened. Her case was supported by

- PW 2 to whom she immediately reported and who saw her distressed state. They both immediately reported the incident to the police as confirmed by PW 5. The sexual assault was corroborated by the medical evidence of PW 4 notwithstanding the fact that PW 1's testimony did not require to be corroborated by reason of the proviso to **section 124** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*. I therefore find and hold that the prosecution established the element of penetration.
13. The substantial issue for determination is whether the appellant is the person who committed the offence. PW 1 testified that she did not know the person prior to the assault. However, she was able to identify him in the presence of her father PW 3, PW 6 and another officer when they went to his home which she pointed out. The incident took place at about midday and she could recall the house where it took place. The appellant did not deny that the place he was found was his house. I therefore find that the circumstances were that such there was no possibility of mistaken identity.
 14. The appellant raised an alibi. When alibi evidence is proffered, the prosecution is obliged to investigate it but the appellant had not given any notice that he would raise it and since it was being set up after the close of the prosecution's case, it was open to the trial court to weigh it against the prosecution evidence already tendered (see *Wangombe v Republic [1976 – 80] KLR 1683*). In this case the testimony of PW 1 was clear and convincing. She had no reason to lie or implicate the appellant as she did not know him. The appellant, in his defence, suggested there was a grudge between him and the complainant's father PW 3. PW 3 denied that he even knew the appellant before the incident. Like the learned magistrate I find that the appellant's defence lacked any merit.
 15. In light of the prosecution evidence and the fact that the appellant was being charged with defilement, it was not necessary to produce the knife that the appellant allegedly threatened the appellant with. Likewise, it was unnecessary for the investigating officer to visit the scene of the alleged offence.
 16. The last element of the offence is that of the age of the complainant. Proof of age of a child is a question of fact and as regards the offence of defilement it is 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. The P3 form produced by PW 4 stated PW 1 was 18 years old. In his evidence, he stated that PW 1 was 15 years old. On the other hand the birth certificate produced in evidence stated PW 1 was born on 16th August 1993.
 17. In resolving the issue of age, I find the evidence of the birth certificate credible. PW 4 did not conduct an age assessment nor provide a basis for the concluding that PW 1 was 18 years. He also did not establish any basis for stating that PW 1 was 15 years. I therefore reject PW 4's testimony and finding on the issue of age. I therefore find, as per the birth certificate, that the complainant was 17 year as the time the offence was committed. She was a child within the meaning of **section 2** of the *Children Act*.
 18. The last issue I will deal with is the contention that the appellant's rights were violated as the amendment of the charges was done after the close of the prosecution case. I have considered the record and I find that the application for amendment was made before the close of the prosecution case. The same was allowed and the hearing commenced afresh. This was done in accordance with the provisions of **section 214** of *Criminal Procedure Code* and the new amended charge was properly read over to the appellant as provided for by the law and the trial commenced afresh. I find that the appellant did not suffer any prejudice and the trial was fair.
 19. I find and hold that the prosecution proved all the elements of the offence and I accordingly affirm the conviction. As regard the sentence, it was the minimum provided for under **section 8(4)** of the *Sexual Offences Act*. I affirm the sentence.
 20. The appeal is dismissed.

DATED and DELIVERED at HOMA BAY this 28th 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.