



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT HOMA BAY**  
**CRIMINAL APPEAL NO. 39 OF 2014**

**BETWEEN**

**KENNEDY OCHIENG' ODONGO.....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

*(Being an appeal from the Judgment in Criminal Case No. 988 of 2012 at the Chief Magistrate's Court at Homa Bay, Hon. N. Kariuki, RM dated on 14<sup>th</sup> July 2014)*

**JUDGMENT**

1. The appellant faced a charge of defilement contrary to **section 8(1)** as read with **section 8(4)** of the **Sexual Offences Act**. He also faced an alternative charge of indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars of the principal charge were that on 2<sup>nd</sup> September 2012 at [Particulars Withheld] Village, Kasgunga West Sub-Location, Gembe West Location in Mbita District, he intentionally caused his penis to penetrate the vagina of WAO, a child aged 16 years.

2. The prosecution case was that on 2<sup>nd</sup> September 2012, the complainant (PW 1) called the appellant who told her he had something good for her. He picked her by the roadside and took her to lodging where he had booked a room. He left her outside as he went in. He asked someone to call her and direct her to a room where she found him sitting on a bed. He told her he needed her. She described what happened to her as follows;

*He ignored me. He closed the door. He pulled me to where he was sitting on the bed. I was standing on the wall. He told me to remove the clothes but I refused. I had a skirt and a blouse. I had underwear and a biker. He removed my clothes by force. He took out the skirt, then the biker and the panty. He started touching my private parts, my breasts, thighs and vagina. He put me on the bed. I was crying. He had sex with me more than two times. He didn't use a condom. I felt pain when he had sex with me. I had sex with a classmate before. It was my first time to sleep with the [appellant]. It was by force. I bled later the same night. He slept with me at 3pm.*

3. After the ordeal, PW 1 testified that the appellant gave her Kshs.500 and told her not to tell anyone. As they rode on the motorbike, they met PW 1's sister, PW 2 who stopped them on the road. PW 2 had seen PW 1 leave home earlier on the motorbike being ridden by the appellant. She waited for them on the way back and attempted to stop them. There was a confrontation where people gathered and both PW 1 and the appellant ran away.

4. PW 1 went to stay with her aunt and the next day she informed her mother of her ordeal on 3<sup>rd</sup> September 2012. She went to Mbita Hospital where she was examined and the doctor prepared the P3 form. She also reported the matter to the police.

5. The appellant, in his defence gave a sworn statement and called one witness. He denied that he was Kenneth Ochieng Odongo, the person charged, but Kennedy Ochieng Odongo according to his identity card. He denied that he knew PW 1 or had ever defiled her as she had alleged. He stated that on 2<sup>nd</sup> September 2012, he was at home because he was putting up a house for his second wife. He stated that he was at his wife's place until 7:53 pm when he went home. He testified that the complainant's mother's name was Perez Oluoch and that she had a grudge with him as he removed her name from the register of fishmongers because she sold undersize fish. DW2 testified that on 2<sup>nd</sup> September 2012, the appellant came to see him and requested for poles. He was with the appellant the entire day until 7:00pm as he assisting the appellant to build his wife's house.

6. The learned magistrate convicted the appellant on the alternative charge of indecent act with a child but acquitted him on the principal charge of defilement. He was sentenced to 12 years imprisonment. The appellant appeals on the grounds set out in the amended petition as follows:

1. *The learned trial Magistrate erred in law when she ruled that the prosecution had proved their case beyond reasonable doubt yet the threshold set under the Criminal Procedure Code and the Sexual Offences Act had not been attained.*
2. *The learned trial magistrate misapprehended the law with regard to Sexual Offences Act.*
3. *The learned trial magistrate had no reason to believe the evidence led by the prosecution especially with regard to the commission of the alleged offence as the evidence of the witnesses produced in court was full of contradictions and gaps.*
4. *The learned trial magistrate relied on evidence which otherwise was unsafe for a finding that there was sufficient evidence to convict the appellant.*
5. *The learned trial magistrate erred in law and in fact.*

7. Mr Nyauke, counsel for the appellant, in addition to reiterating the grounds of appeal submitted that the evidence led by the prosecution did not meet the threshold of conviction for the offence. He contended that the testimony of the child did not point to the commission of a sexual offence by the appellant. He further submitted that although there was no requirement of corroboration, the court needed to warn of the dangers of acting on uncorroborated evidence of the child. He also opposed the cross-petition on the ground that penetration was not proved.

8. On its part, the State also cross-appealed on the following grounds;

1. *The learned trial magistrate erred in law in holding that the offence of defilement contrary to section 8(1) and 8(4) of the sexual offences act had not been proved.*
2. *The learned trial magistrate erred in law in disregarding the compelling evidence of the complainant*
3. *The learned trial magistrate erred in law in not taking into account the provisions of s. 124 of the Evidence Act.*

9. Mr Oluoch, learned counsel for the respondent, supported the conviction but submitted that there was sufficient evidence of penetration and that the complainant's testimony did not require corroboration by reason of **section 124** of the **Evidence Act (Chapter 80 of the Laws of Kenya)**. Counsel in support of the cross-petition contended that the learned magistrate gave undue weight to the evidence of the clinical officer in reaching her conclusions which was not warranted in the circumstances.

10. The issues raised by the appellant and the respondent call for this court to exercise its duty as the first appellate court. That duty is to review the evidence and independently reach a conclusion as to whether or not to uphold the appeal. The court must make an allowance for the fact that it neither heard nor saw the witnesses testify.

11. In order to prove defilement, the prosecution must prove that the child had been subjected to penetration by the appellant. On the issue of penetration the learned magistrate found as follows;

*The medical evidence availed provides no proof of penetration with regards to PW1. Secondly PW1 said that they had sex twice without a condom. Section 8(1) of the Sexual Offences Act describes the offence as an act of penetration with a child. The term "penetration" is described to mean the partial or complete insertion of the genital organs of a person into the genital organs of another person. This fact was not expressly brought out by the prosecution therefore the court cannot conclusively find that the accused has sex with PW1 in the manner envisaged by the Act.*

12. The testimony of PW1 was clear that there was sexual intercourse. Part of the testimony which I have outlined at paragraph 2 is clear as to what happened. Although it would have been preferable for PW 1 to refer to the fact that the appellant's penis was inserted into the vagina, her description of what took place amounted to penetration. In my view therefore, there was sufficient evidence of penetration.

13. The medical evidence of PW 4 only confirmed that indeed there had been sexual intercourse previously but in view of the fact that PW 1 admitted to having a previous sexual encounter, the testimony was inconclusive. The examination yielded a negative result for spermatozoa as the examination had taken place at least 2 days after the incident and the complainant admitted that she had taken a bath. Even if spermatozoa were not evident on examination, it does not necessarily mean that there was no penetration by the appellant.

14. My findings are supported by the proviso to **section 124** of the **Evidence Act** which provides that no corroboration is required in cases where the court believed that the complainant, it can convict on her evidence alone. The complainant's testimony was firm and consistent and unshaken in cross-examination. I would also add what the Court of Appeal stated in **Geoffrey Kioji v Republic, NYR Crim. App. No. 270 of 2010 (Nyeri)** where it stated that;

*Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.*

15. The next issue is whether it is the appellant who committed the felonious act. In this case the appellant testified that he was not the person charged and that he had an alibi and that the mother of PW1 had a grudge against him. All these issues are intertwined. As regards the alibi, the learned magistrate directed her mind to the case of **Stephen Chebii Chebowo v R ELD HCCRA No. 172 of 2011 [2013]eKLR** where Kimondo J., following **Wangombe v. Republic[1976 – 80] KLR 1683** stated that:

*[17] When alibi evidence is proffered, the prosecution is obliged to investigate it. The appellant had not given any notice that he would raise it. It was being set up well after the close of the prosecution's case. It was thus open to the trial court to weigh it against the evidence already tendered.*

16. I agree with the learned magistrate that the alibi was never suggested during the prosecution case hence it was an afterthought. However, it must be weighed against the prosecution case. PW 1 was clear that she knew the appellant as well as PW2. PW2 and PW3 reported the appellant to the police station. PW3 also knew him as the BMU chairman. He was positively identified and I have no reason to doubt his identity as the person who sexually assaulted PW 1.

17. The appellant stated that there was a grudge between him and PW 3 as a result of his failure to

register her to sell fish. On this point the appellant did not put any questions to PW3 to suggest that there was a grudge between him and PW 3 as a result of the said issue.

18. The age of the complainant was proved. PW1 herself testified that she was 16 years old, PW2 her sister stated she was 17 years old, PW3 her mother stated she was 17 years old. PW4, the registrar of births and deaths, produced the birth certificate stating that PW 1 was 17 years old. The complainant was thus a child at the time of defilement and was proved to be 17 years old.

19. I find that all elements of the offence of defilement were proved. The appeal is dismissed. The cross appeal is allowed to the extent that the conviction for indecent act is set aside and substituted with that of defilement.

20. The appellant is sentenced to 15 years imprisonment which is the minimum sentence under **section 8(2)** of the *Sexual Offences Act*.

**DATED** and **DELIVERED** at **HOMA BAY** this 24<sup>th</sup> day of April 2015.

**D.S. MAJANJA**

**JUDGE**

Mr Nyauke instructed Nyauke and Company Advocates for the appellant.

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