



REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL NO. 121 OF 2014

BETWEEN

ABAKUK OMONDI ODERO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 227 of 2011 at Principal Magistrates Court at Rongo, Hon. Z. J. Nyakundi, RM dated 2nd May 2012)

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to **section 8(1) and (3)** of the ***Sexual Offences Act, 2006*** in the subordinate court. He was convicted and sentenced to 20 years imprisonment. The particulars of the charge were that on 3rd May 2011 at [Nyarach] Village, North East Kamagambo Location within Migori District, he caused his genital organ, his penis to penetrate into the vagina of Z A M, a child aged 14 years old. He also faced an alternative count of committing an indecent act with a child contrary to **section 11(1)** of the ***Sexual Offences Act, 2006*** based on the same facts.
2. The appellant appeals against conviction and sentence based on the grounds set out in the petition of appeal dated 10th May 2012. Mr Nyauke, counsel for the appellant, relied fully on the grounds of appeal. In summary, the grounds are the prosecution did not prove the particulars of the charge against the appellant. That the learned magistrate relied on third party evidence to convict the appellant. That the age of the child was not proved and that the sentence was excessive in the circumstances.
3. Mr Oluoch, counsel for the respondent, submitted that the prosecution proved all the elements of the offence. He contended that the evidence of the complainant was clear that they stayed together for one week which fact was admitted by the appellant. He further submitted that the age of the complaint was proved by production of the birth certificate.
4. As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see ***Okeno v Republic [1973] EA 32***).
5. PW 1, the complainant, testified that she was in Standard 5 and that she was born on 6th June 1997. She narrated how the appellant took her to a neighbour, M's house and had intercourse with

- her on 3rd May 2011. On next day he took her to his mother's house and she stayed there helping his mother to cook. He once again had intercourse with her on that day in M's house. She stayed with the appellant for one week until the day she was arrested with the appellant and taken to the police station. PW 1 testified that the appellant had promised to marry her.
6. In the meantime PW 2, the complainant's father, reported to the police that her daughter had gone missing on 5th May 2011. When he received information that PW 1 was at the appellant's home, he informed the area chief. PW 4, the Chief of North East Kamagambo, confirmed that he received a complaint from PW 2 that PW 1 was missing. He carried out investigations and later arrested the appellant with PW 1 on 14th May 2011 while they were walking together. He took them to the police station.
 7. PW 5, a police officer from Kamagambo Police Station, was the investigating officer. He testified that on 5th May 2011, PW 2 made a report that PW 1 had been missing since 3rd May 2011. He also confirmed that PW 4 reported the defilement of PW 1. He recalled that on 14th May 2011, the appellant and PW 1 were brought to the police station and placed under arrest. He issued a P3 form to PW 1 and recorded statements from the witnesses. PW 3, a clinical officer at Rongo District Hospital, recalled that he examined PW 1 on 15th May 2014. He examined her genitalia and observed that they were normal. He however noted that her hymen was not intact which was suggestive of penetration.
 8. The appellant elected to give an unsworn statement after he was put on his defence. The thrust of his statement was that he met PW 1 with a friend of his called M on 5th May 2011. He stated that they went and stayed at the home where M worked until they were arrested by the Chief. He stated that during that time he would visit M's place during the day.
 9. On the basis of the evidence, the learned magistrate convicted the appellant and it is the conviction and sentence that precipitated this appeal. I have reviewed the evidence in light of the issues raised in the appeal and I take the following view of the matter.
 10. 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.*"
 11. The testimony of PW 1 was clear and consistent as to how she and the appellant had sexual intercourse on at least two occasions. Her testimony was validated by that of her father, PW 2, who confirmed that she was missing from 3rd May 2011. PW 2, PW 4 and PW 5 also confirmed that PW 1 and the appellant were arrested together on 14th May 2011. The fact of that there was sexual intercourse was corroborated by the medical evidence of PW 4. The medical evidence was additional evidence to prove the offence notwithstanding the fact that PW 1's testimony did not require corroboration by reason of the proviso to **section 124** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)***.
 12. The appellant's defence proved that he and PW 1 were together for the period she was said to have been missing and that they were arrested together. He also confirmed that they stayed at M's house during that period which is where the sexual intercourse took place. I therefore find and hold that the prosecution established the element of penetration.
 13. The age of a child is a question of fact. PW 1 produced her birth certificate which showed that she was born on 6th June 1997. She was 14 years old at the time the offence was committed. She stated that she was in primary school and it could not be suggested or implied that she was an adult. I therefore find that her age was proved. Under **section 8(3)** of the ***Sexual Offences Act*** the sentence imposed of 20 years imprisonment is mandatory.

14.The conviction and sentence were sound and are accordingly affirmed.

15.The appeal is dismissed.

DATED and DELIVERED at HOMA BAY this 28th day of May 2015

D.S. MAJANJA

JUDGE

Mr Nyauke instructed by Nyauke and Company Advocates for the appellant.

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