REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL NO. 36 OF 2014

BETWEEN

KENNEDY OTIENO ODONGA ……..…..…..……...…. APPELLANT

AND

REPUBLIC …..…….……... RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 756 of 2013 at Chief Magistrates Court at Homa Bay, Hon. N. Kariuki, RM dated 23rd May 2014)

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to **section 8(1)** and **(2)** of the ***Sexual Offences Act, 2006*** in the subordinate court. He was convicted and sentenced to life imprisonment. The particulars of the charge were that on 5th July 2013 at [Particulars Withheld] Village within Homa Bay County, he willfully and unlawfully caused his penis to penetrate into the vagina of RWJ, a child aged 6 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. 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**).

3. After a *voire dire*, the complainant testified through an intermediary that on 5th July 2013, she was at the market center with her father and the appellant, who was working nearby, sent her to get a padlock and key in his house. The appellant remained with her father but the appellant later followed her to the house, carried her and placed her on the bed, removed her clothes and proceeded to have sexual intercourse with her. Thereafter, he left her and she went home and told her mother and siblings. Her mother took her to Homa Bay District Hospital. Upon cross-examination she stated that she told her father what the appellant had done but she did not know why he did not report the matter immediately.

4. The complainant's mother (PW 2) testified that on 5th July 2013 she was away attending funeral preparations and she returned home on 8th July 2013. She testified that husband fell sick and was admitted to hospital. When she came home she found the complainant asleep. She went to hospital discharged her husband and came back found the complainant walking in a funny manner and when he asked what happened she told her what the appellant had done. She checked her private parts and found that was a discharge coming out which she described as sperm. She reported the matter to Homa Bay Police Station and took the child for treatment.

5. Dr George Kinuthia (PW 3) is the doctor who prepared the P3 Form in respect to the complainant. He noted that the complainant had been seen at the outpatient clinic on 10th July 2013 in respect of a complaint of assault that had taken place 5 days earlier on 5th July 2013. He noted that the hymen was not intact and was perforated and that there was presence of a whitish discharge which was not normal. He confirmed that there was evidence of penetration. He did not examine the appellant because he was he was brought beyond 72 hours and that physical evidence would not be viable hence the test would not be useful but he nevertheless ordered a blood test from the appellant for DNA testing.

6. PC Naomi Magerera (PW 4), the investigating officer, testified that on 10th July 2013, she received the complainant and her parents who had come to report a case of defilement which had taken place on 5th July 2013. She stated that the complainant's father had been admitted to hospital and was discharged on 10th July 2013 and that her mother had gone for a funeral and only reported the matter after she had returned from the hospital.

7. After the close of the prosecution case, the appellant was put on his defence and elected to make an unsworn statement. He stated that he used to work with the complainant's father and that on 26th June 2013 when he went to do stock taking he found 5 bags of cement missing. The complainant's father wanted to give him some money but later on he was forced to bring the items with the assistance of Administration Police Officers from Rodi AP Post. The appellant was later chased away from work. The complainant's father met him on 3rd July 2013 and told him he will know who he is and on 9th July 2013, the complainant's father, PW 2 and complaint alleged that he had defiled the complainant on 5th July 2013. They went to the AP camp but were sent away. On the same day they went to Homa Bay District Hospital and then to Homa Bay Police Station where he was arrested for an offence which he denied.

8. On the basis of the evidence I have outlined, the learned magistrate found that the prosecution had proved its case. The appellant filed his petition of appeal on 1st July 2014 in which contended that the prosecution had failed to prove its case. The appellant, through his advocate, was permitted to file further grounds of appeal which he did on 16th March 2015. In summary the issues raised in the grounds are as follows;

1. The procedure for taking the evidence was defective.
2. The learned magistrate decided the case against the weight of evidence and failed to take not of the contradictions in the prosecution witness testimony.
3. The age of the complainant was not established by the evidence.
4. The learned magistrate failed to take note of the motive of framing the accused and the appellant's alibi.

9. I will first deal with the issue of manner in which the evidence of the complainant was taken. Mr Okoth, learned counsel for the appellant, submitted that the learned magistrate erred in misapplying the provisions of **section 19(1)** of the ***Oaths and Statutory Declarations Act (Chapter 15 of the Laws of Kenya)***. In particular he urged that the *voire dire* showed clearly that the complainant understood the importance of telling the truth and she should have given evidence on oath. In response, Mr Oluoch, learned counsel for the respondent, submitted that the trial magistrate appreciated the provisions of law regarding taking the evidence of the child and having observed her demeanour, she made the proper decision.

10. The taking of testimony of a child of tender years must comply with ***Section 19*** of the ***Oaths and Statutory Declarations Act*** which requires the court to be satisfied, where the evidence is to be given on oath, that the child possesses sufficient intelligence to justify the reception of the evidence and understands the nature of the oath, that is, the duty of to speak the truth. The learned magistrate conducted the *voire dire* by asking a series of question and thereafter concluded as follows;

> *I have observed the complainant. I have observed here demeanour. She is quite young. She does not know her age. I find that that she is not sufficiently intelligent to understand the nature of the oath despite the answer to the contrary, only because of her age. An*

intermediary shall give evidence of her behalf. I find her vulnerable due to her age. An unsworn statement shall be issued.

11. According to Mr Okoth, the complainant's answers were quite intelligible and there is no reason she should have given unsworn testimony. The issue of whether a child is to give sworn evidence is really a matter of the good sense of the trial magistrate who is able to observe the child. I therefore do not find any to fault in the resolution of the learned magistrate.

12. **Section 31** of the ***Sexual Offences Act*** permits the use of intermediary to convey or transmit the testimony of a vulnerable witness. In ***M M v Republic*** **NRD CA Criminal Appeal No. 41 of 2013 [2014]eKLR**, the Court of Appeal stated as follows in relation to the role of an intermediary;

> *The role of an intermediary is provided for in **subsection 7** of **section 31** [of the **Sexual Offences Act**] namely, to convey the substance of any question to the vulnerable witness, inform the court at any time that the witness is fatigued or stressed; and to request the court for a recess.*
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> *It is difficult for a child or indeed a victim of a sexual attack to publicly relive the most traumatic and humiliating experience of their lives in order to get justice, more so, if they have to be subjected to the rigors of daunting and intimidating cross-examination. The thinking behind the enactment of **section 31** was, in our view, to moderate these traumatic effects in criminal proceedings.*
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> *It is clear from **sections 31 (2)** and **32** that, first and foremost it is the duty of the prosecution to ascertain the vulnerability of the witness and to apply to the court to make that declaration before appointing an intermediary. In addition, the court, as we have earlier observed, can on its own motion, through voir dire examination, declare a witness vulnerable and proceed to appoint an intermediary. Any witness (other than the one to be declared vulnerable) can likewise apply to the court for the declaration. The application must not be granted merely because the victim is young or too old or appears to be suffering from mental disorder. The court itself must be satisfied that the victim or the witness would be exposed to undue mental stress and suffering before an intermediary can be appointed.*
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> *It is clear from what we have said so far that the procedure of appointing an intermediary precedes the testimony of the intended vulnerable witness even where the court does so suo moto. It is also clear that an intermediary can be an expert in a specified field or a person, who through experience, possesses special knowledge in an area or a social worker, or a relative, a parent or a guardian of the witness.*

13. After the *voire dire* was conducted, the learned magistrate considered that this was a proper case where an intermediary was appropriate. I do not find any error in the procedure adopted. According to the record the intermediary merely communicated the testimony of the child to the court and the accused was able to communicate to the child through the intermediary.

14. I now turn to the evidence before the court. The thrust of the appellant's case was that the offence was not proved and that the prosecution witnesses gave contradictory evidence. Counsel for the respondent submitted that the child gave clear testimony on how she was sexually assaulted by the appellant who was someone she knew. He contended that her evidence was corroborated by both PW 2 who saw her after the ordeal and PW 3 the doctor who examined her.

15. I have considered the evidence and I find as follows. The complainant testified that she was sexually assaulted on 5th July 2013. On that day when she was sent to the appellant's house, her father was with the appellant. In cross-examination the complainant stated she told her father what the appellant did but she could not tell why he did not report the appellant immediately. He mother came back home on 8th July 2012 and went to discharge her husband in hospital. She only reported the matter to the hospital on 10th July 2012.

16. In my view, the prosecution did not explain why it took 5 days to report a sexual assault that had been committed by a person known to the complainant. This issue is grave because the complainant herself testified that on the material day, she was with her father when she was sent to the appellant's house and she informed her father. Was the father informed and if not, why did he not report the incident. The investigating officer testified that the child's father was admitted to hospital but is not clear when he got sick and when he was admitted to the hospital when it is clear that the evidence was that the child reported to him as the closest parent. Furthermore, the investigating officer stated that the complainant's father was discharged on 10th July 2013 yet PW 2 testified that when she came back from the funeral on 8th July, she went to discharge her husband. While the prosecution is entitled to call any witnesses it wishes, the failure to call the complainant's father undermined the prosecution case particularly in view of the fact that the appellant alluded to a grudge between him and the complainant's father.

17. Another issue has caused me grave concern in evaluating the matter is that PW 2 testified that when she found PW 1 on 8th July 2013, she had a white discharge from her vagina which she described as sperm. When PW 3 saw her on 10th July 2013, she still had a whitish discharge from her vagina. According to the P3 form he produced, he recorded that a vaginal swab had been taken for DNA sampling but the results were not produced in court. He also ordered a DNA test for the appellant but the results were not produced in court. If, as PW 4 testified, that the samples from the child could not be taken after 72 hours of the event, why did the doctor order samples a vaginal swab? Did he suspect that the white discharge was actually spermatozoa and that is why he ordered a DNA test for the complainant and the appellant? Wouldn't this imply that the child had been defiled even after 8th July 2014?

18. I have looked at the judgment and it is clear that the learned magistrate did not deal with these material contradictions and the appellant's defence. In the circumstances, I find the appellant's conviction unsafe. I quash the conviction and sentence and set the appellant free unless otherwise lawfully held.

DATED and DELIVERED at HOMA BAY this 22nd day of May 2015

D.S. MAJANJA

JUDGE

Mr Okoth instructed by G. S. Okoth and Company Advocates for the appellant.

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