



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT MIGORI**  
**CRIMINAL APPEAL NO. 37 OF 2015**

**BETWEEN**

**LUKA RUVISHA AMAGOYA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the original conviction and sentence in Criminal Case No. 603 of 2014 at Principal Magistrate's Court at Migori, Hon.P. Y. Kulecho, RM dated on 20<sup>th</sup> May 2015)*

**JUDGMENT**

1. The appellant was charged with defilement contrary to **section 8(1) and (3)** of the ***Sexual Offences Act, 2006***. The particulars of the charge were that between 2<sup>nd</sup> and 5<sup>th</sup> September 2014 at [Particulars Withheld] Sub-location within Migori County, he intentionally and unlawfully caused his penis to penetrate the vagina of JAO, a child aged 14 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*** grounded on the same facts. He was convicted and sentenced to 20 years imprisonment. He now appeals against the conviction and sentence.
2. The case against the appellant was as follows. PW 1, the complainant, aged 14 years testified that she was a Standard 6 pupil in primary school. She testified on oath that on 10<sup>th</sup> August, she left her home in Suba with her aunt to attend a funeral in Kanyamkago. During the funeral she left her aunt and proceeded to Awendo to visit another aunt. On reaching Uriri, the accused approached her with a motorcycle and since it was around 6 pm, he took her to his rented house to stay for the night. She stayed there for a period of 3 days. On the last day she stated that she was arrested by the Assistant Chief.
3. She further testified as follows;

*I have never got intimate with anyone. I had sex with the accused. The first night he took me to his home he slept with me. He is the first man to get intimate with me.*

4. PW 2, the Assistant Chief of [Particulars Withheld] Sub-location, testified that on 4<sup>th</sup> September 2014, he received information that a child was seen drawing water from a well and entering a certain house whereupon the door was locked from outside and the child never came out. He went to the premises, knocked the door and as there was no response he peeped through the window and saw a young girl lying on the bed. He decided to call the OCPD to ask for police officers. When the child heard him make the call, she opened the door and upon interrogation, she told him that she hailed from Gwasi and that the appellant had abducted her. Since he knew the landlord of

the house, he went to see him and was directed to the appellant's residence. He proceeded to the appellant's place with PW 1. The appellant confirmed to him that he owned the premises where the girl was found. The appellant was thereafter arrested by police officers who had come.

5. PW 3, a police officer, was the investigation officer recalled that on 5<sup>th</sup> September 2014, the appellant and PW 1 were brought to Migori Police Station. The allegation was that the appellant has defiled PW 1 in his house between 2<sup>nd</sup> and 5<sup>th</sup> September 2014. She issued a P3 form to PW 1 and called for an age assessment to be done which confirmed that PW 1 was between 14 and 15 years.
6. A clinical officer at Migori County Referral Hospital, PW 4, testified that PW 1 was seen at the facility on 9<sup>th</sup> September 2014 on allegations that she was defiled. He examined her on 11<sup>th</sup> September 2014. He noted the following material observations and findings. That the genitalia were normal with a white discharge oozing, the hymen was absent, there were no tears or bruises and pus cells were noted. He opined that there was penetration. He assessed PW 1's age as between 14 and 15 years.
7. The appellant made an unsworn statement when put on his defence. He stated that on 2<sup>nd</sup> September 2014, while he was doing a road test, a certain girl called him and told him that she was from Gwasssi and that she had run out of fare so she wanted Kshs. 700/- . As he did not have money, he offered to give her a place to sleep until the next day. He took her to his residence. His wife gave her Kshs. 700/-. She stayed at his home overnight. On the next day after he returned from work in the evening the girl had left but she came back at 8.00pm having purchased some clothes. He told his wife that on the next day he would report the matter to the police the next day but when he got up in the morning, she had already left. She returned at 9.00 pm whereupon he took her to his rented house. He stated that it is on that night the PW 2 came and arrested him.
8. On the basis of the evidence I have outlined, the learned magistrate was satisfied that the prosecution had proved its case and proceeded to convict the appellant. He now appeals against the conviction and sentence on the grounds set out in petition of appeal filed on 27<sup>th</sup> May 2015. In summary, the appellant contends that the learned magistrate shifted the burden of proof to him, that he was not served with witness statements, that the prosecution did not call any witness who was at the scene to support the allegations, that he did not know the importance of calling his wife for the defence and that the court did not consider mitigating circumstances in sentencing him. The appellant also filed written submissions to supplement the grounds of appeal. Ms Owenga, learned counsel for the respondent, supported the conviction on the ground that there was overwhelming evidence to support the prosecution case.
9. In considering the grounds of appeal outlined above this court is enjoined to follow the principle established in ***Okeno v Republic* [1972] EA 32** where the Court of Appeal held that the first appellate court is required to conduct an independent evaluation of all the evidence and reach an independent conclusion as to whether to uphold the conviction taking into account that it neither heard nor saw the witnesses testify.
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 first issue for consideration whether it is the appellant who perpetrated the felonious act. In this respect PW 2 gave testimony of how he located the appellant after finding PW 1 in a rented house, he proceeded to locate the landlord who directed him to the appellant. The appellant was found at his residence and in his unsworn statement he admitted that he had a rented house where PW 1 was sleeping and PW 2 came with PW 1 to his house on the day he was arrested. In the circumstances, the issue of mistaken identity cannot arise nor was there need for independent evidence to confirm the fact that the house was his and he was arrested.

12. As regards the act of penetration, PW 1 gave clear testimony of the fact that she had sex with the accused. While it would have been better for the PW 1 to describe the exact nature of the act that took place, the evidence is clear that an act which amounted to penetration took place. When he was given the opportunity to cross-examine her, he did not contest the issue of sexual intercourse. Although her testimony did not require any corroboration by virtue of the proviso to **section 147** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*, such corroboration was found in the evidence of PW 4 who examined her on and confirmed that she had had sexual intercourse. The appellant did not suggest that PW 1 had a reason to lie or implicate him in the offence hence I find her testimony credible.
13. The appellant's unsworn testimony also supported PW 1's testimony in that he confirmed that he had rented premises where the PW 1 slept for three days. Although the accused could not remember the precise dates when she was under the appellant's control, it is not in doubt from her evidence that she was there for three days. PW 2 testified that PW 1 told her he was in that house for 3 days and his own unsworn statement confirmed that fact. Although the appellant raised the issue of a grudge between him and the Assistant Chief in his petition of appeal, he did not put any questions to him in cross-examination that would suggest that there was a grudge or indeed raise the issue in his defence.
14. Finally on the issue of age, I hold that proof of age is a question of fact. PW 1 was a child and she testified that she was in the year 2000. As age assessment report produced by PW 3 and the assessment done by PW 5 confirmed that her age was between 14 and 15 years old. I therefore find and hold that PW 1's age was proved to be between 14 and 15 years old.
15. For purposes of the sentence prescribed by **section 8(3)** of the *Sexual Offence Act*, the appellant fell within the bracket which attracts a minimum sentence of 20 years imprisonment. In the circumstances, there was no error in the sentence and the sentence being a mandatory sentence it was lawful.
16. The appellant complains that he was not given witness statements prior to the hearing of the prosecution case. Although there is no record that an order was made directing the prosecution to issue witness statements, the appellant did not raise the issue at the trial and at times the matter proceeded for hearing, the appellant indicated he was ready to proceed for hearing. I do not find any prejudice in the circumstances.
17. The conviction and sentence are affirmed. The appeal is dismissed.

**DATED and DELIVERED at MIGORI this day of 23<sup>rd</sup> July 2015.**

**D.S. MAJANJA**

**JUDGE**

Appellant in person.

Ms Owenga, Principal Prosecuting Counsel, instructed by the Director of Public Prosecutions for the respondent.