IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL NO. 11 OF 2015

BETWEEN

BRIAN ONYANGO OKECH ……………………………..……… APPELLANT

AND

REPUBLIC …..……..…………………………….………… RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 271 of 2014 at Principal Magistrates Court at Ndhiwa, Hon. B. R. Kipyegon, RM dated on 11th December 2014)

JUDGMENT

1. In the subordinate court the appellant **BRIAN ONYANGO OKECH** faced a charge of defilement contrary to **section 8(1)** and **(2)** of the ***Sexual Offences Act, 2006.*** The particulars were that on 6th June 2014 in Ndhiwa District, Homa Bay County he intentionally causes his penis to penetrate the vagina of IAS, a child aged 15 years. He also faced a charge of committing an indecent act with a child contrary to **section 11(1)** of the ***Sexual Offences Act*** based on the same facts.

2. The appellant was tried, convicted and sentenced to 15 years imprisonment. He now appeals against conviction and sentence on the grounds set out in the memorandum of appeal dated 31st December 2014. Apart from contending that the prosecution did not prove its case, the substance of the appeal is that the appellant was a child at the time of commission of the offence and he ought to have been sentence accordingly.

3. The respondent's position is that the issue of the appellant's age was dealt with and it was proved he was over 18 years old at the time. Learned counsel submitted that the offence was proved and as such the appeal ought to be dismissed.

4. 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 (see ***Pandya v Republic*** **[1957] EA 336** and ***Kariuki Karanja v Republic*** **[1986] KLR 190**).

5. The prosecution case was that the complainant, PW 1 was aged 15 years old and was in form 1 at a local secondary school. She testified on oath that she stayed at the appellant's house between 23rd May 2014 and 6th June 2014 within which time they both engaged in sexual intercourse. On 6th June 2014, she and the appellant were arrested at the appellant's father's house by police officer and taken to Ndhiwa Police Station. At the time of trial she was 4 – 5 months pregnant.

6. PW 2, a teacher at the secondary school PW 1 was attending, testified that PW 1 left school on 23rd May 2014 claiming that she was sick. When she did not return for 2 weeks, he went inquire about her whereabouts from her grandmother who told her about a boy who used to visit her. On 6th June 2014, he found a photograph of a boy whom the grandmother suspected had eloped with PW 1. PW 2 reported the matter to the police. PW3, the investigating officer, and PW 4, a police officer confirmed receiving the report of PW 1's disappearance at the police station on 6th June 2015. They commenced investigations which led him to the appellant's home where they found PW 1 and the appellant. They arrested the appellant and PW 1 and took them for medical examination.

7. The medical reports were produced under **section 77** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** by PW 5, a clinical officer at Ndhiwa District Hospital, who confirmed that he knew his colleague's handwriting and signature. He confirmed that both the appellant and PW 1 were examined. As regards PW 1, the report found no evidence of penetration but confirmed that she was 4 months pregnant. According to the age assessment based on dental formula, the officer concluded that she was 15 years old. As regards the appellant, the dental formula assessment showed that he was approximately 19 years old.

8. After hearing the prosecution evidence, the appellant was put on his defence. He testified on oath and stated that he was a motorcyclist and that he knew PW 1. He stated that PW 1 was not in good terms with her grandparents and that she had been chased away and had in fact completed her primary school while living at their home. When she went to secondary school, she fell sick and after treatment was brought to her home where she stayed but was later chased away from school. In cross-examination, he stated that PW 1 was not his girlfriend by his sister's friend and that PW 1 had been coached to come and fix him by her guardian.

9. In order to prove its case under **section 8(1)** of the ***Sexual Offences Act***, the prosecution must show that the appellant did an act that amounted to penetration of 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."*

10. I have evaluated the evidence presented before the subordinate court and I find that the prosecution proved its case beyond reasonable doubt. As regards penetration, PW 1 gave clear and credible evidence of how she was at the appellant's house and how they had sexual intercourse. The fact that PW 1 was with the appellant was corroborated by PW 2 who noted her absence from school for the period she was at the appellant's home. Further, PW 2, PW 3 and PW 4 all confirmed that the PW 1 and the appellant were arrested at the appellant's home. The appellant's own defence corroborates the fact that the PW 1 was staying at the appellant's home. As concerns the grudge between the appellant and members of the PW 1's family nothing was suggested to the witnesses in that regard.

11. Although the clinical officer who examined PW 1 did not find any evidence of penetration, I find that such evidence could only be corroborative of the fact of penetration otherwise and in light of **section 124** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)***, the testimony of PW 1 was sufficient. In ***Andrew Cauri Ndungu v Republic*** **NAI CA Criminal Appeal No. 132 of 2008 [2013]eKLR,** the Court of Appeal pointed out that;

    > *We agree that there are instances in which an accused person ought to be medically examined before a court of law can positively connect him to commission of an offence, but we do not think that in this particular case there was dearth of evidence to enable the two courts below reach a conclusion that it was the appellant who defiled the complainant. Even in the absence of a medical examination on the appellant, there was sufficient evidence to enable the trial court reach the finding that it arrived at. We must, therefore, reject the third ground of appeal.*

12. When the appellant was asked to plead to the offence, he stated that, *"It is true, but she is not a*

child." His contention was that she was an adult. The prosecution however proved that she was aged 15 years old. She stated on oath that she was 15 years old and was in Form 1 and the age assessment report determined that she was about 15 years old. In the circumstances I find and hold that PW 1 was 15 years old.

13. I accordingly hold that the prosecution proved the case beyond reasonable doubt and I accordingly affirm the conviction.

14. The substantial issue raised by Mr Odingo in this appeal is that appellant was a child hence the sentence was excessive and unwarranted. Where an accused is likely to be child, it is important for the learned magistrate to ascertain the fact of the age of the accused before the trial as any person below the age of 18 years is a child and is entitled to all the protections and rights of a child under the ***Children Act***. The age of the appellant also affects the sentence under **section 8** of the ***Sexual Offences Act***. The Court of Appeal in the case of ***Dennis Abuya v R*** **KSM CA CR APP. No. 164 OF 2009 [2010] eKLR**, dealt with a case where the evidence regarding the age of the appellant at the time of the offence was committed was inconclusive. The Court stated as follows:

> *Neither the trial magistrate, nor the learned judge on first appeal dealt with the issue of the appellant's age at the time he allegedly committed the offence. It may be that he was eighteen years of age at the relevant time; but it may equally be that he was below eighteen years at the time. We do not understand the provisions of the Sexual Offences Act to authorize the imprisonment of minors and we are unable, on the material on record, to rule out the possibility that the appellant was under eighteen years on 19th June, 2007 when the offence was allegedly committed. Section 8(7) of the Sexual Offences Act which states, "Where a person is charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act and the Children Act." The question of imprisoning a minor does not, therefore, arise under the provisions of the Sexual Offences Act.* [Emphasis mine]

15. At the trial, the appellant did not contend that he was below the age of 18 years. The age assessment presented by PW5 determined that he was 19 years old and was not contested by the appellant. Moreover, in his sworn defence, he did not raise the issue that he was a child. On the available evidence I am satisfied that the appellant was above the age of 18 years old.

16. I therefore affirm the conviction and sentence. The appeal is dismissed.

DATED and DELIVERED at HOMA BAY this 26th day of August 2015

D.S. MAJANJA

JUDGE

Mr Odingo instructed by Odingo 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.