IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL NO. 3 OF 2015

BETWEEN

JOHNSON OGEGA MAKORI ……..……...….... APPELLANT

AND

REPUBLIC …..…….……... RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 234 of 2014 at Senior Resident Magistrates Court at Ndhiwa, Hon. B. R. Kipyegon, RM dated on 9th January 2015)

JUDGMENT

1. The appellant **JOHNSON OGEGA MAKORI** was charged and convicted of the offence of defilement contrary to **section 8(1)** and **(3)** of the ***Sexual Offences Act, 2006.*** The particulars were that on 15th May 2014 at [Particulars withheld] Sub-location in South Mugirango District, Kisii County, he intentionally caused his penis to penetrate the vagina of DAO, a child aged 14 years old after having moved her from [Particulars withheld] Village of North Kanyamwa Location in Ndhiwa District to Obonyale Sub-location of South Mugirango District. He also faced of committing an indecent act with a child contrary to **section 11(1)** of the ***Sexual Offences Act*** based on the same facts by unlawfully touching her breast, buttocks and vagina.

2. The appellant was sentenced to 20 years imprisonment. He now appeals against conviction and sentence on the basis of the grounds of appeal filed on 29th January 2015 which may be summarized as follows; that there was no medical evidence to prove that the child was defiled, that the chief who arrested him was not called, that the age of the complainant was not proved and that the court shifted the burden of proof on him.

3. Mr Oluoch, counsel for the respondent, submitted that when called upon to plead, the appellant admitted the fact that he had intercourse with the child but since the age of the child was in issue of the appellant's age a plea of not-guilty was entered. He submitted that the complainant testified she was 17 years old since she was a willing participant in the offence and that the evidence of the clinical officer, which did not prove that there was penetration, should be examined in light of the entire evidence. 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 complainant, PW 1, testified on oath that she was aged 17 years old and was in standard 6 at a local primary school. She further testified that she left her home on 13th May 2014 and went to live with the appellant in Kisii where they lived as husband and wife. During that period they had sexual intercourse. When cross-examined by the appellant she insisted she was 17 years old and that she was friend with the appellant since January 2013 when he worked as a herdsman for the neighbour.

6. The complainant's father, PW 2, testified that that PW 1 was 15 years old and had a baptismal card which showed she was born on 14th February 2000. He knew the appellant as he used to work near his home and he was informed by people that his daughter and the appellant were friends. He reported that his daughter was missing to the school and was issued with a letter with which he used to trace the appellant. He reported his daughter's disappearance to Ndhiwa Police Station on 20th May 2015 after doing some follow up in Obonyole Location in Kisii.

7. PW 3, the investigating officer, confirmed that he received the report from PW 2 and after the appellant was arrested and taken to Kamagambo Police Station, he organized for the appellant to be brought to Ndhiwa Police Station. He issued a P3 for PW 1 to be examined by the clinical officer, PW 4. PW4 testified that PW 1 was seen at Ndhiwa District Hospital on 20th May 2015 and that the genitalia had no bruised, tears or lacerations. The other medical tests were negative and he concluded that there was no penetration.

8. After hearing the prosecution evidence, the appellant was put on his defence. He testified on oath and stated that he left school in October 2013 as he could not afford to buy text books. He found employment as a farm hand where he worked from October 2013 to April 2014. When he requested to be paid his dues, his employer only paid him part of the amount and promised to pay the balance but did not do so. He later went to demand for the money but was told that he could not be paid until he returned a girl he was alleged to have taken. He stated that he was arrested by the area chief on 10th May 2015. He accused the complainant's parents of demanding money from him and when he could not pay, the case was brought against him. He denied that he was staying with the complainant. DW 2, the appellant's brother, testified that the appellant was arrested on 10th May 2015.

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 went to the appellant's home where they resided as husband and wife and how they had sexual intercourse. Despite intense cross-examination, her testimony was unshaken. 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.

11. When called upon to plead to the principal charge, the appellant stated, *"It is true, it's the mother who allowed me to go with her. It is true I slept and had sex with the child. I did not know she was a child aged 18 though."* This fact was confirmed by PW 1 who, in answer to the appellant's question, stated that it is her mother who packed her clothes so that she could leave with the appellant.

12. Although the clinical officer who examined PW 1 did not find any evidence of penetration, this was not fatal to the prosecution case given the length of time that had lapsed between the felonious act and the time examination was done. 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.

13. The appellant's contention that he was only charged after he refused to pay the PW 1 parent's does not negate the elements of the offence of defilement proved by the prosecution. Furthermore, the issue was categorically denied by PW 1 and was not put to PW 2 during cross-examination.

14. On the issue of failure to call the Chief who arrested him to give evidence, I find that the chief was not an essential witness. Further, the appellant himself confirmed that he was indeed arrested by the chief. All in all I find that there was conviction was based on sound facts.

15. The issue of the age of the child was contested. The age of a child is a question of fact and I would echo what the Court of Appeal stated about proof of age for purposes of the ***Sexual Offences Act*** in ***Moses Nato Raphael v Republic*** **NRB CA CRA No. 169 of 2014 [2015] eKLR**. It stated that;

On the challenge posed by the uncertainty in the complainant's age, this Court had occasion to deal with a similar issue in ***Tumaini Maasai Mwanya v. R****,* ***Mombasa CR.A. No. 364 of 2010****, where we held that proof of age for purposes of establishing the offence of defilement which is committed when the victim is under the age of 18 years should not be confused with proof of age for purposes of appropriate punishment for the offence in respect of victims of defilement of various statutory categories of age. As long as there is evidence that the victim is below 18 years, the offence of defilement will be established. The age, which is actually the apparent age, only comes into play when it comes to sentencing. The contradictions in respect of the child's age cannot therefore assist the appellant to avoid criminal culpability.*

16. PW 1 testified that she was 17 years old. PW 2 produced testified that PW 1 was born on 14th February 2000 and as such she was 14 years old when the offence was committed. He produced a baptismal card which confirmed as much. I agree with counsel for the respondent's submission that PW 1 was a willing participant in the offence hence she was wont to exaggerate her age. Even with such exaggeration, he age was still below 18 years and hence the offence of defilement was proved. I therefore hold that PW 2's testimony was credible and sufficient to establish first, that she was a child and secondly she was aged 14 years at the time the offence was committed. Under **section 2** of the ***Children Act***, age means the apparent age where the exact age is not known. In this case there was sufficient proof that the PW 1 was aged 14 years.

17. 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

Appellant in person.

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