



IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL NO. 101 OF 2014

BETWEEN

GEORGE OWUOR ODHIAMBO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 11 of 2014 at Chief Magistrate's Court at Migori, Hon. L. K. Sindani, RM dated on 25th November 2014)

JUDGMENT

1. The appellant, **GEORGE OWUOR ODHIAMBO**, was charged with defilement contrary to **section 8(1) and (2)** of the ***Sexual Offences Act, 2006***. The particulars of the charge were that on 19th December 2013 within Migori County, he intentionally and unlawfully caused his penis to penetrate the vagina of MAO, a child aged 11 years. He also faced an alternative charged 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. The complainant, PW 1, testified on oath that she was 11 years old in class 5. She recalled that on 19th December 2013 at about 11 am she had gone to buy tea at [particulars withheld] but before she could do so she met the appellant whom she knew as she used to see him at the local video shop. She testified that the appellant followed her when she refused to greet him. He held her by the neck, slapped her, removed her skirt and panty and proceeded to forcibly have sexual intercourse with her. After the ordeal, the appellant left her whereupon she went back home. As her parents had gone for a funeral she told the house help what had happened but he was drunk. She waited until her parents returned home. She told her mother what had happened and on the way to Awendo, she spotted the appellant.
3. PW 2, the complainant's mother, recalled that she was away from home and had left the children in the custody of the house help (PW 3). When she returned from the funeral on 4th January 2015, PW 1 narrated her ordeal to her. PW 1 told her that she could identify the person who sexually assaulted her. PW 1 and PW 2 then proceeded to the video shop at [particulars withheld] where PW 1 identified the appellant as the person who defiled her. When PW 2 confronted him, the appellant threatened to beat her up. On the next day PW 2 reported the matter to the Chief who told her to take PW 1 to hospital.
4. PW 3, was employed by the complainant's father as the house help, testified that on 19th

- December 2013, PW 1 had left to buy tea leaves at [particulars withheld]. She came back a while later crying. She had dust on her head, a scratch on the face and her skirt was dirty. She narrated to him how the appellant had sexually assaulted her. He went to [particulars withheld] with PW 1 and found the appellant at the video shop. The appellant rebuffed his inquiries. He proceeded to inform the chief what had happened but the chief was not present so he went home and took the day off.
5. PW 4, a clinical officer at Migori District Hospital, recalled that on 4th January 2014, he examined PW 1 after being informed that she had been sexually on 19th December 2013. PW 1 observed her genitalia and noted that the hymen was not present and that there was a whitish discharge. The other tests namely, the vaginal swab, HIV and urinalysis did not yield positive results. He opined that sexual intercourse had taken place. PW 7, a medical doctor stationed at Migori District Hospital, examined PW 1 on 12th March 2014 and according to him the estimated age of PW 1 was 13 years.
 6. The Investigating officer, PW 5, testified that she received the complaint from PW 1 and PW 2 on 6th January 2014. She issued the P3 form and issued an arrest order for the appellant. PW 6, a police officer stationed at Mukuyu Police Post, effected the arrest order on 8th January 2014. On that day he proceeded to the accused's home in the company of PW 1 and PW 2 and although they did not find him at home, they found him at [particulars withheld]. He arrested the appellant after he was identified by PW 1 and PW 2.
 7. When put on his defence, the appellant elected to give sworn testimony. He testified that on 19th December 2013, he was at [particulars withheld] taking part in a football tournament. He was there from 9.00 am to 4.00pm. Thereafter he went home as he was too tired. DW 2, who testified on the appellant's behalf, recalled that on 19th December 2013, he was at the football tournament from 10.30am upto 4.00pm with the appellant.
 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 9th December 2014. In summary the essence of the appeal was the prosecution case was not proved beyond reasonable doubt and the conviction was unsafe. The appellant contends that the prosecution case was full of material contradictions and that the identification and or recognition of the appellant remained doubtful. The appellant also states that the learned magistrate failed to appreciate the duration of time between the time the alleged offence took place and the time it was reported. He accuses the learned magistrate of outright bias.
 9. In his oral submissions, learned counsel for the appellant, Mr Kisera, emphasized the grounds set out in the petition of appeal. He further added that the medical evidence was insufficient and inconclusive to establish penetration. He submitted that the appellant's alibi defence was not considered when in fact the appellant had laid a proper basis for it.
 10. Ms Owenga, learned counsel for the respondent, supported the conviction on the ground that there was overwhelming evidence to support the prosecution case. She submitted that the appellant's defence was considered by the learned magistrate and properly dismissed and that sentence imposed was within the law.
 11. 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 obliged to conduct an 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.
 12. 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.*”

13. The first issue for consideration whether it is the appellant who perpetrated the felonious act. The incident took place at day time in conditions that were conducive for positive identification. This was however not a case of identification but rather recognition as PW 1 knew the appellant as she has seen him at video shop previously. The fact that she knew him is confirmed by the fact she took PW 2 to where he was and identified him to her. PW 3 also testified that she showed him where the appellant was and she identified him at the video shop where he was seated on his motorbike. Lastly, PW 1 and PW 2 were with PW 6 when the appellant was arrested. In the circumstances, it was unnecessary for PW 1 to give the police a description of the appellant’s features as Mr Kisera argues as the testimony from the witnesses is clear that PW 1 knew the appellant.
14. Closely related to the issue of identification is the appellant’s alibi defence. Mr Kisera assailed the learned magistrate’s decision that the alibi defence was not raised in the cause of the prosecution case. He contended that the issue was put to PW 2 in examination. Ms Owenga, on her part contended that the alibi was considered in light of the entire prosecution case and the learned magistrate rightly concluded that the appellant committed the offence.
15. The law has been settled that an accused person who raises the defence of alibi does not thereby assume the burden of proving it. It is sufficient if the alibi raises reasonable doubt as to whether or not the accused was at the scene of the crime (*see Kiarie v Republic [1984] KLR 739*). This means that the burden always remains with the prosecution to prove that the accused committed the crime under trial. In this case the accused did not give notice of his intention to give alibi defence in order for the prosecution to call evidence in rebuttal. The substance of the alibi was that he was playing at a football tournament on the material day. Although the issue as to whether the appellant is the person who committed the offence was a live issue and the subject of examination, nothing was put to the witnesses regarding a football tournament at [particulars withheld] on 18th December 2012. No questions were put to PW 1 who testified that she was at [particulars withheld] on that day or to PW 3 who went to [particulars withheld] on the material day. At the end of the day, when the testimony of the PW 1, PW 2 and PW 3 are considered with that of the appellant and DW2, the appellant’s alibi’s remains an afterthought.
16. As regards the act of penetration, PW 1 gave clear and convincing testimony of her ordeal on the material day. She described what the appellant did to her in graphic terms and although her testimony did not require any corroboration by virtue of the proviso to **section 124** of the **Evidence Act (Chapter 80 of the Laws of Kenya)**, such corroboration was found in the evidence of PW 4 who examined her and concluded that there was sexual intercourse. Furthermore, PW 3 who saw her immediately after her ordeal testified of her distressed state which is consistent with her being sexually assaulted.
17. Even without the medical evidence, the complainant’s testimony was sufficient to sustain the conviction. In *Geoffrey Kionji vs Republic Cr. Appeal No 270 of 2010*, the Court of Appeal appreciated this argument in the following terms;

Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80, Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.

18. The appellant contended that the duration taken from the time the offence was committed and to the time it was reported undermined the prosecution case. I have reviewed the testimony of the witnesses and it is clear that PW 1, being a child, could not have reported the matter to her parents immediately as PW 2 stated that they were at a funeral. She reported the matter to PW 3 whom she testified was drunk. PW 3 himself confirmed that he received the report of the defilement on the same day and proceeded with PW 1 where the appellant was. Although he went to report to the chief, he was absent. As it was his off day, he went away and left PW 1 to report to her parents. In my view, there is sufficient explanation as to why the report was not made immediately. Further, there is no evidence that undermines the credibility of the witnesses and nothing was suggested in the testimony to imply that there was a grudge between the complainant, any of the prosecution witnesses and the appellant or that they deliberately lied.
19. The appellant pointed to inconsistencies in the prosecution case. Mr Kisera contended that there was material contradiction in regard to the place where the incident took place. The learned magistrate in her judgment referred to the incident taking place in a maize plantation. PW 1 stated in her testimony that the incident took place in a maize plantation while PW 3, in stated that PW 1 told her that the act took place in a maize plantation and that he went with to the place where the act took place it was near a church at [particulars withheld]. When viewed in light of all the prosecution evidence, I do not find this contradiction material or substantial to undermine the prosecution evidence. PW 1 was clear that the incident took place in a maize plantation near a church at [particulars withheld].
20. Finally on the issue of age, I hold that proof of age is a question of fact. In sexual offences proof of age is necessary for two reasons. First, to establish the offence of defilement which is committed if the victim is below the age of 18 years. Second, to establish the penalty applicable in the event of conviction. In this instance, there is no doubt that PW 1 was a child and in her testimony she stated that she was born on 5th July 2003 and was thus 11 years old. PW 5 stated that the birth certificate was misplaced but that it had some alteration hence it was necessary to subject her to an age assessment test which was done by PW 7. He explained that he used the sequence of teeth eruption and concluded that she was 13 years old. In light the evidence, I would give the appellant the benefit of doubt on the issue of age and hold that the child was 13 years old.
21. 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.
22. I therefore find that the prosecution proved its case beyond reasonable doubt and the conviction was safe. It is affirmed. The sentence is also affirmed. The appeal is dismissed.

DATED and DELIVERED at MIGORI this day of 21st August 2015.

D.S. MAJANJA

JUDGE

Mr Kisera instructed by Omonde Kisera and Company Advocates for the appellant.

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