



REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL NO. 100 OF 2014
(FORMERLY KISII HCCRA NO. 2 OF 2012)

BETWEEN

JACOB OGWENO ONYISI APPELLANT

AND

**REPUBLIC
RESPONDENT**

(Being an appeal from the original conviction and sentence in Criminal Case No. 1758 of 2010 at Principal Magistrates Court at Homa Bay, Hon.O. J. Ong’ondo, RM dated 29th December 2011)

JUDGMENT

1. The appellant, **JACOB OGWENO ONYISI**, was charged with the offence of defilement contrary to **section 8(1) and (4)** of the ***Sexual Offences Act, 2006*** in the subordinate court. The particulars of the charge were that on the 17th September 2010 and 14th October 2010 within Homa Bay County, he intentionally and unlawfully did an act which caused penetration with his genital organ namely penis to penetrate into female genital organ namely the vagina of PAO, a child aged 16 years. 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 by touching the vagina and breasts of the said PAO.
2. After trial, the appellant was convicted on the alternative charge and sentenced to 10 years imprisonment. He now appeals against conviction and sentence on the basis of the petition of appeal filed on 9th January 2012. In summary, the grounds are that prosecution failed to prove the offence and that it failed to prove the age of the child which is an essential element of the offence. The appellant also complains that the learned magistrate ignored the testimony of the complainant and relied on the evidence of a third party to support the conviction. Counsel for the appellant, Ms Foza, submitted that the main issue in the appeal is the learned magistrate failed to take into account that the age of the child was not proved as the evidence before the court was insufficient and contradictory. Further that the complainant testified that she was 18 years old and that the learned magistrate disregarded that testimony.
3. The respondent opposed the appeal and in addition filed a cross-petition of appeal. The respondent contended that the learned magistrate disregarded the mandatory provisions of **section 124** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)***, that the learned magistrate disregarded the uncontested evidence of PW 1 and that the learned magistrate exhibited bias against the

prosecution. Mr Oluoch, the learned Senior Assistant Director of Public Prosecutions, was of the view that the prosecution proved all the elements of the offence and that the learned magistrate totally ignored the testimony of the complainant in which she confirmed that she and the appellant were living together as husband and wife and that they had sexual intercourse.

4. 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**).
5. In her testimony the complainant, PW 1, stated that she was born on 8th April 1994 and was attending primary school. She stated that the appellant was her husband and she started residing with him in September 2010. She stated that he proposed to marry her and she agreed and went to stay with him at his home. During the time they stayed together as husband and wife, she testified that they had sexual intercourse. On 14th October 2010, the Chief came to the appellant's home and arrested them. She later went to Mbita Police Station where she was issued with a P3 form. She was examined at Mbita District Hospital. By the time of the trial, she testified that she was 5 months pregnant. When the accused was called upon to cross-examine PW 1 he stated that, *"From what she has said, I do not have any questions to ask her. She has stated the truth."*
6. The complainant's sister, PW 2, testified that PW 1 was aged 16 years and that she had dropped out of school and had disappeared. After her disappearance, PW 2 asked the chief to look for her and the chief found her staying with the appellant. PW 3, the clinical officer at Mbita District Hospital, testified that he examined PW 1 on 14th October 2010. He noted that he had examined her 26 days after the sexual act and that there was no significant finding except a missing hymen which was indicative of sexual intercourse in the past. He concluded that PW 1 had been defiled. The investigating officer, PW 3, confirmed that he received a complaint of defilement from PW 2. He investigated the matter and caused the appellant to be charged.
7. In dismissing the charge of defilement against the appellant, the learned magistrate stated as follows;

To the extent that PW 3's basis for concluding that PW 1 had been defiled was the fact that the hymen was missing without indicating it happened during intercourse with the accused 26 days prior to examination, the first count has not been proved beyond reasonable doubt as PW 1 had had intercourse prior to meeting the accused. I therefore acquit the accused of the offence of defilement contrary to section 8(1) of the Sexual Offences Act.

8. 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."*
9. I find that PW 1's testimony was clear that she had been having sexual intercourse with the appellant at the time they were staying together as husband and wife. In that respect her testimony was sufficient to establish the fact of penetration. Moreover, the appellant confirmed that PW 1 was saying the truth when he was called upon to examine her. In light of the proviso to **section 124** of the **Evidence Act (Chapter 80 of the Laws of Kenya)**, her testimony did require corroboration to support a conviction. I therefore find that the prosecution proved penetration.
10. The medical evidence of PW 4 only confirmed that she had had sexual intercourse in the past. It did not weaken the prosecution case when taken with the entire evidence. As the Court of Appeal noted in **Geoffrey Kioji v Republic, NYR Crim. App. No. 270 of 2010 (UR)** ;

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 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.

11. The age of a child is a question of fact. Although the complainant initially contended that she was 18 years old. She produced a baptismal card which showed that she was born in April 1994. PW 2 also confirmed the complainant's age. In the circumstances, the learned magistrate was right to conclude that she was aged 16 years old.
12. In conclusion, I find the learned magistrate erred in convicting the appellant on the alternative charge when the testimony of PW 1 was clear and uncontested that she had sexual intercourse with the appellant. I dismiss the appeal and I allow the cross-appeal and convict the appellant of the offence of defilement contrary to **section 8(1)** of the *Sexual Offences Act*.
13. The sentence imposed ought to have been under **section 8(4)** of the *Sexual Offences Act* which provides a minimum sentence of 15 years imprisonment upon conviction for person who defiles a child aged between 16 and 18 years. I therefore sentence the appellant to 15 years imprisonment.
14. I convict the appellant of the offence of defilement contrary to **section 8(4)** of the *Sexual Offences Act* and sentence him to 15 years imprisonment.

DATED and DELIVERED at HOMA BAY this 17th day of November 2015

D.S. MAJANJA

JUDGE

Ms Foza, instructed by Nyauke and Company Advocates for the appellant.

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