



IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL NO. 19 OF 2014

(FORMERLY KISII CRIMINAL APPEAL NO. 100 OF 2013)

BETWEEN

ROBERT OUKO NYANJWA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

*(Being an appeal from the original conviction and sentence in Criminal Case No. 575 of 2012 at Senior Principal Magistrate's Court at Migori, Hon. P. Kulecho, RM dated on 16<sup>th</sup> September 2013)*

JUDGMENT

1. The appellant **ROBERT OUKO NYANJWA** was charged with the offence of defilement contrary to **section 8(1)(3)** of the *Sexual Offences Act, 2006*. The particulars of the offence were that on the night of 11<sup>th</sup> and 12<sup>th</sup> October 2012 at [Particulars Withheld] within Migori County he intentionally and unlawfully caused his penis to penetrate the vagina of WAO, a child aged 15 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* based on the same facts. He tried, convicted and sentenced to 15 years imprisonment.
2. This appeal must succeed because PW1, the complainant, testified that on the 11<sup>th</sup> October 2012 at 9 pm she was with the accused at home as they were friends and they knew each other. Although she admitted that on a previous date they had made love, on that day nothing happened as two police officers and her father stormed into the house and arrested the accused. The complainant was not re-examined on this aspect of her testimony nor was the charge amended to reflect that the complainant would have been defiled by the accused on another date.
3. In her judgment, the learned Magistrate stated as follows, "*The Court finds PW1 to be untruthful witness and thus rejects her evidence. On the other hand the Court finds PW3 to be a truthful witness and thus believes his evidence.*" In its entirety PW3 had testified that on 11<sup>th</sup> October 2012, PW1 and the accused were together. She did not testify that they had sexual intercourse.
4. It is the duty of the prosecution to prove its case beyond reasonable doubt. Its principal witness gave a version of events that was inconsistent with the charge and exonerated the accused. She was not declared a hostile witness nor were previous inconsistent statement put to her. Her statement confirmed the accused's unsworn testimony where he denied that he had sexual intercourse with the complainant. Any doubt could only be resolved in favour of the accused.
5. It was not for the Magistrate to try as make up the case for the prosecution. I also find that there was no evidence produced to show that the complainant was coerced to change her testimony or in any way influenced.

6. The State properly conceded this appeal. As a result, I allow the appeal, quash the conviction and sentence. The Appellant is set free unless otherwise lawfully held.

**DATED and DELIVERED at MIGORI this 15<sup>th</sup> day of August 2014**

**D.S. MAJANJA**

**JUDGE**

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

Ms Owenga, Prosecution Counsel, instructed by the Office of the Director of Public Prosecution for the respondent.