



REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA-BAY
CRIMINAL APPEAL NO. 20 OF 2014

BETWEEN

WYCLIFF OPIYO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 174 of 2013 of the Senior Principal Magistrates Court at Rongo, Hon. P. K. Rugut dated 5th May 2014)

JUDGMENT

1. In the subordinate court, the appellant faced the principal charge of defilement contrary to **section 8(1)(3)** of the ***Sexual Offences Act, 2006***. The particulars of the offence are that on diverse dates between 7th May 2013 and 10th May 2013 at [Particulars Withheld] within Migori County he intentionally caused his penis to penetrate the vagina of LAO a child aged 15 years. An alternative charge of committing an indecent act with a child contrary to **section 11(1)** of the ***Sexual Offences Act*** was also preferred based on the same facts.
2. After hearing, the appellant was convicted and sentenced 15 years imprisonment. He now appeals against the conviction and sentence based on the following grounds:
 - i. *The learned trial magistrate erred in law by failing to prove by the evidence adduced especially the age of the minor.*
 - ii. *The learned trial magistrate erred in law by not considering that defilement is an offence pegged on the age and proof of age is mandatory thereby making a case where age is unknown or unproven as totally defective.*
 - iii. *The learned trial magistrate erred in law by shifting the burden of proof in the circumstances against me.*
 - iv. *The learned trial magistrate further erred in law when he failed to appreciate the evidence given by the complainant was obtained through undue influence.*
 - v. *The learned trail magistrate further erred in law and in facts by meting out a sentence which was excessive in the circumstances.*
 - vi. *The learned trial magistrate erred in law and fact by failing to consider the mitigating circumstances and other options when sentencing me.*
3. The appellant, who was unrepresented, relied entirely on the grounds of appeal and urged the court

to set aside the conviction and sentence. On the other hand, the State through learned counsel, Mr Oluoch supported the conviction and sentence and urged the court to find that there was sufficient evidence to support the conviction.

4. The prosecution called four witnesses to prove its case. The complainant, PW1 testified that on 7th May 2013 at about 2 pm on the school opening day, her mother, PW3 took her to the stage where she boarded the accused's motor bike. Instead of taking her to school, the accused took her to his house by force. Over the course of three days he had sexual intercourse with her. On 10th May 2013, he returned her to the school where she had been reported missing. She was later taken to the police station by her mother and to hospital where she was examined by a clinical officer, PW2 at Rongo district Hospital.
5. PW2 examined PW1's genitalia where she found that it was normal as even though the hymen was broken. She noted that there were no tears on the cervix. She concluded that there was previous sexual activity. She prepared the P3 form and produced it in evidence.
6. PW1's mother, PW3, recalled that she escorted her to the bus stage where she boarded a motor bike. Although she did not know the cyclist personally, they agreed on the fare to take PW1 to school on 7th May 2013. It is only on the 9th May 2013 that she received information from her husband, who had been called by PW1's grandmother, that PW1 had not reported to school. She reported the matter at Rongo Police Station. On 10th May 2013, she collected PW1 from school and took her to hospital.
7. PW4 the investigating officer confirmed that she received a complaint of defilement on 10th May 2013 at Kamagambo Police Station. She investigated the matter and charged the accused.
8. As the first appeal, the court is obliged to conduct an independent assessment of the evidence and reach its own conclusion bearing in mind that it neither saw nor heard the witnesses (see ***Okeno v Republic [1972] EA 32***).
9. Under **section 8(1)** of the ***Sexual Offences Act*** a person who commits an act which causes penetration with a child is guilty of an offence termed as defilement. Under **section 2** of the ***Act***, "***penetration***" means the partial or complete insertion of the genital organs of a person into the genital organs of another person.
10. The identity of the perpetrator was established by the testimony of PW1 and PW3 who confirmed that the accused is the one who took PW1 to school and having been with the complainant in his custody for three days there was no basis for mistaken identity.
11. As to whether penetration was established, it is clear that for the three days, PW1 was subjected to intercourse. The learned magistrate properly directed herself that under **section 124** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)***, she could receive and convict the accused on the basis of uncorroborated evidence of the complainant. In this case, she observed the demeanor of the child and had no reason to doubt its credibility. On my part, I find the recorded testimony of PW1 clear, consistent and detailed enough leaving no doubt that the evidence of penetration was established. Furthermore, the medical evidence of PW2 corroborated the evidence of sexual intercourse.
12. The age of the complainant is an essential part of proof of the offence of defilement and underlies the basis for the sentence. The age in this case was proved by the production of the birth certificate which showed that PW1 was born on 26th May 1997. At the time the offence was committed she was 15 years old.
13. When put on his defense, the appellant gave sworn testimony in which he stated that he never committed the offence. He also stated that although he is in the motorbike business, he never met

PW1 on the 7th May 2013, took her to school or his home as alleged. He complained that he was not taken for medical examination to confirm that he did not commit the offence.

14.The prosecution evidence established that the appellant had intercourse with the complainant hence it was not necessary to conduct a medical examination on the appellant. In any case, the accused was arrested after the incident and any medical test would have been worthless.

15.The sentence is neither harsh nor excessive. It is the minimum sentence provided under **section 8(3)** of the **Act** that is 15 years imprisonment. In the circumstances, there is no basis for interference.

16.The conviction and sentence are affirmed and the appeal is dismissed.

DATED and DELIVERED at HOMA BAY this 1st August 2014

D.S. MAJANJA

JUDGE

Appellant in person.

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