



IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL NO. 29 OF 2014

(FORMERLY KISII HCCRA NO. 275 OF 2012)

BETWEEN

DANIEL ODHIAMBO OYAMO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 80 of 2012 at Senior Principal Magistrate's Court at Migori, Hon. G. W. Kirugumi, RM dated on 18th December 2012)

JUDGMENT

1. Before the trial Court the appellant, **DANIEL ODHIAMBO OYAMO**, faced a charge of defilement contrary to **section 8(1) and (3)** of the ***Sexual Offences Act, 2006***. The particulars of the offence were that between 21st January and 26th January 2012 at [Particulars Withheld] within Migori County, he intentionally and unlawfully cause his penis to penetrate the vagina of E O O, a child aged 14 years. He also faced an alternative charge of committing an indecent act with a child contrary to **section 11(1)** of the ***Sexual Offence Act, 2006*** based on the same facts.
2. The appellant was convicted on the principal charge and was sentenced to serve 20 years in prison. He now appeals against the conviction and sentence. The essence of his appeal is that the prosecution did not prove that there was sexual intercourse between him and the complainant. In his written submissions he contended that the ingredients of the offence were not established. The State on its part supported the conviction and sentence on the ground that the prosecution proved that the appellant committed the offence.
3. The prosecution case was supported by five witnesses. PW 1 testified that at the time she was 14 years old in standard six. She recalled that on 21st January 2012 she went to the appellant's house to be prayed for as she had some illness afflicting her left hand. She spent three days at his house, where the appellant had intercourse with her on 21st January, 23rd January and 24th January 2012. She further recalled that on 26th January, an elder came to the house, found her and returned with two policemen who took her to the Chief's camp. She was later to hospital and was examined by the doctor.
4. PW 2, the mother of PW 1, testified that on 21st January 2012, she sent PW 1 to look for vegetables but she did not return home. She reported the matter to the area Chief on 22nd January 2012. She stated that PW 1 was found in the appellant's house. She knew the appellant as a preacher who has once come to her house to pray for PW 1.

5. PW 3, a dental surgeon, examined PW 1 on 30th January 2012. He testified that as the incident had taken place beyond 48 hours he could not detect any blood stains, bruises or spermatozoa. He therefore could not conclusively determine whether sexual intercourse took place. After conducting an age assessment, he was of the opinion that PW 1 was between 17 and 19 years old.
6. PW 4, the area Chief, confirmed that he received information from PW2 that PW 1 was missing. He told her to make a report to the Primary School PW 1 was attending. PW 2 brought to her the letter from the School confirming that PW 1 has been absent from school. He started investigations and informed other Chiefs and elders in the locality to assist. A clan elder informed him that the appellant was praying for people. He informed the police who went to the appellant's house where they found PW 1. The appellant was thereafter arrested.
7. PW 5, the investigating officer, investigated the matter, took statements from witnesses, issued the P3 form and later charged the appellant.
8. When put on his defence, the appellant elected to give an unsworn statement. He denied the charges. He stated that he prays for the sick. He recalled that PW 2 brought PW 1 to his house for prayers on 28th December 2011. He also went to their place on 30th December 2011. He stated that a week later PW 2 brought PW 1 to his house and left her there for three days to be prayed for. He stated that the case was as a result of a grudge as PW 2 promised him Kshs. 5,000/- if PW 1 recovered. He testified that he was charged because he demanded the money.
9. The learned Magistrate found a fact that PW 1 knew the appellant and that even though the medical evidence was inconclusive as to the act of penetration, she believed the testimony of PW 1. The grounds for believing PW 1 was that she was the appellant's house for three days and there was no reason for her to lie about having been sexually assaulted. She also dismissed the appellant's defence as incredible in light of the prosecution evidence.
10. As the first appellate Court, this Court is called upon to evaluate the evidence before the subordinate Court and reach its own independent conclusion bearing in mind that it neither saw nor heard the witnesses (see *Okeno v Republic* [1972]EA 32).
11. Under **section 8(1)** of the *Sexual Offences Act, 2006*, the prosecution must prove, beyond reasonable doubt, that the appellant caused the act of penetration, which 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* " and that the other person is a child.
12. The evidence implicating the appellant was that of a single witness. The proviso to **section 124** of the *Evidence Act*, entitles the Court to convict a person based on the uncorroborated evidence of the complainant if the court is satisfied that the complainant is telling the truth. Like the learned magistrate, I find that the appellant was known to the complainant and she was at his house for a period of three days. Her testimony was clear and consistent. Her absence during that period was corroborated by PW 2 and PW 4.
13. The medical testimony of PW3 was not helpful in proving penetration as an element of the offence. But this alone was not fatal to the prosecution case as medical evidence is not necessary when penetration can be proved by other means (see *Andrew Cauri Ndungu v Republic NAI CA Criminal Appeal No. 132 of 2008* [2013]eKLR). In this case, the testimony of PW 1 was sufficient to prove penetration.
14. As regards the age of PW 1, the dental surgeon, who conducted an independent assessment of the age, concluded that she was between 17 and 19 years old. Her birth certificate states that she was born on the 4th May 1998. Proof of age in sexual offence is crucial in two respects. The first is to determine whether the offence constitutes rape or defilement. In the former case proof of consent is necessary while in the latter case consent is not an issue. Second, in the case of defilement, the age determines the penalty to be imposed.

15. The prosecution led inconsistent evidence on the issue of age. The doctor, who was an independent witness, assessed the age of PW 1 to be between 17 and 19 years. While the birth certificate showed that the complainant was born on 8th May 1998. The birth certificate was issued on 31st May 2012 which was during the pendency of the proceedings. The appellant's defence is that there was a grudge between him and the complainant's mother. It is therefore possible to conclude that the certificate was issued for the purposes of the proceedings. In the circumstances there is reasonable doubt as to the age of the complainant particularly whether she is a child or an adult.

16. As there is a possibility that the complainant could have been above 18 years, any doubt must be resolved in the appellant's favour. While it is possible to have a retrial, the trial was not defective or illegal; the result was a failure by the prosecution to prove an essential ingredient of the offence. It should not be given another chance to make up its case.

17. Consequently the appeal is allowed. The conviction and sentence are quashed. The accused is set free unless otherwise lawfully held.

DATED and DELIVERED at MIGORI this 23rd day of September 2014

D.S. MAJANJA

JUDGE

Appellant in person.

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