



IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL NO. 18 OF 2014

(FORMERLY KISII HCCRA NO. 72 OF 2013)

BETWEEN

GEORGE OKOTH OBWORO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 682 of 2012 at Senior Principal Magistrate's Court at Migori, Hon. S. M. Shitubi, CM dated on 4th May 2012)

JUDGMENT

1. The appellant **GEORGE OKOTH OBWORO** appeals against a conviction and sentence of 20 years imprisonment imposed after he was found guilty of defilement contrary to **section 8(1)(4)** of the ***Sexual Offences Act, 2006***. The particulars of the offence as set out in the charge were that:

On 27th Day of March 2011 at [Particulars Withheld] in Migori County in the Republic of Kenya, he intentionally and unlawfully caused his penis to penetrate the vagina of LAO a girl aged 16 years.

2. The appellant 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.

3. The prosecution marshalled four witnesses to prove its case. PW 1, the complainant testified that she was aged 16 years old attending primary school. She stated that on 27th March 2011 at about 10 am, her neighbour, Milka, asked to meet the appellant. At Milka's place she met the appellant with five other people who told her to go and see the appellant's home in Nyatike. They promised her that she would return the following morning. She left on a *boda boda* with the appellant and when she got to his home, she slept in his house. The appellant had sexual intercourse with her. When she requested to go back to her home, he refused and tied her hands and legs with a rope. He only untied her when she accepted to be his wife. She stated that she stayed there for 6 during which time the appellant continued to sexually assault her. PW1 stated that she could not leave as she did not have any money. She only ran away when the appellant gave her some money to buy food. When she arrived home she met her father and narrated her ordeal. She was taken to Migori District Hospital where she was examined by PW3.

4. PW2, PW1's, father testified that on 27th March 2011, PW1 disappeared from home. One of his children told him that PW 1 had gone with a certain woman. He suspected that it was Milka, his neighbour, but when he asked her she denied having seen PW1. He reported the matter to the Chief. He further testified that on 6th May 2011 when PW 1 came back home she had pus was oozing from her legs. He reported the matter to the village elder and the chief who referred him to Migori Police Station. He

also took PW 1 to Migori District Hospital where she was treated by PW3. He further testified that PW 1 identified the appellant and the appellant's house.

5. PW3, a clinical officer, testified that PW1 was examined by his colleague and that she had bruises on the right side of the face, and rope marks on the upper hands and lower limbs. His examination revealed that PW1 had been sexually assaulted. He filled a P3 form and classified the injury as harm. He also confirmed that PW 1 had contracted a sexually transmitted disease.

6. The investigating officer, PW 4, testified that he was at Migori Police Station on 11th May 2011 when PW1 accompanied by PW2 came and the circumstances where the appellant lured PW 1 to his home and sexually assaulted her. He carried out investigations, arrested the appellant and charged him.

7. When the accused was put on his defence, he gave unsworn evidence where he denied the charge. He stated that the charge against him was planted and denied knowing PW 1. He further stated that the people who convinced PW 1 to go with him were not called to give evidence and that he should be acquitted.

8. The learned magistrate found that the prosecution had proved its case beyond reasonable doubt. The appellant appeals against the conviction and sentence on the following grounds raised in the supplementary grounds of appeal:

- i. *That the learned trial magistrate erred in law and fact in convicting him to an offence to which he pleaded not guilty.*
- ii. *The learned trial magistrate erred in law and in fact in failing to observe that there was no direct evidence linking the appellant to the offence and that he was not properly identified.*
- iii. *That the learned trial magistrate erred in law and fact in failing to observe that key witnesses were not called to testify.*
- iv. *The learned trial magistrate erred in law and in fact in failing to find that the medical report exonerated him from the alleged offence since the complainant was found to be suffering from a sexually transmitted disease yet he was not examined to ascertain if he really penetrated her and infected her with a sexually transmitted infection.*
- v. *That the learned trial magistrate erred in law and in fact in failing to observe that it was within the law for the age of the complainant to be ascertained to prove the right sentence imposed.*

9. Ms Owenga, learned counsel for the State, supported the conviction on grounds that the conviction was founded on evidence.

10. As this is the first appeal, the court is enjoined to consider the entire evidence, evaluate it and reach an independent conclusion bearing in mind that it neither heard nor saw the witnesses testify see ***Okeno v Republic [1972] EA 32***). The grounds outlined by the appellant call upon the court to evaluate the entire prosecution evidence.

11. In order to prove the offence of defilement under **section 8(1) (3)** of the ***Sexual Offences Act***, the prosecution must establish that the accused committed an act which caused penetration. Penetration is defined at **section 2** of the ***Act***, to mean the partial or complete insertion of the genital organs of a person into the genital organs of another person. It is also mandatory to prove the age of the complainant for the purpose of determining whether the offence is one of defilement and meting out the appropriate sentence.

12. The fact that the appellant is the one who committed the act was established by the testimony of PW 1. She stayed with the appellant in his house together with his wife for a period of time and was defiled throughout that period. In the circumstances, there was no opportunity for mistaken identity.

13. PW1's evidence of sexual intercourse was clear, consistent and credible. She testified that it was the first time for her to have sexual intercourse. Her testimony was corroborated by the medical evidence of PW3 who confirmed that not only the sexual assault but the assault that was caused by the appellant tying her hand and legs. The proviso to **section 124** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** is

clear that it is not necessary for the evidence of a single witness to be corroborated in sexual offences where the Court is satisfied that the victim is telling the truth. However, as I have outlined above, the evidence of the fact of penetration was in fact corroborated by the other evidence. The fact that the appellant was not examined to confirm whether he had a sexually transmitted disease is not fatal to the prosecution case. What the prosecution was required to prove is penetration and the evidence presented points to the appellant.

14. In his submissions, the appellant complains that there were material contradictions in the prosecution evidence particularly as regards the dates that the complainant is alleged to have been at the appellant's home. PW 1 testified that she was there for 6 weeks while her father PW 2 stated that she was away from 27th March 2011 to 6th May 2011. In my view, the contradiction is not material. PW 1 gave the period she understood to be the time when she was at the appellant's home while PW 2 gave the precise dates. What is true is that the complainant was away from her home for some time and it has been proved she was at the appellant's place at the time. The appellant did not raise the issue of an alibi in his defence nor did he cross-examine PW 1 and PW 2 on the dates or time.

15. The appellant complains that the prosecution failed to call crucial witnesses. **Section 143** of the **Evidence Act** states, "*No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for proof of any fact.*" In **Bukenya and Others v Uganda [1972] EA 549**, the Court held that where essential witnesses were not called, the court was entitled to draw an inference that if their evidence had been called, it would have been adverse to the prosecution case. In this case, the witnesses who were not called would merely corroborate the evidence of PW 1 which, as I have stated, was not necessary as her evidence was clear and convincing and taken together with the prosecution evidence proved the offence.

16. The age of a child is a question of fact to be proved by evidence. In this case, PW 1's birth certificate was produced and it confirmed that she was born on 15th June 1995, hence at the time of the offence, she was 15 years old.

17. The appellant's defence is that he did not know the complainant cannot be believed in light of the evidence of PW 1. The appellant's allegations that the charges were planted on him are unsubstantiated as he never raised any issue in cross examinations that could point towards a grudge or anything.

18. On the whole therefore, I find that the conviction was well founded on the evidence established by the prosecution. It is affirmed.

19. The appellant has raised the issue of age of the complainant. **Section 8 (4)** of the **Sexual Offences Act, 2006** provides that the minimum sentence when the child is 16 years old is 10 years imprisonment.

20. The evidence before the court was that PW 1 in her evidence stated she was 16 years old. The birth certificate produced shows that she was born on 15th June 1995. While the medical report shows that she was 16 years old. Whereas according to the birth certificate PW 1 was 15 years old at the time the offence was committed. The learned magistrate did not make a finding on this issue and I am prepared to give the appellant the benefit of doubt on the age for purposes of the sentence. The sentence imposed was therefore within the law and is accordingly affirmed.

21. The conviction and sentence are affirmed. The appeal is dismissed.

DATED and DELIVERED at MIGORI this 23rd September 2014

D.S. MAJANJA

JUDGE

Appellant in person.

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