



IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL NO. 1 OF 2014
(FORMERLY KISII HCCRA NO. 5 OF 2014)

BETWEEN

DAVID OMONDI ADEK.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case

No. 286 of 2012 at Senior Principal Magistrate's Court at Migori,

Hon. D. K. Kemei, SPM dated on 2nd April 2013)

JUDGMENT

1. The appellant, **DAVID OMONDI ADEK**, was convicted of the offence of defilement contrary to **section 8(1) and (4)** of the **Sexual Offences Act, 2006**. He was sentenced to serve 15 years imprisonment. The particulars of the offence were that on the 4th and 6th days of May 2012 at [Particulars Withheld] Migori County he intentionally caused his penis to penetrate the vagina of LAO a child aged 17 years.

2. He now appeals against the conviction and sentence on the grounds that may be summarized as follows; that the learned magistrate erred in holding the complainant was aged 17 years without an age assessment report or birth certificate to support the charge against him and that the learned magistrate erred when he failed to consider the appellant's defence under **section 8(5)** of the **Sexual Offences Act, 2006**. The appellant supported the grounds with written submissions.

3. Ms Owenga, learned State counsel, supported the conviction on the ground that it was founded on the evidence and the prosecution proved all the elements of the offence. She submitted that the sentence imposed was the mandatory sentence provided in law and it was neither harsh nor excessive.

4. In determining the appeal, this Court is called upon to evaluate the entire evidence and come with its independent conclusion having regard to the fact that it neither heard nor saw the witnesses testify (see **Okeno v Republic [1972] EA 32**). In order to accomplish this task it is necessary to appreciate the facts as they emerged before the trial court.

5. PW 1, LAO, testified that she was a secondary school student aged 17 years. She stated that she was seduced by the appellant at her school and they eloped. They were both arrested on 13th May 2012. She admitted that they both had sexual intercourse. PW 2, the principal of the school where PW 1 was

studying, recalled that he learnt LAO was missing from school and upon investigating the matter he learnt that appellant and the LAO were residing together in [Particulars Withheld]. He accompanied the police officer from Macalder Police Station to arrest LAO and the appellant. PW 3, an administration police officer, testified that he was the one who accompanied PW 2 to [Particulars Withheld] and found LAW and PW 1 living together.

6. The final prosecution witness, PW 4, a clinical officer at Macalder District Hospital stated the he examined LAO, who was 17 years old, on 13th May 2012. He established she had had sexual intercourse before and had contracted syphilis. He also established that the appellant had syphilis.

7. When called upon to give his defence, the appellant gave a sworn statement where he admitted that LAO was his lover and that they the eloped and were later arrested. He also admitted that he engaged in sex with LAO.

8. In order to prove the offence of defilement under **section 8(1)** of the **Sexual Offences Act, 2006**, the prosecution must prove that a person 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. The learned magistrate found that the offence of defilement was proved. In my view and in light of the testimony of PW 1 and the express admission of the appellant, there is no doubt that penetration was established as an element of the offence.

10. The age of the complainant is an essential ingredient of the offence of defilement. Proof of age is a question of fact proved by the available evidence. In this case PW 1 herself testified that she was 17 years and produced a birth certificate which showed she was born on 14th September 1994. This fact was not challenged in cross-examination by the appellant and there was no need to adduce further medical evidence to prove the complainant’s age. I therefore find and hold that the age of the complainant was proved.

11. The appellant contends that the learned magistrate failed to consider his defence under **section 8(5)** of the **Sexual Offences Act**. This provision states that it is a defence to a charge of defilement if it is proved that the complainant deceived the accused person into believing that he or she was over the age of 18 years at the time of the alleged commission of the offence and the accused reasonably believed that the child was over the age of 18 years. The appellant contends that he was deceived by the complainant as he believed that she was above 18 years due to her large body.

12. Unfortunately, the appellant did not raise the issue that the complainant deceived him at the trial. He did not put any questions to the witnesses in cross-examination that would have suggested that he was deceived. Likewise his defence did not allude to the issue. The evidence emerging from the trial is that the two were love birds and they eloped together.

13. In the circumstances, the prosecution proved its case and upon analysis of the evidence I am satisfied that the conviction should be and is hereby affirmed.

14. After conviction, the appellant stated in mitigation that he was 16 years old. According to the record, no age assessment was made or presented by the prosecution. In the case of **Githono James Maina v Republic Migori HCCR App. No. 12 of 2014 [2014]eKLR**, I noted that, “*It was important for the learned magistrate to ascertain the fact of the age of the appellant before the trial as any person below the age of 18 years is a child and is entitled to all the protections and rights of a child under the Children Act. The age of the appellant also affects the sentence under section 8 of the Sexual Offences Act.*”

15. The age assessment was presented after completion of the case and for purposes of sentencing. The medical report presented stated that he was above 18 years and that, “*We considered him to be 19 years old within our observation.*” Had the evidence be placed before the court as part of the prosecution case, he would have had the opportunity to challenge it. In the case of **Dennis Abuya v R KSM CA CR APP.**

No. 164 OF 2009 [2010] eKLR, the Court of Appeal dealt with a case where the evidence regarding the age of the appellant at the time of the offence was committed was inconclusive. The Court stated as follows:

Neither the trial magistrate, nor the learned judge on first appeal dealt with the issue of the appellant's age at the time he allegedly committed the offence. It may be that he was eighteen years of age at the relevant time; but it may equally be that he was below eighteen years at the time. We do not understand the provisions of the Sexual Offences Act to authorize the imprisonment of minors and we are unable, on the material on record, to rule out the possibility that the appellant was under eighteen years on 19th June, 2007 when the offence was allegedly committed. Section 8(7) of the Sexual Offences Act which states, "Where a person is charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act and the Children Act." The question of imprisoning a minor does not, therefore, arise under the provisions of the Sexual Offences Act. [Emphasis mine]

16. I am prepared to give the appellant the benefit of doubt as regards his age at the time of commission of the offence hence he ought to have been sentenced in accordance with the options available under **section 191** of the **Children Act**. Since he has been in custody for a period of over one and a half years, I direct that he serves under the a further period of one year from the date hereof under probation as permitted by **section 191(1)(c)** of the **Children Act**.

17. The conviction is affirmed. The appeal succeeds to the extent that I direct that the appellant serve one year probation from the date hereof. The appellant is set free unless otherwise lawfully held.

DATED and DELIVERED at MIGORI this 24th day of October 2014

D.S. MAJANJA

JUDGE

Appellant in person.

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