



IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL NO. 14 OF 2014

(FORMERLY KISII HCCR APPEAL NO. 44 OF 2013)

BETWEEN

JOSHUA OUMA ONTHAO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 16 of 2012 at Senior Principal Magistrate's Court at Migori, Hon. E. M. Nyaga, SRM dated on 16th May 2013)

JUDGMENT

1. In the subordinate court, **JOSHUA OUMA ONTHAO** was charged with the offence of defilement contrary to **section 8(1) and (2)** of the ***Sexual Offences Act, 2006***. He was convicted and sentenced to life imprisonment. The charge against the appellant was that between the night of 3rd and 4th January 2012 at [Particulars Withheld] within Migori Township, he intentionally caused his penis to penetrate the vagina of SA, a child aged 11 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, 2006*** based on the same facts.
2. SA, PW 1, testified that she was an 11 year old standard four primary school student. She narrated to the court how on 3rd January 2012 at about 8pm while she was going to her aunt's place, someone held her by the neck and threatened to kill her. She was taken into a room where she was subjected to sexual assault the whole night. She stated that she only saw the appellant in the morning. She reported the ordeal to her aunt, PW 2, the next morning who reported the incident and took her for examination at the hospital.
3. The complainant's aunt, PW 2, testified that on 4th December 2012, PW 1 came home in the morning, at around 9 am, in blood stained clothes. She stated that PW 1 informed her that the appellant had defiled her. She reported the matter to the police and took PW 1 to hospital. She testified that she knew the appellant as she had seen him in the neighbourhood where her sister lived and the he lived next door to her sister.
4. PW 3, an administration police officer, testified that on 4th January 2013 at about 2.30 pm he was called by someone called Kevin Odhiambo who informed him that someone had been caught who had defiled a child and was trying to escape. Accompanied by another officer, he went to the scene and arrested the appellant and handed him over to Lwanda Police Post. They also escorted the PW 1 to Sori Sub-district Hospital. At Lwanda Police Post the appellant was arrested by PW5,

a police officer, who testified that the appellant was brought by the administration police officers. She issued a P3 form to PW 1, recorded statements and caused the appellant to be charged.

5. The last prosecution witness was PW 5, a clinical officer, who examined PW 1 at Karungu Sub-district Hospital on 4th January 2012. He testified that the examination was done about 5 hours after the incident. Upon examination of PW 1 he observed swelling of labia, vaginal bruises extending to the cervix and a whitish blood discharge from the vaginal opening which suggested penetration. Urinalysis was performed and it revealed spermatozoa and epithelial cells. He produced the medical card and P3 form as exhibits.
6. The appellant gave an unsworn statement in his defence. He denied committing the offence and all the allegations made against him. He said that the person named Kevin is the person who committed the act of defilement.
7. The learned magistrate found that the prosecution had proved its case, convicted the appellant and sentenced him to life imprisonment. The appellant now appeals against the conviction and sentence on principally on the grounds that he was not the one who committed the offence. Ms Owenga, learned counsel for the State, submitted that the identity of the appellant was proved by the testimony of PW 1 who gave clear testimony and PW 2 who confirmed that she knew the appellant. She submitted that all the elements of the offence of defilement were proved and that the sentence was within the law.
8. The case for the appellant calls upon the court to re-evaluate the evidence and make its own independent findings having regard to the fact that it never heard or saw the witnesses testify. This task of the first appellate court was elucidated in ***Okeno v Republic [1973]EA 32*** as follows;

An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the Appellate Court's own decision on the evidence. The first Appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.

9. The ingredients of the offence of defilement are set out in **section 8(1)** of the ***Sexual Offences Act*** and are satisfied when the prosecution proves that a person has 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."
10. PW 1 gave clear testimony on how she was sexually assaulted. Her testimony remained unshaken in cross-examination. The proviso to **section 124** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** does not require her testimony to be corroborated in order to found a conviction. It states as follows;

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

11. Notwithstanding the said provision, the act of penetration was corroborated by other testimony and evidence namely that of PW 2 who saw the PW 1, on the morning after the incident, in bloodied clothes and PW 5, the clinical officer, who examined her and concluded that she had been sexually assaulted. Likewise, the age of the complainant was proved by her testimony and the P3 medical report which showed that her age was assessed by PW 5 as 11 years.

12. The main issue for consideration is whether the appellant was identified as the person who defiled PW 1 on the material night. In his memorandum of appeal filed, the appellant states that no person in the neighbourhood came to testify. That in her statement, PW 1 stated that she defiled by a person she knew as Kevin Odhiambo yet she pointed out the appellant as the person who defiled her thereby contradicting herself. That his real names are Samson Taabu Onthao as stated in his national identity card and not Joshua Ouma Onthao. In view of the contradictions, the appellant argues that it is possible that it is either Kevin or Joshua who defiled PW 1 hence his conviction should be quashed.
13. The appellant raises the issue of his name for the first time in this appeal. He did not raise it either by putting it to the prosecution witnesses in cross-examination or in his defence. As the issue of his name and in particular the name appearing on his identity card was a matter peculiarly within his knowledge, the appellant ought to have raised it in his defence. I therefore dismiss the ground that the appellant's name is not Joshua Ouma Onthao.
14. The second issue is that of the person known as Kevin Odhiambo. He is the person who called PW 3 and informed her that someone had defiled a child. When the identity of the person known as Kevin was put to PW 1 and PW 2, they denied knowing such a person. The issue then is whether there is a possibility that the said Kevin could have committed the offence. PW 1 gave clear and consistent evidence that she was defiled the whole night by someone she did not know but that she identified him in the morning. Her evidence was clear and unshaken on cross-examination. She stated that she told her aunt immediately after she left the house. The testimony was buttressed by that of the PW 2 who knew him as the next door neighbour of her sister. It also emerged from the cross-examination of PW 1 that she took PW 2 to the appellant's place where she identified him and this is also confirmed by PW 2 who stated when cross-examined that she was threatened by him when she identified him. I find that in the totality of the evidence, the appellant was properly identified as the person who committed the felonious act. I therefore affirm the conviction.
15. Under **section 8(2)** of the *Sexual Offences Act*, the mandatory sentence imposed where a person is found guilty of defiling a child aged 11 years or less is life imprisonment. The sentence is mandatory and in light of the conviction, it is also affirmed.
16. The conviction and sentence are affirmed. The appeal dismissed.

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

D.S. MAJANJA

JUDGE

Appellant in person

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