



REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL NO. 28 OF 2014

BETWEEN

JANNES OCHOLA ADUNDA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 691 of 2011 at Principal Magistrate's Court at Migori, Hon.E.M. Nyaga, Ag. PM dated on 6th August 2014)

JUDGMENT

1. The appellant, **JAMES OCHOLA ADUNDA**, was charged with the offence of defilement contrary to **section 8(1) and (3)** of the ***Sexual Offences Act, 2006***. The particulars of the offences were that on diverse dates between 24th and 30th November 2011 at [Particulars Withheld] within Migori County the appellant intentionally and unlawfully caused his penis to penetrate the vagina of VAA, a child aged 13 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***. He was convicted on the principal charge and sentenced to serve 20 years imprisonment.
2. He now appeals against the conviction and sentence on the basis of the grounds set out in the amended petition of appeal filed on 24th September 2014. There were a total of 27 grounds set out in the petition but Mr Abisai, learned counsel for the appellant, condensed the arguments in support of the appeal into three broad grounds. The first ground was that the learned magistrate contravened the mandatory provisions of **section 169** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*** by failing to specify in the judgment the specific offence which the appellant was convicted of. He cited the case of ***Joseph Anyanga v Republic Busia HCCRA No. 28 of 2004 [2006]eKLR*** where Ombija J., stated that, “[O]nce it is conceded that the trial court did not comply with the mandatory provisions of section 169 of the Criminal Procedure Code, the whole edifice on which the conviction is based crumbles and with it the sentence.” Second, that there was no evidence of penetration as the complainant’s genitalia were normal and no spermatozoa were seen. Third, that there prosecution failed to prove that the offence of defilement.
3. Learned counsel for the respondent, Ms Owenga, supported the conviction and submitted that the prosecution proved all the elements of the offence and that the sentence was proper and legal. As regards want of compliance with **section 169** of the ***Criminal Prosecution Code***, she argued that the failure to comply with the same was an irregularity and once the court was satisfied that there was evidence to convict the appellant then it could correct the error.

4. As this is the first appeal, the court is enjoined to review all the facts and evidence and come to its own independent conclusion bearing in mind that it neither saw nor heard the witnesses testify (see ***Okeno v Republic* [1972] EA 32**).
5. In order to deal with the appeal it is necessary to outline the material facts as they emerged from the evidence in the subordinate court. PW1, the complainant, testified that she was aged 13 years and was attending school in Class 4. She recalled how on 24th November 2011, she was taken to the accused home, invited there and had sexual intercourse with the appellant. She stated that she was at his place from 24th November 2011 upto 30th November 2011 and could not leave as the appellant told her she was his wife. She was rescued by her father on the 30th November 2011.
6. PW 2, the area assistant chief, recalled that on 24th November 2011 he received information that PW 1 had been married. Subsequently, he received the same information from another person causing him to personally go to the appellant's home where he found PW 1 who told her that she had been married to the accused. He took the girl to Bondo AP Camp where she spent the night. He called the Children's office in Migori to cause the appellant to be arrested. He stated that in order to arrest the accused, PW 1's father tricked him into attending dowry negotiations and when he came to his office he was arrested.
7. The clinical officer, PW 3, testified that he examined PW 1 on 1st December 2011. He examined genitalia and found her labia and cervix intact and normal though he concluded that she was sexually active. He did not see any spermatozoa.
8. The investigating officer, PW 4, testified that on 1st December 2011, he re-arrested the accused who were being brought by administration officers. He carried out investigations, caused PW 1 and the appellant to be examined and charged the appellant.
9. The appellant was put on his defence and in his sworn testimony he said that PW 1 had run away and stayed in his house for only one night. He stated that he informed PW 1's father that she was at his place and the father said that the girl had the habit of running away and that he would send his brother to get her. The following day when he returned home he found that the girl had been arrested. He went to the Assistant Chief office where he was arrested together with the girl's father.
10. The appellant attacked the judgment on the basis on non-compliance with **section 169** of the ***Criminal Procedure Code***. In the judgment the learned magistrate stated, "*The prosecution has then proved this case beyond reasonable doubt and accordingly I will be convict the accused person under section 215 of CPC.*" The learned magistrate did not specify whether the conviction applied in respect of the principle charge or the alternative charge.
11. Counsel for the appellant termed this omission as fatal while the State contended that it was a curable error. This issue was recently dealt with by the Court of Appeal in ***Republic v Edward Kirui* NRB CA Criminal Appeal No. 198 of 2010 [2014]eKLR**. The court was categorical that non-compliance with **section 169** of the ***Criminal Procedure Code*** did not render the conviction a nullity. It stated;

In an ordinary criminal appeal therefore non-compliance with the provisions of section 169 of the Criminal Procedure Code though not invalidating a conviction, would enable the court consider the case on its merit and reverse conviction if that be warranted..... A mere non-compliance does not render the entire trial a nullity.
12. The case must now be considered on its merits and I now turn to the central issue in this appeal. It is whether the appellant committed the offence. In order to secure a conviction for the offence of defilement under **section 8(1)** of the ***Sexual Offences Act***, the prosecution must establish that the 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.*”

13. PW 1 testified that she knew the appellant prior to the incident. She described the fact that she had sexual intercourse on the night of 24th November 2011. She stayed with the appellant for at least a week hence removing any doubt as to his identity. In any event, the appellant admitted that PW 1 was in his house for the one night when she came to his home.
14. The next issue is that of penetration. This was proved by the testimony of PW 1. Her account of the ordeal was very clear and consistent and was not contested by the appellant in cross-examination. **Section 124** of the **Evidence Act (Chapter 80 of the Laws of Kenya)** does not require her testimony to be corroborated. The testimony of PW 3 that there was her genitalia were normal does not undermine the prosecution case. PW 1 testified that she had sexual intercourse on 24th November and she was examined on 1st December 2011 hence it is likely that the examination would not yield positive results.
15. The appellant’s defence, which amounted to a mere denial, could not stand scrutiny. At least he was at home on the night PW 1 stated that she was defiled. He did not give an account of the full week that she was staying at his home as his wife. The appellant’s defence was properly rejected.
16. During the proceedings the prosecutor indicated that she had not secured PW 1’s birth certificate or baptismal card to prove her age. These documents were eventually not produced. Was the age of PW 1 proved? The proof of age of a child under **section 8** of the **Sexual Offences Act** is an essential ingredient of the offence. It is necessary to show the victim is a child for purposes of the proof of the offence and for determination of the penalty. The proof of age is a question of fact. PW 1 testified on oath that she was 13 years and in standard 4 and PW 3 assessed her age as 13 years in the P3 form. The appellant did not ask any questions to suggest that he contested her age. I therefore find that the age of the child was proved.
17. The sentence imposed was the mandatory minimum sentence under **section 8(3)** of the **Sexual Offence Act** and as such there is no error in the sentence.
18. I affirm the conviction and sentence. The appeal is dismissed.

DATED and DELIVERED at MIGORI this 21st day of November 2014.

D.S. MAJANJA

JUDGE

Mr Abisai, instructed by Abisai and Company Advocates for the appellant.

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