



REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL NO. 32 OF 2014

BETWEEN

F O D..... APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 1072 of 2013 at Chief Magistrate's Court at Homa Bay, Hon. N. Kariuki, RM dated on 14th March 2014)

JUDGMENT

1. The appellant **F O D** was initially charged with the offence of incest contrary to **section 20(1)** of the ***Sexual Offences Act, 2006***. The charge before the court alleged that on 10th September 2013 at [Particulars Withheld] within Mbita District he intentionally caused his penis to penetrate the vagina of DAO, a child aged 13 years who was, to his knowledge, his daughter. He 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.
2. In the course of the proceedings, the original charge was substituted with that of defilement contrary to **section 8(1)** as read with **section 8(3)** of the ***Sexual Offences Act***. He was accordingly convicted and sentenced to serve 35 years imprisonment.
3. Before I proceed to consider the grounds of appeal, I will outline the evidence emerging from the trial. PW 1 testified that she was 13 years and in Class 5. She testified she lived with her father, the appellant, mother and her four siblings. She gave graphic testimony how the appellant had sexual intercourse with her on 10th September 2014 at 6 pm when her mother was had gone in to the Salon where she worked. He threatened her not to make any noise. Her sister, PW 3, saw what happened. She did not tell her mother that night as she had been threatened by the appellant.
4. PW1 further testified that on 13th September 2013, the appellant tried to have sex with her by offering her Kshs. 50 but she refused. It is only on 15th September 2013, that PW 1 told her mother, PW 2, what happened and when she asked him what happened he chased her away. PW 2 reported the matter to the police station where she was given a P3 form which she took to Mbita District Hospital where she was examined by the doctor.
5. PW 2 produced a baptismal card showing that her daughter, PW 1, was 13 years old. She testified that although the appellant was her husband he was not PW 1's biological father. She recalled that on 15th September 2013 when she arrived from her work at the Salon, PW 1 told her how she had been sexually

assaulted by the appellant on 10th September 2013. When she questioned the appellant about the issue on that day, he chased her with a panga whereupon she reported the matter to Mbita Police Station.

6. PW 3, a sister to PW 1, testified that she was 8 years old and on 10th September 2013 after playing she went home at about 6 pm and found the appellant lying on PW 1 who was naked at the time. The appellant told her not to tell anyone and she did not tell PW 2 because she was afraid of the appellant. She later told PW 2 after PW 1 had disclosed what happened.

7. PW 4, a clinical officer at Mbita District Hospital, testified that he examined PW 1 on 16th September 2013, six days after the defilement incident. He noted that her clothes were intact and not stained. There was no vaginal discharge, her labia were intact, no lacerations were noted and her hymen was absent. Her genitalia were normal and all the tests conducted for HIV and venereal disease were negative.

8. PW 5, the investigating officer, testified how she received the complaint, recorded statements from the witnesses and made investigations leading to the appellant being charged after he presented himself at Mbita Police Station.

9. When put on his defence, the appellant elected to remain silent.

10. The appellant now appeals against the conviction and sentence on the following grounds set out in his petition filed on 16th April 2014;

(a) That the prosecution did not make any attempt to medically link him with the offence as he was not subjected to any medical examination.

(b) That the age of the complainant was not ascertained to support the charge and sentence of 35 years imprisonment.

(c) That the charge of defilement was not supported by the evidence as he ought to have been charged with incest instead.

The appellant supported his grounds of appeal with written submissions.

11. Mr Oluoch, counsel for the State, opposed the appeal. He submitted that the prosecution had proved the elements of the offence and that the testimony of PW 1 was corroborated by that of PW 2 and PW 4 although corroboration was not necessary under **section 124** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)***. He asserted that the age of the child was proved by the evidence. As regards substitution of the charges, he submitted that although it was not necessary, no prejudice was occasioned to the appellant.

12. In considering the grounds of appeal outlined above this court is enjoined to follow the principle established in ***Okeno v Republic [1972] EA 32*** where the Court of Appeal held that the first appellate court is enjoined to conduct an independent evaluation of all the evidence and reach an independent conclusion taking into account that it neither heard nor saw the witnesses testify.

13. The first issue for consideration is whether the appellant was prejudiced by substitution of the initial charge of incest with that of defilement. The appellant was initially charged with incest under **section 20(1)** of ***the Sexual Offences Act, 2006*** states as follows:

20. (1) Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years [Emphasis mine]

14. An “*indecent act*” under **section 2(1)** of the **Act** is defined as an unlawful intentional act which

causes, “(a) any contact between any part of the body of a person with genital organs, breasts or buttocks of another, but does not include an act that causes penetration.”

15. 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.”

16. While in the case of incest, the prosecution was only required to prove either penetration or an indecent act, in defilement the prosecution was required to prove penetration. The additional element of the relationship between the accused and the child is what makes the offence incest. It is clear that the appellant was the step-father of PW 1 and as such fell into the categories of prohibited relationships in **section 22** of the **Sexual Offences Act**.

17. Under **section 8(3)** of the **Sexual Offences Act**, sentence prescribed for a person found guilty of committing an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years. On the other hand where a person is found guilty of incest, the minimum sentence prescribed is not less than 10 years imprisonment and the maximum sentence is life imprisonment.

18. Although there was no reason to substitute the charge, I do not find any prejudice occasioned to the appellant in this case.

19. I have evaluated the evidence and the testimony of PW 1 was clear, precise and consistent as to what had happened. Her testimony was not shaken on cross-examination. PW 1’s testimony did not require corroboration in light of the proviso of **section 124** of the **Evidence Act** which states;

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.

20. Notwithstanding the provisions of **section 124** of the **Evidence Act**, PW 1’s testimony was readily corroborated by that of PW 2 who was an eye witness and who caught the appellant in the act. The appellant did not contest her testimony in cross-examination. Likewise, the testimony of PW 4, the clinical officer, indicated that PW 1 had had sexual intercourse in the past. Because PW 1 was examined 9 days after the incident, the medical evidence was weak but nevertheless on the basis of the testimony of PW 1 and PW 2, the prosecution proved penetration. In light of the prosecution evidence, it was not necessary for the appellant to be examined to ascertain whether there was penetration.

21. The age of the complainant is a question of fact to be proved by available evidence. The age of the complainant was proved by the age assessment conducted by PW 4 who confirmed that she was 13 years old. PW 1 and PW 2 gave testimony that that affirmed that PW 1 was 13 years old. PW 5 also produced the baptismal card to confirm the age. The appellant did not contest this evidence by cross-examination.

22. The learned magistrate imposed a sentence of 35 years imprisonment. Although the maximum sentence is life imprisonment, I do not find aggravating factors that would justify increasing the sentence to that extent. I therefore reduce the sentence to the minimum under **section 8(3)** of the **Sexual Offences Act**.

23. I affirm the conviction. The sentence is however reduced to 20 years imprisonment.

DATED and DELIVERED at HOMA BAY this 15th day of December 2014.

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Oluoch, Senior Assistant Director of Public Prosecutions, instructed by the Office of Director of Public Prosecutions for the respondent.