



REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL NO. 86 OF 2014

BETWEEN

KENNEDY ODHIAMBO OKEYO APPELLANT

AND

STATE RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 584 of 2012 at Principal Magistrate's Court at Migori, Hon. D. Kemei, PM dated on 7th May 2013)

JUDGMENT

1. The appellant was charged with defilement contrary to **section 8(1) and (4)** of the ***Sexual Offences Act, 2006***. The particulars of the offence were that between the month of June and October 2012 at [Particulars Withheld] within Migori County he caused his penis to penetrate the vagina of EA, a girl aged 7 years. He was convicted and sentenced to 15 years imprisonment.
2. When the appeal came up for hearing, Ms Owenga, learned counsel for the State, conceded the appeal on the ground that the issue of the age was not proved as there were material inconsistencies in the evidence.
3. As this is a first appeal, I am required to review the evidence and come to an independent conclusion bearing in mind that I neither saw nor heard the witnesses testify.
4. The thrust of the prosecution case was that the complainant, PW 1 had eloped with the appellant and that they lived together as husband and wife between June and October 2012 at [Particulars Withheld] . At the time of the trial she was expecting his child. This fact was confirmed by PW 3, her father, who testified that she had disappeared during the August holidays. PW4, the Chairman of the motorbike riders was informed that the appellant was residing with PW 1 and when he went to his home, he found PW 1 who pointed out that the appellant was her husband. PW 5, the Clinical Officer who examined PW 1, confirmed that she was pregnant.
5. PW 1 gave clear testimony that she was defiled at the time she was residing with the appellant as her husband. This testimony did not, in law, require any corroboration but it was nevertheless corroborated by the testimony of the other witnesses which I have outlined above. I find and hold that the essential element of penetration was established.
6. The appellant and respondent have raised the issue of age. The issue of age is a question of fact. When the matter came up for hearing for the first time, the complainant stated that she was 18 years old during the *voire dire*. I would state that given the age of the complainant a *voire dire*

was unnecessary. She later stated that she was 18 years old based on her birth certificate. Her father, PW 3, produced the birth certificate which showed she was born on 8th April 1995. The birth certificate was issued prior to the incident that led to the charges against the appellant. In the circumstances, I do not see the contradiction on the issue of age and I find that the prosecution proved PW 1's age.

7. As regards the appellant's contention that he did not undergo a medical examination, I find that it was not necessary to examine him as there was no doubt as to the fact that he had been cohabiting with the appellant for a period of time. As I have stated, the prosecution proved penetration and a medical examination of the appellant would not add anything to the evidence.
8. The appellant contends that that he was not given an opportunity to defend himself. Having studied the record, I find that he was given sufficient opportunity to make his defence. He did not give the Court the names of the witnesses he intended to call for the court to summon. This ground therefore lacks merit.
9. Finally the appellant's defence that he was framed was properly rejected by the learned magistrate. He claimed that he was being framed by the Chairman of Boda Boda riders, PW 4, but when the opportunity arose for him to cross examine the witness, he did not put any questions to him suggesting the frame up.
10. The appellant was sentence to the minimum provided for under the *Sexual Offences Act*.
11. The conviction and sentence are affirmed. The appeal is dismissed.

DATED and DELIVERED at MIGORI this 11th day of December 2014.

D.S. MAJANJA

JUDGE

Appellant in person.

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