



IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL NO. 79 OF 2014

BETWEEN

JOSHUA ONYANGO NDONGA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 725 of 2013 at Senior Principal Magistrate's Court at Migori, Hon. D.K. Kemei, SPM dated on 19th June 2014)

JUDGMENT

1. The appellant, **JOSHUA ONYANGO NDOGA**, was charged with the offence of defilement contrary to **section 8(1) and (3)** of the *Sexual Offences Act, 2006*. The charge stated that on diverse dates between 7th May and 3rd October 2013 at [Particulars Withheld] within Migori County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of SAO, 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 in prison.

2. He now appeals against the conviction and sentence on the basis of the grounds set out in the petition of appeal filed on 7th October 2014 supported by written submissions. In summary the grounds are as follows;

- (a) That his constitutional rights were violated as he was brought to court beyond the 24 hours permitted by **Article 49** of the Constitution.
- (b) That the charge facing him was defective as an offence was not disclosed.
- (c) That the prosecution did not prove the elements of the offence of defilement.
- (d) That the evidence of the complainant was un-corroborated.

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.

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). In order to deal with the appeal it is necessary to outline the material facts emerging at the trial.

5. After a *voire dire*, the complainant, gave sworn testimony. She stated that she was 14 years old. On 7th May 2013 at about 3 pm, she was sent by her grandmother to buy *omena* and tomatoes. On the way to the market she met the appellant who promised to take to the market with his motorbike. Instead he took her to Migori and later to Rongo where, under the threat of force, she lived with him and his children. During that time he had sexual intercourse with her. In October 2013, the appellant chased her away when she got pregnant. By the time the case was heard she had delivered a baby girl. When she came back home, she reported the matter to the Police. She pointed to the accused in the dock as the person who defiled her although she could not recall his name.

6. PW 2, the complainant's grandmother, testified PW 1 did not return home on 7th May 2013 after she sent her to the market. She searched for her in vain, contacted her classmates and alerted the area chief and the girl's uncle in Migori. After 5 months, PW 1 returned home pregnant. She took her to Hospital. She also produced letters from the school and the chief to confirm that PW 1 had disappeared. She also produced the child dedication card to confirm PW 1's age. She stated that she had never met the appellant.

7. PW 3, an uncle of the complainant, testified that he was informed by PW 2 that PW 1 had disappeared. He assisted in searching for her without success. When he was informed that she had returned he went to meet her. She told him that the person who had taken her took her to place called Kameji. When the Police issued an arrest order for the appellant, he accompanied police officers to arrest the appellant who they learnt was a cook at Kameji Secondary School. When they arrived at the School, PW 1 identified him as the person who abducted and defiled her.

8. PW 4, the clinical officer at Migori District Officer, attended to PW 1 on 10th October 2013. He examined her and noted that she had a distended stomach. Her genitalia and cervix were normal and he concluded she was pregnant. PW 5, the investigating officer, testified that she recorded PW 1's statement on 9th October 2013 and investigated the complaint, issued the P3 form and recorded witness statements.

9. After the close of the prosecution case, the appellant was put on his defence. He elected to give sworn testimony. He denied committing the offence and stated that he was an employee of Kameji Secondary School and that he was arrested on 9th October 2013.

10. I will deal with the first two grounds before I consider the evidence. In his submissions, the appellant contends that he was brought to court the beyond the 24 hours permitted by **Article 49(1)(f)** of the Constitution. This issue was not raised before the trial court as a matter of record. While the violation of the accused pre-trial rights is regrettable, it was held by the Court of Appeal in *Julius Kamau Mbugua v Republic Criminal Appeal No. 50 of 2008* [2010]eKLR that such violations do not have any bearing on the innocence or guilt of the accused and may be vindicated by filing a separate petition under **Article 22** of the Constitution.

11. As regards the charge, in his submission that the appellant states that the charge is defective as it states the date of Arrest was "10/10/2013" while PW 5 in her evidence stated that he was arrested on "9/10/2013." The date of arrest on the charge sheet is not material to the charge and a wrong date of arrest does not necessarily invalidate the charge. I find that the charge sheet complied with **section 134** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)* which states;

Every charge shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged." [Emphasis mine]

12. I now turn to the merits of the appeal and the central issue is whether the appellant was identified as the person who 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. There is no dispute that PW 1 disappeared from home from May to October 2013. PW 1 testified that she did not know the appellant prior to the incident. After the abduction she stayed with him for a period of five months therefore removing any doubt as to mistaken identity. The fact that she did not know his name arises from the circumstances under which she was abducted and held captive under the constant threat of use of force. PW 3 confirmed that PW 1 identified the appellant when he was arrested. The appellant did not contest the testimony of PW 3. He stated in his defence that he was an employee of Kameji Secondary School, which where he was identified by PW 1 and arrested.

14. The fact that PW 1 became pregnant while the appellant’s custody proves the fact of penetration. It was therefore not necessary to carry out a DNA test as the paternity of the child was not issue.

15. PW 1’s account of the ordeal was very clear and consistent and remained unshaken on cross-examination. PW 1’s testimony did not require corroboration if the trial court was convinced that she was telling the truth. The proviso to **section 124** of the **Evidence Act (Chapter 80 of the Laws of Kenya)** states that,

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.

16. The learned magistrate who heard the matter concluded that PW 1 was possessed with sufficient intelligence and was forthright in her testimony. I therefore find that it is the appellant who defiled the complainant and I uphold the learned magistrate’s finding.

17. 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 14 years old. PW 2 produced a child dedication card which showed that she was born on 12th June 2000. I find and hold that the evidence was sufficient proof of age and that she was 13 years old when the offence was committed.

18. 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.

19. I affirm the conviction and sentence. The appeal is dismissed.

DATED and DELIVERED at MIGORI this 8th 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.