



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAMIRA**

**CORAM: D. S. MAJANJA J.**

**CRIMINAL APPEAL NO. 32 OF 2016**

**BETWEEN**

**DENNIS OMBATI NGOKO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the original conviction and sentence of Hon. A. P. Ndege, RM dated 19<sup>th</sup> January 2010 at the Magistrates Court in Keroka in Criminal Case No. 28 of 2014)*

**JUDGMENT**

1. The appellant, **DENNIS OMBATI NGOKO**, was charged with the offence of defilement contrary to **section 8(1)** as read with **section 8(3)** of the **Sexual Offences Act** (“the Act”). It was alleged that on 1<sup>st</sup> August 2009 at [Particulars withheld], Masaba District within the then Nyanza Province, he unlawfully penetrated the genital organ namely anus of VK, a girl aged 9 years with his genital organ namely penis. The appellant was convicted and sentenced to life imprisonment.
2. Before I proceed to consider the grounds of appeal, I remind myself the duty of the first appellate court. It is to re-appraise the evidence afresh and reach an independent decision as to whether to uphold the conviction. I must bear in mind that I neither heard or saw the witnesses testify. In dealing with this task, I shall outline the evidence before the trial court.
3. The complainant, PW 1, testified on oath after a voire dire that she was 9 years old and that on 1<sup>st</sup> August 2009 at around 1.00pm, she was at the river with other girls fetching water. As they were going home, they met a man who accused them of damaging his trees. He told the other children to go and inform their grandmother to give them money to bring to his as compensation for the damaged trees. In the meantime, he remained with PW 1 as the other children left. PW 1 narrated how the man proceeded to penetrate her anus with his penis several times. Thereafter, he got hold of her pants and cap and threw them in the river and left her to go home. As she was going home crying she met her uncle, PW 4, and informed him what happened. He took her home and to her grandmother. PW 1 testified that she did not know the man who sexually assaulted her but she was later told by her uncle that he was arrested. She also identified him in court.
4. PW 1’s mother, PW 2, recalled that on the material evening she was informed that PW 1 had been sexually assaulted and that she was at her grandmother’s home. She proceeded there and found PW 1. When she examined PW 1’s private parts, she observed that the child was bleeding. She took her to Masaba District Hospital. The child’s father, PW 3, also testified that he was informed that his daughter had been sexually assaulted. He arranged for PW 1 to be taken to hospital. He was told by his cousin, PW 4, that he knew where the suspect had escaped to.
5. PW 4 recalled that on the material day, he was informed that some children were being chased from the river. He rushed there and met PW 1 who told him that someone had assaulted her. She showed him the direction where the person had gone and he stated to follow him. He told the court that he could not recognise him but continued to follow the person. He met some women washing clothes and they described to him who the person was. They also informed him that they knew his home. He tried to follow the man but he disappeared. He met other villagers and they divided themselves in groups to search for him until they found him in a bar. PW 4 recalled that he recognised the appellant as his cousin whom he knew well. He had not changes clothes and he arrested him and took him to the nearby AP camp. PW 6, an officer at the AP camp, received the appellant after he had been arrested at about 6.00pm.
6. PW 5, the clinical officer who examined PW 1 on 2<sup>nd</sup> August 2009, recalled that on physical examination, PW 1 appeared depressed and had difficulty walking. The child had a tear of labia and the hymen was broken. Further, there was an anal tear and bleeding from the anal orifice. A laboratory test of the high vaginal swab revealed spermatozoa and red blood cells. PW 5 concluded that there was penetration and ejaculation.

7. The investigating officer, PW 7, recalled that the incident of defilement involving PW 1 was reported at the Police Station on 1<sup>st</sup> August 2009 at 7.00pm. He organized for PW 1 to be treated after issuing the P3 form. He recorded witness statements and proffered charges against the appellant.

8. In his unsworn statement, the appellant denied the offence. He stated that on 1<sup>st</sup> July 2009 at 4.20pm he was at home when his uncle called him and inform that he had committed an offence. He was taken to the Chief's camp and later to the police station before he was charged.

9. The trial magistrate was satisfied that the prosecution had proved the offence beyond reasonable doubt and convicted the appellant who now appeals against the conviction and sentence. The thrust of his petition of appeal and the appellant's written submissions, is that the prosecution did not prove the offence beyond reasonable doubt. The respondent conceded the appeal on the ground the identification of the appellant by PW 4 was doubtful and his evidence inconsistent.

10. In order to prove defilement, the prosecution must show that an accused did an act that amounted to penetration of 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.*"

11. PW 1's testimony was clear and coherent on how she was subjected to an act of penetration. PW 2 and PW 3 who saw her in a state of distress confirmed that her private parts were injured. That evidence was augmented by PW 5 who examined the child confirmed that the child had injuries on the labia and anus. Further the presence of spermatozoa following laboratory examination of the high vaginal swab confirmed penetration and ejaculation. The totality of the evidence is that the prosecution proved penetration.

12. The main issue in this case is whether appellant was identified as the person who sexually assaulted PW 1. PW 1 admitted that she did not know the appellant and only came to know him when she was told by PW 4 that he had been arrested and also identified him in court. The identification by PW 1 was dock identification. In that regard, the decision of the Court of Appeal in **Ajode v Republic [2004] eKLR** held that:

***It is trite law that dock identification is generally worthless and a court should not place much reliance on it unless it has been preceded by a properly conducted identification parade.***

13. Thus from the evidence, the key testimony implicating the appellant was that of PW 4. He stated that PW 1 showed him where she had been assaulted and he saw the appellant walking away. Although he was at a distance, he did not recognise the appellant whom he stated was his first cousin. The appellant was later apprehended at a bar. In my view the gap between the last time PW 4 saw the man walking away from the scene to the time the appellant was apprehended was not explained or accounted for in order to ensure that the line of identification was unbroken. Moreover, none of the women who saw that assailant walk away and describe him were called as witnesses. Although PW 4 stated that the appellant was wearing the same clothes he had been seen in, the colour of those clothes was not put to PW 1 to confirm that indeed the appellant was the person who sexually assaulted her. The totality of the evidence is that the time from when PW 4 first saw the person who was alleged to be the appellant and the time the appellant was arrested was not uninterrupted. This gap in time cast doubt on whether the appellant was the person who committed the felonious act. The key witnesses who would have provided the connection were not called as witnesses.

14. Having reviewed the evidence, I am satisfied that the appellant's conviction was not safe. I allow the appeal, set aside the conviction and sentence. The appellant is set free unless otherwise lawfully held.

**DATED and DELIVERED at KISII on this 9<sup>th</sup> day of APRIL 2019.**

**D.S. MAJANJA**

**JUDGE**

Appellant in person.

Mr Otieno, Senior Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.