



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CORAM: D. S. MAJANJA J.

CRIMINAL APPEAL NO. 46 OF 2018

BETWEEN

ALFRED DISMUS OCHANGO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. F. Makoyo, SRM dated 28th August 2019 in Butere Magistrates Court in Criminal Case No. 109 of 2016)

JUDGMENT

1. The appellant, **ALFRED DISMUS OCHANGO**, was charged, convicted and sentenced to life imprisonment for the offence of defilement contrary to **section 8(1) and (2)** of the **Sexual Offences Act**. The particulars of the offence were that on 10th March 2016 at in Khwisero Sub-county within Kakamega County, he intentionally caused his penis to penetrate the vagina of MA, a girl aged 6 years.
2. The appellant now appeals against conviction and sentence. In order to carry out this task, this court is called upon to review the entire evidence and reach an independent decision as to whether to uphold the conviction bearing in mind that I neither heard or saw the witnesses testify.
3. The complainant, PW 2, gave an unsworn testimony after a *voire dire*. She told the court that she knew the appellant as Jangi who used to live with her grandmother. On the material day, she narrated how the appellant sexually assaulted her in their grandmother's home. When she started crying, her brother, PW 3, came to the door whereupon the appellant left.
4. PW 3 recalled that he had seen the appellant call PW 2 that morning as they were ploughing. He stated that he saw the appellant taking PW 2 to his house. He decided to call their mother, PW 1, after hearing PW 2 crying. PW 1 told the court that while she was ploughing, PW 3 called her and told her that the appellant had taken PW 2 to his house and that he had heard her crying. When she went to the house, she found PW 2. The appellant had left and was arrested 3 days later. She took the child to the hospital after noting that the child had discharge from her vagina.
5. The investigating officer, PW 6, testified that a report of the defilement incident was made on 10th March 2016. He went to the home with PW 1 and PW 2 where she was shown where the incident took place. He issued a P3 medical report form. In the meantime, the appellant who had fled was arrested by village elder, PW 4 and the child's uncle, PW 5, on 13th March 2016.
6. The Clinical Officer who examined PW 2 at Khwisero Health Centre, PW 7, produced the P3 Medical Report Form and the Post Rape Care (PRC) Form. She confirmed that the child was brought to the hospital on 10th March 2016. The main observation was that the child was unremarkable save that her vagina had a white discharge with laceration and reddening of the vaginal orifice. There was blood and pus cells in the urine which PW 7 considered were indicative of penetration.
7. In the unsworn statement, the appellant denied the charge against him and stated that he was arrested as a result of a land dispute between him and his step brother.
8. In order to prove defilement, the prosecution must show that the 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."
9. I am satisfied that PW 2's evidence was clear and direct as to the fact of penetration. The incident took place at daytime and PW 2 was

seen by PW 3 going with the appellant into a house. PW 1 and PW 3 found her in a state of distress on that morning and the medical evidence of PW 7 corroborated the testimony of PW 2 as to the fact of penetration.

10. The appellant's defence that he was framed could not shake the direct evidence of his complicity in the felonious act and there was no reason for PW 1, PW 2 and PW 3 to frame him. In any case that issue was not put to them in cross examination hence it was an afterthought. The appellant's guilt is further buttressed by the fact that he ran away from the village after committing the act. I uphold the conviction.

11. As regards the sentence, it was lawful at the mandatory as prescribed by **section 8(2)** of the *Act*. I however note that the Court of Appeal has since declared the mandatory minimum sentence unconstitutional in several cases among them; ***BW v Republic KSM CA Criminal Appeal No. 313 of 2010 [2019] eKLR***, ***Christopher Ochieng v Republic KSM CA Criminal Appeal No. 202 of 2011 [2018] eKLR*** and in ***Jared Koita Injiri v Republic, KSM CA Criminal Appeal No. 93 of 2014***. In line with these decisions and considering the gravity of the offence, I sentence the appellant to 30 years' imprisonment.

12. In light of the findings I have made above, I affirm the conviction but quash the sentence of life imprisonment and substitute it with a sentence of **thirty (30) years** imprisonment to start from the arraignment, that is 14th March 2016.

DATED and DELIVERED at KAKAMEGA this 2nd day of September 2019.

D. S. MAJANJA

JUDGE

Appellant in person.

Ms Ombega, Prosecution Counsel, instructed by the Director of Public Prosecutions for the respondent.