



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT KISUMU**

**CRIMINAL APPEAL NO. 9B OF 2017**

**BETWEEN**

**EVANS ONYANGO MOMANYI.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from the original conviction and sentence of Hon. S. A.***

***Opande at Senior Resident Magistrates Court at Tamu in Criminal***

***Case No. 10 of 2015 dated on 1<sup>st</sup> February 2017)***

**JUDGMENT**

1. The appellant, **EVANS ONYANGO MOMANYI** was charged and convicted of the offence of defilement contrary to **section 8(1) and (3)** of the ***Sexual Offences Act***. The particulars were that on the night between 27<sup>th</sup> and 28<sup>th</sup> April 2015 within Muhoroni District in Kisumu County, he intentionally caused his penis to penetrate the vagina of JAO, a child aged 14 years. He also faced an alternative charge of an indecent act with a child contrary to **section 11(1)** of the ***Sexual Offences Act*** based on the same facts. The appellant was convicted and sentenced to 20 years' imprisonment on the principal count. He now appeals against conviction and sentence.

2. In his petition of appeal dated 10<sup>th</sup> February 2017, the appellant raised several grounds of appeal. He contended that the trial magistrate erred in convicting him on a defective charge sheet. That the trial magistrate failed to analyse the evidence and hold that the evidence on record did not support the offence. The appellant contended that the conviction was based on fabricated and hearsay evidence. The appellant blamed the trial magistrate for convicting him even though the prosecution had failed to prove its case beyond reasonable doubt. In addition, counsel for the appellant filed supplementary ground of appeal which were not only prolix but also argumentative and has raised matters which were not raised in evidence. The thrust of the document and written submissions is that the prosecution did not prove its case to the required standard.

3. Counsel for the respondent supported the conviction and sentence. She submitted that the prosecution had proved all the elements of the offence.

4. It is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh

review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see *Okeno v Republic* [1972] EA 32).

5. A summary of the prosecution evidence is that on 27<sup>th</sup> April 2015, the complainant, PW 1, accompanied PW 2 to Muhoroni Sub-County Hospital as PW 2 was unwell. At the hospital, they met the appellant who was stationed at the hospital as a clinical officer. The appellant treated PW 2 and recommended that she be admitted. PW 1 testified that the appellant advised her to stay with PW 2 in the ward overnight as she was quite unwell. PW 1 went back home and informed her father PW 4 that PW 2 had been admitted and that she wanted to stay with her overnight in the ward. PW 4 told her not to go back to the hospital. At around 9.30pm, PW 1 sneaked out of the house and went back to the hospital to check on PW 2. She met the appellant at the hospital gate who convinced her to go with him to his house at the hospital staff quarters.

6. PW 1 testified that the appellant proceeded to insert his penis in her vagina. He told her not to make any noise or tell anyone. He allowed her to stay in the house for some time and she fell asleep. The appellant woke her up at night and told her to go to the ward where PW 2 was.

7. PW 2 testified that when she was admitted at the hospital, PW 1 promised to go back later. By evening she had not returned. PW 2 recalled that when a nurse woke her up at night to take her medicine, PW 1 was not there. Later on, she found PW 1 sleeping beside her. She asked PW 1 where she had been and PW 1 narrated what had happened. In the morning she left and later returned with PW 4 and the local priest.

8. PW 4 recalled that on the evening of 27<sup>th</sup> April 2015, he denied PW 1 permission to stay overnight with PW 2 in the ward. He retired to bed and left PW 1 watching television with her younger brother. Later on, he was woken by his son and who informed him that PW 1 was not in the house. He looked for her outside the house but could not find her so he went to sleep at about 11.00pm. PW 4 testified that PW 1 returned home in the morning and after threatening to cane her, PW 1 narrated to him what had taken place. PW 4 took PW 1 to hospital and confronted the appellant but he denied the accusations. PW 4 reported the matter to the police.

9. PW 3, a clinical officer at Muhoroni Sub-County Hospital, who examined PW 1 stated that she made an impression of sexual assault as the hymen was freshly broken, the vaginal wall was blood stained and labia majora and mons pupis had lacerations. The outer part of the labia had a tear and the area between the vaginal opening and anus had a tear.

10. PW 5, the investigating officer, told the court that the appellant came to the police station to report that someone was accusing him of defiling his daughter. He confirmed that PW 1 accompanied by PW 4 reported the incident of defilement in the evening. He ascertained that PW 1 was born on 18<sup>th</sup> March 2001 by producing the birth certificate. After investigations, he arraigned the appellant in court to face the charges.

11. In his defence, the appellant, a trained clinical officer, gave a sworn testimony. He denied defiling PW 1. He stated that on the material date he left his place of work at 5.00pm and went to a local pub where he had drinks with his friends. At around 10.00pm he left the pub and headed home to his family. The following day he was accosted by PW 4 and the local priest who accused him of defilement. The appellant's wife, DW 2, testified that on the material night she was home and the appellant came back with a friend. She served them dinner and the friend left following which they went to bed.

12. The main issue for determination in this case is whether the prosecution established a case of defilement against the appellant beyond reasonable doubt. 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.*"

13. PW 1 gave clear and detailed testimony on how the appellant met her at the hospital gate and

proceeded with her to his house where he proceeded to sexually assault her. From the record, her testimony was clear and unshaken in cross-examination. Although, under proviso to **section 124 of Evidence Act (Chapter 80 of the Laws of Kenya)**, her testimony is not required to be corroborated if the magistrate concludes for reasons to be recorded that the child is telling the truth, it was corroborated and given credence by other evidence. The testimony of PW 2 confirms that PW 1 came back to the hospital after leaving the appellant's house while the testimony of PW 4, confirms that PW 1 did not sleep at home. PW 1 narrated what happened to her to both PW 2 and PW 4 so soon after the incident.

14. The evidence of penetration is corroborated by the evidence of PW 3 who carried out a medical examination on PW 1. Although PW 1 told the court that she was having her monthly periods, the evidence of a freshly torn hymen and tears and lacerations in the genitalia all point to the fact of penetration. The appellant suggested that the clinical officer who initially examined PW 1 was not in good terms with him and could have been part of the plan to frame him. I reject this suggestion as PW 3 carried out an independent examination and confirmed her findings. At this stage, I would also point out that it was not necessary to examine the appellant as urged by him. As the Court of Appeal noted in **Geoffrey Kioji v Republic NYR Crim. App. No. 270 of 2010 (UR)**;

*Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.*

15. The appellant has raised of identification. From the testimony of PW 1 and PW 2 it is evident that the appellant had spent some time with PW 1 as he is the one who treated PW 2 in her presence earlier in the day. According to PW 1, the appellant is the one who suggested that she stay with PW 2. When PW 1 met the appellant at the gate, he took her to her house and she stayed there for quite a long time. All this evidence excludes the possibility of mistaken identity.

16. The appellant's defence was properly rejected by the trial magistrate. When considered alongside the totality of the prosecution evidence, there is no reason that PW 1 would have framed the appellant then concocted a story in which she roped in PW 2, PW 3 and PW 4. The testimony of DW 2 was therefore self-serving intended to protect the appellant.

17. The final question is that of age of the complainant. For purposes of the offence of defilement, there is no question that PW 1 was below the age of 18 years. The proof of age is a question of fact. PW 1, who was in Form 1, testified that she was 14 years. This was confirmed by her birth certificate produced by PW 5. Thus the sentence imposed was within the bracket provided by **section 8(3) of the Sexual Offences Act**.

18. I affirm the conviction and sentence.

19. The appeal is dismissed.

**DATED and DELIVERED at KISUMU this 7<sup>th</sup> day of February 2018.**

**D.S. MAJANJA**

**JUDGE**

Mr Sagwe, Advocate for the appellant.

Ms Barasa, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the

respondent.