



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

(CORAM: MAJANJA J.)

CRIMINAL APPEAL NO. 1 OF 2016

BETWEEN

JAMES ONYANGO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. G.N. Sitati, RM dated 23rd December 2015 at the Mumias Principal Magistrates Court Criminal Case No. 936 of 2013)

JUDGMENT

1. The appellant, **JAMES ONYANGO**, was charged and convicted of the offence of defilement contrary to **section 8(1) and (2)** of the **Sexual Offences Act** ("the Act"). It was alleged that on 18th October 2013 at about 4.00pm in Mumias District within Kakamega County, he intentionally and unlawfully caused his penis to penetrate the vagina of SO, a child aged 8 years. He was convicted and sentenced to life imprisonment.
2. The thrust of the appellant's case is that the prosecution did not prove its case beyond reasonable doubt as the evidence was insufficient to support the case. In order to determine this appeal, I am required to evaluate the entire evidence afresh and reach an independent decision whether or not to uphold the conviction bearing in mind that I neither heard nor saw the witnesses testify.
3. The prosecution called five witnesses while the appellant gave sworn testimony in his defence. The complainant (PW 2) was sworn after a *voire dire* and she told that she was 8 years old. She recalled that in the afternoon on the material day, the appellant, who she knew as a herds boy in the village, started chasing her towards Okaka's posho mill. He caught up with her, placed her down on the dirt, removed her pants, proceeded to remove his trousers then inserted her penis in her vagina. She testified that she screamed and the grandmother came but by that time the appellant had run away. She was taken to Musanda Police Station and thereafter to the hospital at Butere.
4. The complainant's grandmother (PW 1) testified that on the material day at about 4.00pm, PW 2 had gone to play and when she returned, PW 1 demanded to know where she had been. PW 1 told her that she had been with the appellant who had done "bad manners" to her. PW 2 examined her panty and noted that it was torn and that there was fluid which look like sperms and some blood. She screamed when she realized what had happened and this attracted people who went to where the appellant was and wanted to beat him up. She took PW 2 to the police station then to a clinic where she was examined. PW 1 stated that she knew the appellant as he had been employed as a herdsman in the neighbourhood two or three months prior to the incident.
5. PW 3, the complainant's father was informed that PW 1 had been defiled by the appellant who was a herdsman for his uncle. He went home and found people at his house while other had surrounded the house where the appellant worked. He took PW 1 to the hospital while an elder came and took the appellant to the police station.
6. PW 4, the Medical Superintendent of the Butere County Hospital produced the P3 form prepared by a clinical officer working under him. The clinical officer had examined PW 1 on 20th October 2012, which was two days after the incident. He observed that there was a 2cm tear in the private part and the hymen was absent. He explained that it is likely that there was penetration. The urinalysis revealed red blood cells which showed that some form of trauma to the vagina.
7. The investigating officer, PW 5, recalled that he was at Musanda Patrol Base when he received the report that PW 1 had been defiled from a village elder and PW 1 and PW 3. He issued the P3 form as they already had treatment chits from the hospital. He also recalled that the appellant had been arrested by the village elder and he re-arrested him.

8. In his sworn defence, the appellant denied the charge. He told the court that he was employed by PW 1 but that she failed to pay him on time so he demanded to be paid. He told the court that on 18th October 2013, he was arrested and taken to the police station.

9. In order to prove the offence of defilement the prosecution must prove that the accused did an act which amounted to penetration to 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.*"

10. The evidence against the appellant depends on the credibility of the testimony of PW 2 who gave graphic details of how the appellant sexually assaulted her. Under **section 124** of the **Evidence Act (Chapter 80 of the Laws of Kenya)**, an accused person shall not be liable to be convicted on the basis of the evidence of the victim unless such evidence is corroborated. The proviso to that section makes an exception in sexual offences and allows the court to convict an accused where the trial court on the basis of the evidence of the victim without corroboration if, for reasons to be recorded, the court believes the child was saying the truth. Having heard PW 2, the trial magistrate, recorded her impression as follows;

In my own assessment (PW 2) was very truthful and consistent when she testified and I am satisfied that she was telling the truth. She was consistent throughout cross examination that it was the accused who defiled her. She did not appear coached during cross-examination and I therefore disregard the accused person's defence.

11. PW 1 gave clear testimony and described in graphic terms what the appellant did to her which clearly amounted to penetration. The fact of penetration was corroborated by evidence of PW 1 who saw the state of her panties and private parts immediately she reported to her what had taken place. Further, the medical testimony of PW 4 confirmed that penetration had taken place and although PW 1 was examined two days after the incident, the evidence is that they had visited the local health centre immediately after the incident and the signs of penetration were still available after the two days.

12. As regards the identity of the appellant, he was, by his own admission, working in the neighbourhood as confirmed by PW 1 and PW 3 and was well known to PW 2. The incident took place at daytime hence there was no chance of mistaken identity. The appellant's defence was properly dismissed. He suggested that he was being framed for demanding his payment but PW 1 flatly denied this fact that he was employed by her as a herd boy while PW 3 confirmed he was working for the neighbour.

13. As regards the age of the child, the birth notification was produced showing that PW 1 was born on 15th November 2005 confirming that she was aged 8 years old. In the circumstances, I find that the prosecution proved penetration of a child by the appellant. Since she was aged 8 years, **section 8(2)** of the **Act** provides for a mandatory sentence of life imprisonment. Accordingly, the conviction and sentence are affirmed.

14. The appeal is dismissed.

DATED and DELIVERED at KAKAMEGA this 6th day of April 2018.

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Ng'etich, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.