



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 10 OF 2017**

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

**BETWEEN**

**EZRA JOHN NYANGENA..... APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence of Hon. A.K. Mkoross, Ag SRM dated 28<sup>th</sup> August 2014 at Principal Magistrates Court at Kilgoris in Criminal Case No. 175 of 2014)*

**JUDGMENT**

1. The appellant, **EZRA JOHN NYANGENA** appeals against conviction and sentence on two counts under the *Sexual Offences Act* (“the *Act*”). The first count was that of child trafficking contrary to **section 14(a)** of the *Act*. The particulars of this count were that on diverse dates between 18<sup>th</sup> and 20<sup>th</sup> February 2014 in Nyamache District within Kisii County, the appellant knowingly and intentionally made and organized transit arrangements of DSO, a child aged 15 years from Shankoe to Ritembu with the intention of facilitating the commission of a sexual offence against the said child.
2. According to the second count, he was charged with defilement of a child contrary to **section 8(1)** as read with **section 8(3)** of the *Act*. The particulars were that on diverse dates between 18<sup>th</sup> and 20<sup>th</sup> February 2014 in Nyamache District of Kisii County, he unlawfully caused his penis to penetrate the vagina of DSO, a child aged 15 years. He also faced an alternative charge of an indecent act with a child contrary to **section 11(1)** of the *Act* based on the same facts.
3. The appellant was convicted on the principal counts and sentenced to 10 years’ imprisonment on the first count and to 20 years on the second count. The court ordered that both sentences run concurrently. The appellant now appeals against conviction and sentence.
4. The appellant’s case is set out in his petition of appeal, supplementary grounds of appeal and accompanying written submissions. The appellant contended that the case against him was based on false and fabricated evidence. He submitted that the evidence against him was not credible and could not be relied upon to support the conviction. In essence, he contended that the prosecution failed to prove its case beyond reasonable doubt.
5. Counsel for the respondent supported the conviction and sentence. She submitted that the prosecution had proved all the elements of the offence.
6. 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).
7. The facts emerging at the trial court were as follows. The complainant’s mother (PW 2) recalled that on the morning of 18<sup>th</sup> February 2014, she sent the complainant (PW 1), her brother (PW 4) and the appellant to go and assist a neighbour harvest beans. According to PW 4 and PW 1, the beans were in a sugarcane plantation so the appellant and PW 1 refused to work and were instead told to harvest vegetables. PW 1 and the appellant left at about 1.00pm and on the way home, they met PW 2 as she was going for a group meeting.
8. PW 1 testified on oath that the appellant asked her to escort him to do some shopping for his pregnant wife at Magena. They boarded a motorcycle but instead of stopping at Magena, the appellant took her to his home in Ritembu. While at his home, the appellant asked her to be his second wife but she rebuffed his request telling him that she could not be married as she had not reached 18 years of age. As it was at night she slept in the appellant’s room where the appellant proceeded to have sexual intercourse with her until morning.

9. On the next day, PW 2 came to the appellant's home looking for PW 1 but she was chased away by the appellant who was armed with a stick. PW 2 went to look for the Assistant Chief to report the matter. In the meantime, the appellant took PW 1 to his friend at Nyamache where they stayed for a while and returned to the appellant's home in the evening. She remained there overnight and on the next day, the area Chief (PW 6) came and arrested both PW 1 and the appellant.

10. The Investigating Officer (PW 7) told the court that PW 6 brought the appellant to Olereko Police Post on 22<sup>nd</sup> February 2014 as a suspect in a case of defilement. After recording statements, he issued the P3 form to the PW 1. PW 1 was taken to Transmara District Hospital where she was examined by PW 3, a clinical officer, on 25<sup>th</sup> February 2014. He conducted a physical examination and found that she was in fair condition. Her external genitalia, labia minora and majora were normal. The hymen was broken but not fresh. All other tests were unremarkable. He concluded that the PW 1 was sexually active.

11. The appellant denied the offence in his sworn testimony. He admitted that on the material day, he was with PW 1 and PW 4 at the farm but he left them behind after work to go and check on his pregnant wife. After seeing his wife, he met PW 4 as he was taking a walk. PW 4 asked him about PW 1 but he did not know where she was. He also met PW 2 who asked him about PW 1. On the next day while he was at home, PW 2 came and gave him Kshs. 500/- to go and look for PW 1. He found PW 1 at Ritumbu. She told him that she had quarreled with her mother. On the next day when he went to charge his phone at Magena where PW 2 confronted him about PW 1. He went to talk to PW 1 who accepted to back home with her mother but she came back and slept at the appellant's grandmother's home because PW 2 had beaten her. He told the court that on the next day PW 6 came to arrest him.

12. The main issue for determination in this case is whether the prosecution established a case of child trafficking and defilement against the appellant beyond reasonable doubt. I will deal with the offence of defilement first. In order to prove the 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 tricked her that he was taking her to go shopping for his pregnant wife but instead took her to his home where he proceeded to have sexual intercourse with her on that night. Her evidence was clear that the appellant inserted his penis into her vagina. 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 the evidence of PW 3 who confirmed that the PW 1's hymen was broken and that she was sexually active.

14. The appellant was not a stranger to PW 1. They had been together on the morning of 18<sup>th</sup> February 2014 together with PW 2 and PW 4. The appellant also admitted he knew her. PW 1 was found at the appellant's home by PW 2 when she confronted him and he chased her away, and also by PW 6. His defence that he was framed is sterile in light of the overwhelming evidence of the prosecution witnesses.

15. The final question is that of the 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. She was 15 years old and her birth certificate produced in evidence laid that issue to rest. Thus the sentence imposed was within the bracket provided by **section 8(3)** of the **Act**.

16. As regards the offence of trafficking, the trial magistrate correctly noted that the proper offence was not under **section 14(a)** of the **Act** which deals with child tourism but under **section 13 (a)** of the **Act** dealing with trafficking. However, at the time the appellant was charged the offence of child trafficking under **section 13** of the **Act** had been repealed by the **Counter Trafficking in Persons Act, Act No. 8 of 2010**. Thus the appellant could not face count 1 which was in respect of a non-existent offence.

17. The result of this appeal is that it is allowed to the extent that I quash the conviction and sentence on Count 1. The conviction and sentence of 20 years' imprisonment on Count 2 is affirmed.

**DATED and DELIVERED at KISII this 12<sup>th</sup> day of July 2018.**

**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.