



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CORAM: D.S.MAJANJA J.

CRIMINAL APPEAL NO. 53 OF 2016

BETWEEN

FREDRICK GILBERT BANDA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. P. K. Mutai, RM dated 19th May 2016 at the Senior Principal Magistrate's Court at Kwale in Criminal Case No. 361 of 2015)

JUDGMENT

1. The appellant, **FREDRICK GILBERT BANDA**, was charged and convicted of the offence of defilement contrary to **section 8(1)** and **(2)** of the **Sexual Offences Act** ("the Act"). The particulars were that on 21st March 2015 within Kwale County, he unlawfully and intentionally caused his penis to penetrate the vagina of EAO, a girl aged 9 years old. He was sentenced to life imprisonment and now appeals against the conviction and sentence.

2. As this is a first appeal, I am aware that it is the duty of this 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**).

3. The evidence before the trial court was as follows. After a *voire dire*, the complainant (PW 3) gave unsworn testimony. She told the court that on 21st March 2015 at about 7.00am, the appellant called her to his house while she was coming from the shop. He told her he wanted to send her. She narrated what took place as follows:

I followed him to his house. It is not far from my house. Dei closed the door. He removed my clothes. I had a skirt and pant. Dei removed my skirt and pant. He told me the house belonged to his friend. Dei removed his trouser and underwear. I was placed on the bed. He did bad things to me. "Alitumia kitu yake ya kukojoa kuingiza mbele na nyuma." He warned me against shouting that he will kill me. Dei asked me to put on my clothes. He gave me Kshs. 5. I went back home. I did not tell anybody what happened. I feared I could be beaten. My mother notice I was walking with difficulties.

4. The complainant's mother, PW 1, was not at home on the material day when PW 1 was sexually assaulted. She recalled that on 23rd March 2015, PW 1 was walking with difficulties. PW 1 did not disclose to her what the problem was but on that night she began experiencing pain in her private parts. She noted that there was tenderness and she massaged her with hot water. PW 1 then confided to her what the appellant had done. She later took the child to hospital after calling the child's father (PW 2). PW 2 told the court that PW 1 called him on 24th March 2015 informing him what the appellant had done to the appellant. He knew the appellant as a neighbour. He also produced the clinic card showing that PW 1 was born on 1st June 2006.

5. The investigating officer (PW 4) testified that PW 2 accompanied by PW 3 reported to the police station on 24th March 2015 and made the complaint concerning defilement. She told the court that PW 3 could not talk and had difficulties in walking. She interrogated PW 3 who told her what had taken place. She recorded her statement and issued the P3 form.

6. The clinical officer (PW 5) who examined the PW 3 on 27th March 2015 noted that she had difficulties in walking. She also noted that PW 3 had lacerations on the vaginal walls, a laceration on the anus and the hymen was absent leading her to conclude that there was penetration.

7. The appellant denied the he had defiled PW 3. When cross-examined, he told the court that on 21st March 2015, he was at his sister's

place. On 25th March 2015, he received a call from someone who needed transport to Malindi. He met the person and was asked to bring a car. On 28th March 2015 at about 8.00pm, he was called by the same person and requested to meet him. He passed by PW 2's place and was asked to wait for him whereupon he was arrested.

8. DW 2 testified that he was PW 2's landlord and he was the one who referred the appellant to PW 2 who wanted a driver to take some guests to Diani on 25th March 2015. In cross-examination he told the court that the appellant was called Dei and that he knew PW 2 very well. DW 3, the appellant's brother in law, testified that the appellant had informed him that PW 2 wanted him to drive his guests. He was later informed that the appellant had been arrested. In cross-examination, he told the court that on 21st March 2015, he was with the appellant at home before he left. The appellant's sister, DW 4, testified that she had been told that DW 2 had informed the appellant that he wanted a driver to take some guests to Malindi. She was shocked to learn that he had been arrested.

9. In the petition of appeal dated 27th May 2016, the appellant challenged the conviction and sentence on the grounds that the charge sheet was defective, that prosecution did not prove the charge beyond reasonable doubt. In regard to the testimony of the child, the appellant contended that the trial magistrate relied on the testimony of the child without recording reasons and that the trial magistrate failed to take into account that a child would be misled or coached in evidence. He also contended that the age of the child was not proved. The appellant complained that the sentence imposed was harsh and excessive.

10. The respondent supported the conviction and sentence on the basis the prosecution proved every element of the offence of defilement.

11. The main issue for determination in this appeal is whether the prosecution proved, beyond reasonable doubt, that the appellant defiled the complainant. In order to prove its case under **section 8(1)** of the **Sexual Offences Act**, the prosecution must show that the appellant 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.*"

12. As regards the issue of penetration, PW 3 gave clear testimony on how she was sexually assaulted. Her testimony on the fact of penetration was corroborated by other evidence. First, her mother, PW 1 saw her in a state of distress after her ordeal. She could not walk properly. Likewise, PW 2 noticed that she was not walking properly. PW 5 not only noticed that the child was walking with difficulty but noted that there were lacerations on her vaginal walls, a laceration on the anus and the hymen was absent. Additionally, PW 3 gave the same consistent narration of her ordeal to PW 1, PW 2 and PW 5. On the basis of all this evidence, I am satisfied that the prosecution proved the fact of penetration.

13. The next issue is whether the appellant is a person who was known to PW 3 and whether he is the person who caused the act of penetration. PW 3 referred to the appellant as Dei. This name was confirmed by PW 1, PW 2 and the defence witnesses, DW 2, DW 3 and DW 4. Further, the appellant is a person who lived in the same neighbourhood as PW 3 and her parent. This was also confirmed by the appellant's sister, DW 4. The totality of this evidence is that the appellant was a person known to PW 3 and her family. This therefore put to rest the appellant's suggestion that he did not know PW 3 or her family.

14. Further, the appellant's witnesses were not with the appellant at the time the offence was committed. What is clear and was in fact admitted by PW 2 is that he lured the appellant to his arrest by calling him to take him and his guests to Malindi. This was after the date of the incident and did not add or subtract anything from the evidence implicating him.

15. The final ingredient in proving the offence of defilement is the age of the child. Proof of age is a question of fact. In this case, PW 2 produced the clinic card showing PW 3's date of birth. At the time the offence was committed, PW 3 was aged 9 years old. There is no doubt that PW 3 was a child and the age proved by the prosecution fell within the provisions of **section 8(2)** of the **Act** which provides for a mandatory life sentence. I therefore find and hold that the sentence was within the law and was neither harsh or excessive to warrant interference.

16. I affirm the conviction and sentence.

17. The appeal is dismissed.

DATED and DELIVERED at MOMBASA this 4th day of September 2018.

D.S. MAJANJA

JUDGE

Mr Odera, Advocate for the Appellant.

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