



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CORAM: D.S. MAJANJA J.

CRIMINAL APPEAL NO. 59 OF 2016

JOHN MOBISA ONDARA..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence of Hon. N. Kahara, RM dated 19th August 2016 at the Principal Magistrate's Court at Keroka in Criminal Case No. 29 of 2014)

JUDGMENT

1. The appellant, **JOHN MOBISA ONDARA**, was charged with the offence of defilement contrary to **section 8(1)** as read with **section 8(3)** of the **Sexual Offences Act** ("the Act"). The particulars were as follows:

On the 25th day of December 2013 in Masaba South District within Kisii County, intentionally and unlawfully had an act of penetration with his genital organ namely penis into the genital organ of PBN a girl aged 14 years.

2. The appellant was convicted and sentenced to twenty (20) years imprisonment. He now appeals against conviction and sentence. The thrust of the appellant's petition and written submissions is that the prosecution did not prove the elements of the offence of defilement.

3. In order to succeed proving defilement, the prosecution must prove that the appellant did or caused an act of penetration to the child. In this case the child (PW 1) gave sworn testimony. She stated that on the material night, that is 25th December 2013 at about 7.00pm, she was leaving her grandmother's home when the appellant found her, held her mouth, dragged her into a house belonging to her cousin, tore her panty and biker and proceeded to penetrate her vagina with his penis after removing his trouser.

4. At about the same time, the child's father, PW 2, started looking for her as she had not returned from her grandmother's place. He was with his other daughter, PW 3, and the child's aunt, PW 5, when they found the appellant naked without his trousers on top of PW 1 sexually assaulting her. PW 2 confronted him and the appellant started beating him. In due course other people came and PW 1 was taken to the hospital. The incident was reported at Ibacho Patrol Base and the complainant received by the police officer (PW 5) who issued the P3 form. He also testified that since the appellant had been beaten, he was taken to Kisii Teaching and Referral Hospital.

5. The Clinical Officer, PW 4, recalled that he filled the P3 form on 30th December 2012 but noted that PW 1 came to hospital on 25th December 2013 for treatment after the ordeal. He noted that PW 1 had a bruised labia minora and majora, vagina and cervix together with a mild presence of blood which was indicative of penetration.

6. In his defence, the appellant denied the offence and stated that it is PW 2 who assaulted him until he was unconscious. His brother DW 2 told the court that on that night he heard people screaming and when he went to check he found the appellant had been beaten.

7. I have analysed the evidence independently as required by the first appellate court and I find that PW 1 gave clear and credible testimony on how she was sexually assaulted by the appellant. Despite cross-examination, her testimony remained unshaken. It was also corroborated by PW 2, PW 3 and PW 5 who found him in the act with PW 1. Additionally, the medical evidence showed that the child's vagina had been penetrated.

8. The appellant's defence was that he was beaten or assaulted by PW 2 does not detract from the prosecution case as he was assaulted by the people who responded to the alarm after he had defiled PW 1. The sequence of events from the time PW 1 was defiled, then taken to hospital and his arrest on the material night all taken together point to a water tight case against the appellant.

9. The age of the child was proved by production of the birth certificate which confirmed she was fourteen years old. I also note that since

she was aged fourteen, she was not a child of tender years within the *Oaths and Statutory Declarations Act (Chapter 19 of the Laws of Kenya)* hence she could give sworn testimony without the court conducting a *voire dire* examination (see *Kibageny arap Kolil v R [1959] EA 92*).

10. I affirm the conviction. Since the minimum sentence under **section 8(3)** of the *Act* was imposed on the appellant, it is affirmed.

11. The appeal is dismissed.

Dated and delivered at Kisii this 12th day of October 2018.

D.S MAJANJA

JUDGE

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions.

Appellant in person.