



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CORAM: D. S. MAJANJA J.

CRIMINAL APPEAL NO. 53 OF 2016

M O O.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence of Hon. J. Mwaniki, PM

dated 29th August 2016 at the Senior Resident Magistrate's Court

at Keroka in Criminal Case No. 710 of 2015)

JUDGMENT

1. The appellant, **M O O**, was charged and convicted of the offence of defilement contrary to **section 8(1)** as read with **section 8(3)** of the **Sexual Offences Act** (“the Act”). The particulars of the offence were as follows:

On the 22nd day of June 2015 in Masaba South District within Kisii County had carnal knowledge of FO a girl under the age of fourteen years.

2. The appellant was sentenced to life imprisonment and now appeals against conviction and sentence. He complains that he was not furnished with witness statements and as such could not prepare himself and that the prosecution failed to prove the offence beyond reasonable doubt.

3. As this is a first appeal, I am required to re-evaluate the evidence and come to an independent conclusion as to whether I should uphold the conviction making an allowance as to the fact that I neither heard nor saw the witnesses testify.

4. After a *voire dire*, the child, PW 1, gave sworn testimony. She stated that she knew the appellant as her uncle and on 22nd June 2015 at about 7.00 pm, he called her and told her to accompany him to the kiosk to buy phone credit. She narrated what took place as follows:

I did accompany him to the kiosk and he bought the card. We then went through tea plantation and he did “tabia mbaya” to me. He removed my clothes, he removed my pants. He did also remove his trousers. He gave me some biscuits. He then lay me down and did bad things to me. He then told me not to tell anyone about the incident. I had not engaged in bad things before then. I was injured.

5. After the ordeal, she proceeded home and along the way she met her mother, PW 2, and narrated to her what took place. PW 2 recalled that on the material evening, her daughter told her that PW 1 had gone with the appellant. She went to look for the appellant and found him by the road-side where she confronted him about PW 1. The appellant told her to forgive him and started to cry whereupon people came but the appellant escaped. She later took the child to Ibacho Dispensary.

6. PW 1 was examined by the Clinical Officer, PW 4, on 24th June 2015. He confirmed that the child had been attended to on 23rd June 2015 and produced the Clinic Attendance Card and P3 form. He noted that PW 1 had bruised vaginal outer and inner labia and the hymen was perforated with an open vaginal hole leading him to conclude that penetration had taken place.

7. The Assistant Chief, PW 3, testified that he was informed of the incident on 22nd June 2015, went to the appellant's home and arrested him. PW 5, the investigating officer testified that on the same evening the appellant was arrested and brought to the police station. He

produced the birth certificate that the child was born on 14th August 2008.

8. In his unsworn statement, the appellant denied that he committed the act and that on 22nd June 2015, he had gone on safari and came three days later only to be arrested and arraigned in court.

9. In order to prove the offence of defilement, the prosecution must prove that the appellant did or caused an act of penetration to a child. This was a case where the appellant and PW 1 knew each other as they lived in the same neighbourhood, a fact admitted by the appellant in his unsworn statement. PW 1 gave clear testimony on how she was sexually assaulted by the appellant who lured her to the shop. Her testimony under the proviso to **section 124** of the *Evidence Act (Chapter 80 of the Laws of Kenya)* was sufficient to support a conviction without corroboration if for reasons to be recorded the magistrate believed the child was telling the truth.

10. In this case, the trial magistrate did not comment on whether she believed the child as required by the proviso **section 124** of the *Evidence Act*, but found corroborative evidence. I also find that PW 1 testimony was corroborated by that of PW 2 who found her in a state of distress immediately after the incident and the medical evidence that confirmed penetration. Moreover, the appellant's behaviour of admitting to the offence and pleading for forgiveness when he was with PW 2 tends to support his guilt.

11. The appellant attempted to raise an alibi but it was really an afterthought in light of PW 1's testimony and that of PW 2 who met him the same evening after the act. PW 3 and PW 5 confirmed that he was arrested on the same night thus exploding his defence.

12. The appellant has raised the issue that he was not provided with statements. On the date of plea, the court did order that he be provided with statements but he did not raise the issue when PW 1 and PW 2 testified. He appears to have raised the issue later on 16th December 2015 and an order made but nevertheless the trial proceeded later without any complaint. I note that the trial court ordered that the complainant be recalled but nothing came of it and the appellant made his defence. I am of the view that he was not prejudiced at all.

13. Finally, I am satisfied that the age of PW 1 was proved by the birth certificate which showed she was seven years old. Although the charge sheet referred to **section 8(3)** of the *Act*, this was a curable error as the proper sentencing provision is **section 8(2)** of the *Act* which provides for a life sentence where the child is below the age of eleven years.

14. I affirm the conviction and sentence and dismiss the appeal.

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.