



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 69 OF 2018**

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

**BETWEEN**

**RICHARD KIREMA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from the original conviction and sentence of Hon. P. M. Wechuli, RM dated 12<sup>th</sup> March 2018 at the Principal Magistrate's Court at Tigania in Criminal Case No. 52 of 2015)***

**JUDGMENT**

1. The appellant, **RICHARD KIREMA**, was charged and convicted of the offence of defilement contrary to **section 8(1) and (3)** of the **Sexual Offences Act** ("the **Act**"). The particulars of the charge were that on the 7<sup>th</sup> day of January, 2015 in Tigania West District within Meru County he intentionally caused his penis to penetrate the vagina of AK, a girl child aged 12 years.

2. The facts leading to the case were as follows. PW 1 gave sworn testimony after a *voire dire*. She narrated what took place as follows:

*I was sweeping the kitchen, Kirema came and asked where my mother was. I told her she had gone somewhere. He then threw away my broom, he held my neck and threw me on the bed. He then started defiling me. He removed all my clothes and he also removed his clothes. He threw me on the bed which we normally sleep on. [PW 2] came and Kirema ran. He fell and ran away. I did not see him again. He did bad manners to me. He did the bad manners here (pointing to her crotch). I felt pain. He used his penis to touch me here. He had held my neck I couldn't scream.*

3. PW 2 testified on oath after a *voire dire*, that she was at her grandmother's house with PW 1 and she left her sweeping. When she returned, PW 1 was nowhere. She started looking for her and when she went to the kitchen, she found the appellant holding PW 1 by her neck and arm and lying on her. She started screaming causing people to come as the appellant ran away. When PW 1's grandmother, PW 3, arrived home, PW 1 told her what had transpired. She took PW 1 for treatment at the nearby clinic and also reported the incident at Kithiari A.P post. PW 7, an officer at the A.P post, confirmed that PW 1 and PW 3 came to report the incident on 7<sup>th</sup> January 2015.

4. PW 5, a Clinical Officer, at Mbeu Hospital, testified and produced the P3 form. She did not observe any injuries or bruises on the vagina but noted that the hymen was absent. In her view the absence of the hymen was indicative of penetration.

5. When put on his defence, the appellant testified that he and the complainant's family had a dispute over land and the matter had been reported to the assistant chief. He concluded that he had been framed.

6. The learned magistrate was satisfied that on the basis of the evidence, the prosecution had proved its case and convicted the appellant thus precipitating this appeal. The thrust of the appellants' appeal is that the prosecution did not prove its case beyond reasonable doubt. 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.*"

7. As regards the identity of the appellant, PW 1 and PW 2 were clear that the appellant was a person known to them and he used to pass by their place. In his defence, the appellant acknowledged that he knew them as he complained about being framed due to a land dispute.

8. The events of the material day were clearly outlined and leave no doubt that the appellant did an act which amounted to penetration. Under the proviso to **section 124** of the **Evidence Act (Chapter 80 of the laws of Kenya)**, the testimony of a child victim is sufficient to support a

conviction without any corroboration if for reasons to be recorded the trial magistrate believes the child is telling the truth. In this case the trial magistrate recorded as follows:

*I did observe the minor in court and have no doubt that she was speaking the truth. She was cross examined by the accused and her testimony remained consistent. She knew the accused well, since he always passed by their home to take tea. Further, the evidence occurred during day time so she was able to see the accused clearly.*

9. Speaking about the effect of the proviso to **section 124** of the **Evidence Act**, the Court of Appeal in **Mohamed v Republic [2006] 2 KLR 138** stated that:

*It is now settled that the Courts shall no longer be hamstrung by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful.*

10. Notwithstanding this there is sufficient corroborative evidence to support the prosecution case. The first is the testimony of PW 2 that she found the appellant in the act of sexually assaulting PW 1. The second is the medical evidence which tended to establish the act of penetration.

11. The appellant argued that the medical evidence was inclusive. It is true that the vagina did not have bruises or laceration but given her age, P.W 5 was of the view that penetration was the only or likely cause of the penetration. Even if I were to discount the medical evidence, the testimony of PW 1 and PW 2 was sufficient to sustain the conviction.

12. The appellant's defence was an afterthought. He did not raise the issue when he cross examined PW 3. In any case, it would be inconceivable that PW 1 and PW 2 would have a land dispute with him.

13. The appellant also complained that an essential witness was not called. In this case, the investigating officer did not give evidence. He would have given an account of the investigation had he testified. In this case though, the testimony of PW 1, PW 2, and PW 3 together with that of PW 4 and 5 leave no doubt that it is the appellant who committed the offence. On this issue the Court of Appeal in **Sahali Omar v Republic MSA CA Crim. App No. 44 of 2016 [2017] eKLR** held as follows:

*The prosecution reserves the right to decide which witness to call. Should it fail to call witnesses otherwise crucial to the case, then the court has the mandate to summon those witnesses. But should the said witnesses fail to testify and the hitherto adduced evidence turn out to be insufficient, only then shall the court draw an adverse inference against the prosecution. This is because the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt (see. Keter v Republic [2007] 1 EA 135).*

14. The child's age is a question of fact. PW 1 was aware of her own age and the age assessment done confirmed she was 12 years old at the time of assessment. The precise age of the child puts the case within the bracket of **section 8(3)** of the **Act** which attracts a sentence of 20 years' imprisonment.

15. I note that during the course of the proceedings, the appellant stated that the parties should forgive each other but the trial magistrate refused. This confirms his guilt. However, and based on the evidence alone, I affirm the conviction and sentence.

16. The appeal is dismissed.

**DATED and DELIVERED at MERU this 15<sup>th</sup> day of October 2018.**

**D.S. MAJANJA**

**JUDGE**

Appellant in person.

Mr. Kiarie, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.