



**REPUBLIC OF KENYA**

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

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

**CRIMINAL APPEAL NO. 57 OF 2017**

**PETER MOGUCHE OMBONGI..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

***(Appeal from the original conviction and sentence of Hon. N. Kahara– RM dated 6<sup>th</sup> March 2017 at the Principal Magistrate’s Court at Keroka in Criminal Case No. 787 of 2016)***

**JUDGMENT**

1. The appellant, PETER MOGUCHE OMBONGI, was charged, convicted and sentenced to twenty (20) years imprisonment for the offence of defilement contrary to **section 8(1) and (3)** of the Sexual Offences Act (‘the Act’). The particulars of the offence were that on 7<sup>th</sup> July 2016 at Keroka Township, he intentionally caused his penis to penetrate the vagina of CN a child aged 12 years with his penis.
2. At the trial the prosecution called three witnesses. The complainant (PW 1), the complainant’s mother (PW 2) and the Clinical Officer (PW 3). PW 1 testified on oath after a voire dire. She stated that she was sent to Kasuku Hotel to collect a jug on the evening of 7<sup>th</sup> July 2016. When she reached the hotel, she found another lady who told her to wash the jug. The appellant, whom she referred to as “Kafupi” came where she was. She narrated what took place as follows;  
  
*“Kafupi (witness points at accused) came from a room next to the hotel and found me washing the jug. Kafupi works at Kasuku hotel. The room is where he sleeps. He got hold of my dress and pulled me towards the room. He pulled me to the room and when we entered the room he closed the door. He then placed me on the bed. He removed my skirt, petticoat and panty. I started screaming and he would grab my mouth. He also removed his trousers. He then slept on top of me. He raped me. He erected his penis and put it in my vagina. I would try to scream and he would cover my mouth. He inserted his penis in my vagina. After he had finished he wore his clothes, opened the door and ran away. I also wore my clothes and left the room.”*
3. PW 1 went home after her ordeal. PW 2 was not at home on the material evening but she came back on the next day. PW 1 told her that she was having stomach pains and could not sit well and was also having pain while going for short and long calls. PW 2 sent her to the doctor but the doctor called PW 2 and asked her to examine PW 1’s private parts. PW 1 examined PW 1 and saw the vagina wide open and a shiny fluid coming out. It is at this point that PW 1 then narrated to her what the appellant had done to her.
4. PW 2 then mobilized community policing to locate the appellant who was then arrested. She also reported the matter to Keroka Police Station and was issued with a P3 form. The clinical officer who prepared the P3 form and PRC form testified that PW 1 was initially seen at Keroka on 10<sup>th</sup> July 2017. When he examined her, he observed that the hymen was broken and there was a whitish discharge.
5. After the close of the prosecution case, the accused gave a sworn statement where he denied the offence. He told the court that he could not have committed the offence as he worked for seven days straight.
6. The issue raised by the appellant in this appeal is whether the prosecution proved its case. In order to prove the offence of defilement under section 8(1) of the Act, the prosecution must prove that the appellant caused an act of penetration to a child.
7. The testimony of PW 1 was descriptive of what the appellant did to her at the hotel on the material day. The appellant was a person she knew and both her and PW 2 confirmed that they were neighbours and that they were using the same toilet where PW 2 had rented a house.
8. PW 1’s testimony was corroborated by that of PW 2 to whom she narrated her ordeal. Although she did not tell her immediately, PW 2 testified that she had been away. PW 1 only told PW 2 what had transpired when she was assured that PW 2 would not beat her. Moreover, PW 2 saw that she had difficulties walking and complained of pain in her stomach and private parts from the date of the sexual assault all

pointing to the fact of penetration. Lastly, the medical evidence by PW 3 confirms that there was penetration.

9. Although the defence was in the nature of an alibi, it was displaced by the firm prosecution evidence which showed that the appellant worked at the hotel close to where PW 1 lived and they used the same toilet. Even if he worked for seven straight days, he would still have had the opportunity to commit the offence as he lived and worked at the same place PW 1 resided.

10. The appellant complained that key witnesses were not called. First, the lady who was at the hotel and who gave PW 1 the jug, second, the doctor who alerted PW 2 that there was a problem and third, the investigating officer. The law is that the prosecution need not call all the possible witnesses but failure to call material witnesses may lead the court to make an adverse inference against the prosecution. (see **Bukenya and Others v. Uganda [1972]EA 549**). From the evidence, the lady at the hotel did not witness the incident as she left before the appellant grabbed PW 1. As regards the initial doctor, his evidence would not add to any further medical evidence that was produced to confirm penetration. The investigating officer would give a summary of the investigating process and in this case there was no suggestion that he did or failed to do anything that impacted the case. At the end of the day, the evidence presented was sufficient to sustain the conviction which I now affirm.

11. I am also satisfied that the age of PW 1 was proved by production of her birth certificate. The child was 12 years and under **section 8(3)** this attracts a minimum mandatory sentence of 20 years imprisonment.

12. I affirm the conviction and sentence. The appeal is dismissed.

**Dated and delivered at Kisii this 13<sup>th</sup> day of November 2018.**

**D.S MAJANJA**

**JUDGE**

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

Appellant in person.