



REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL NO. 44 OF 2015

BETWEEN

DAVID OTIENO ALEX alias MZEE MKUBWA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 1088 of 2014 at the Chief Magistrate's Court at Homa Bay, Hon. P. Gichohi, CM dated on 30th September 2015)

JUDGMENT

1. The appellant **DAVID OTIENO ALEX** alias **MZEE MKUBWA** was charged with the offence of defilement contrary to **section 8(1) and (2)** of the ***Sexual Offences Act***. The charge against him was that on 13th October 2014 at around 6 in Homa Bay County, he caused his genital organ namely his penis to penetrate the genital organ namely the vagina of MA, a child aged 5 years. The accused also faced an alternative charge of indecent act with a child contrary to **section 11(1)** of the ***Sexual Offences Act*** based on the same facts.
2. The accused was convicted and sentenced to life imprisonment. He now appeals against conviction and sentence on the grounds set out in the petition of appeal filed on 10th December 2015. The grounds therein are supported by written submissions. The thrust of his appeal is that the prosecution failed to prove the offence against him. He also challenged the veracity of the prosecution witnesses.
3. As this is a first appeal, I am required to review the evidence, evaluate it and reach an independent conclusion as to whether to uphold the conviction. In so doing, I am alive to the fact that I never saw or heard the witnesses testify (see ***Okeno v Republic [1973] EA 32***).
4. The evidence before the court was as follows. PW1, after a *voire dire*, gave unsworn testimony. She stated that on the date of the incident she returned home from school and went to her grandmother's house where the appellant was. She knew the appellant as Mzee whom she used to see at her grandmother's house. She described how he removed his clothes and also removed her clothes. The learned magistrate recorded her testimony as follows;

When he did tabia mbaya to me, I felt pain and cried. He then left me. He did tabia mbaya using his "thing" (asked what thing it is and to point which part of the body the accused's thing is, she points at her private part). She declines to talk further at this juncture and covers her face with her hands.

5. After the ordeal she went home. She did not tell her mother or anyone but when she went to school the next day she told her teacher, PW 2, what had transpired. PW 2 recalled that on 13th October 2014 in the morning, PW 1 came to school and was huddled in a corner. She also noticed that PW 1 was not walking properly and when asked, PW 1 replied that she had been pricked by a thorn on her foot. She suspected something was amiss and took her outside and inspected her vagina. She noticed that she was bruised and a foul smelling discharge. Together with another teacher they took PW 1 to Asumbi Mission Hospital. PW 1's mother was called and she went to hospital where the child was examined by the doctors. During the examination, she identified the person who had defiled her as Mzee. The complainant's mother, PW 3 confirmed that she was called and went to the hospital when the complainant was examined. She stated that the PW 1 was 6 ½ years old.
6. PW 3 reported the matter to Rangwe Police Station where she was issued with a P3 form. She proceeded to Homa Bay District Hospital where the child was examined by PW 4, a medical practitioner, on 15th October 2014. He observed that PW 1 had difficulties in walking. He noted that PW 1 had a broken hymen and bruises on both sides of the labia majora. According to the tests done at Asumbi, the vaginal swab had revealed blood in the urine. He concluded that there was forceful penetration.
7. The investigating officer, PW 8, confirmed that the incident pertaining to the defilement of PW 1 was reported to Rangwe Police Station on 14th October 2014 by PW 3 who was accompanied by PW 1. PW 1 had been treated at Asumbi Mission Hospital and was issued with a P3 form and referred to Homa Bay District Hospital for examination. PW 3 informed him that she knew the suspect who was asking for her forgiveness and was coming to see her the following day. PW 8 advised her to lock the appellant in the house when he came to see her and when he came to see her he locked him in the house and called PW 8 who came and arrested him. PW6 confirmed that the appellant was identified by PW1 and PW 3.
8. In his sworn testimony, the appellant denied that he had committed the offence. He stated that he was arrested on 16th October 2010 after being locked by PW 3 in her house after she had called him to discuss an issue regarding admission to college. He claimed he had rebuffed PW 3's sexual advances.
9. 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.*"
10. As regards the first element of penetration, the testimony of PW1 was clear and consistent as to the fact that she had sexual intercourse. Although she was a very young child, her testimony, which I have outlined at paragraph 4 above, left no doubt that she had been sexually assaulted. Her testimony remained unshaken even after cross-examination. Although under the proviso to **section 124** of the **Evidence Act (Chapter 80 of the Laws of Kenya)**, her testimony did require corroboration to support a conviction, there was ample corroborative evidence. The fact that she had sexual intercourse was corroborated by the medical evidence of PW 4 which showed clearly that her vagina had bruises and the hymen broken. PW 2 saw her in a distressed state on the next day at school and also observed the state of her private parts. The fact that she did not report her ordeal to immediately after the incident is not strange as she was a child and was probably scared by the ordeal hence when she was questioned by PW 2 she stated that she was injured by a thorn. The totality of the evidence leaves no doubt that penetration took place and was proved.
11. Did the appellant commit the offence? The complainant stated that she knew the appellant as Mzee and informed the doctor who treated her in presence of PW 2 and PW 3 that it is Mzee who had sexually assaulted her. The accused admitted that he was called Mzee but his defence was threadbare and was in reference to the manner of his arrest. The accused subjected the prosecution witnesses to searching cross-examination but their testimony remained unshaken. There was

absolutely no reason for PW 1, a child of tender years, to lie to the court about her ordeal. I find and hold that the appellant was the person who committed the felonious act.

12. Finally, as regards the age, the appellant did not contend that the complainant was an adult. A matter of fact, she was nursery school and her mother PW3, testified that she was born on 24th August 2008. For purposes of the sentence the age of the PW 1 fell was below the 11 year old bracket which attracts mandatory life sentence under **section 8(2)** of the ***Sexual Offences Act***.

13. The appellant complains that he was not given witness statements but the record shows that he raised the issue on 2nd December 2014 and the court directed the prosecution to furnish the statements. The accused confirmed that he had received the statements on that day and that matter adjourned for hearing to another day. The appellant never raised the issue again and proceeded to examine the witnesses vigorously. His complaint on this ground lacks merit.

14. The conviction and sentence are affirmed. The appeal is dismissed.

DATED and DELIVERED at HOMA BAY this 3rd day of March 2016

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Oluoch, Senior Assistant Director of Public Prosecutions, instructed by the Office of Director of Public Prosecutions for the respondent.