



REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL NO. 1 OF 2016

(FORMERLY MIGORI HCCRA NO. 31 OF 2015)

BETWEEN

RICHARD OCHIENG ORWA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 446 of 2011 at Senior Resident Magistrates Court at Rongo, Hon.P.K.Rugut, SRM dated 12th May 2015)

JUDGMENT

1. The appellant **RICHARD OCHIENG ORWA** was charged with the offence of defilement contrary to **section 8(1) and (3)** of the ***Sexual Offences Act, 2006*** in the subordinate court. The particulars of the charge were that on 25th August 2011 at [particulars withheld] within Migori County, he caused his penis to penetrate the vagina of RAO, a child aged 12 years. He also faced an alternative count of committing an indecent act with a child contrary to **section 11(1)** of the ***Sexual Offences Act, 2006*** based on the same facts. He also faced a second count of abuse of authority contrary to **section 24(4)** of the ***Sexual Offences Act***. It was alleged that he took advantage of his position as head teacher of [particulars withheld] Academy to induce RAO, a pupil at the said Academy, to have sexual intercourse with him. He was convicted on both counts and sentenced to serve 20 years on the first count and 10 years imprisonment on the second count with both sentences running concurrently.
2. The appellant appeals against conviction and sentence based on the grounds set out in the memorandum of appeal dated 14th May 2015. In summary, the grounds are that the prosecution did not prove the particulars of the charge against the appellant and that the complainant's testimony was not corroborated. He contended that the prosecution evidence had several inconsistencies which should have been resolved in his favour. The appellant supplemented the grounds of appeal with written submissions.
3. Mr Oluoch, counsel for the respondent, submitted that the prosecution proved all the elements of the offence. He contended that the evidence of the complainant was vivid and did not require corroboration notwithstanding the fact that medical evidence proved the element of penetration.
4. As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see ***Okeno v Republic***

[1973] EA 32).

5. The complainant PW 1 stated that she was born on 28th August 1999 and that when the incident took place, the appellant was the head teacher of [particulars withheld] Academy where she was a student. She described what happened to her on the evening of 25th August 2011 as follows;

I was called by Mwalimu B who told me that the headteacher was calling. I went in his office he told me that he was giving me a letter to take to another teacher but the letter was at his house, he told me to accompany him, we went, he opened the house, and we went to an inner house, he made me lie down and he made sex to me, I was wearing half dress, bike and pant. He removed my biker and pant, after he finished, he asked me if I was injured, I told him yes, he told to go to class, after that, we went home, I did not tell my mother because he warned me.

6. PW 1 further testified that she did not tell anyone until the next week when she started feeling pain. She finally told her mother, PW 2 what happened. PW 2 recalled that on 5th September 2011, PW 1 told her that she had stomach pains and could not work in the shamba. Later on she found PW 1 crying and she asked her what happened, she told him how the appellant had sexual intercourse with her. She went to the school and confronted the appellant about the incident. She took PW 1 the hospital on 6th September 2011, reported to the police station and was issued with a P3 form. The appellant was arrested on the same day when they were at the hospital.
7. PW 1 was examined at Awendo District Hospital on 6th September 2011. The P3 form was produced by PW 3 on behalf of the clinical officer who examined her. He testified that the PW 1 was examined 5 days after the incident. The report noted that PW 1 had a blood stained panty and that she had vaginal bleeding and discharge due to her monthly periods. He also noted that her hymen was broken. He concluded that PW 1 had been defiled.
8. PW 4, who worked at the Academy as an untrained teacher, recalled that on 25th August 2011 at around 5pm, the appellant called him to the staffroom and asked him to call PW 1, who was pupil in the class he was teaching, to collect a letter. He summoned PW 1 and told to go and see the appellant. He went back to teach. PW 1 came back after he had finished the lesson and followed him to the staffroom. When he asked her whether she had been given the letter by the appellant she told him the letter had been misplaced. He later learnt that PW 1 had been defiled when the appellant was arrested.
9. The complainant's father, PW 5, recalled that he arrived home late on 5th September 2011. PW 2 told him that PW 1 had been defiled by the appellant and threatened to kill her if she disclosed. The appellant telephoned him and asked for forgiveness and also went to his place of work.
10. The investigating officer, PW 4, testified that PW 5 came to Awendo Police Station on 6th September 2011 to report that his daughter had been defiled by the appellant. He was informed that the appellant was heading to Awendo Hospital where he proceeded and arrested him in the presence of PW 1 and PW 2.
11. When put on his defence, the appellant elected to give sworn testimony. He denied that he defiled PW 1. He admitted that he was the head teacher at the Academy where PW 1 was a student. He stated that on 25th August 2011, he was at his home in Kokuro between 4 – 6pm grazing his cows and that he did not see PW 1 on that day as he was away attending classes at a college in Migori during the day. He also denied that PW 4 was a teacher at the school or that he was in the school on that day.
12. The appellant further testified that 5th September 2011 was the third term school opening day. PW 2 came to his office with PW 1 in the evening and informed him that she had been defiled by him and she demanded his apology. He stated that he was concerned about the child's health and

- advised the mother to take her to hospital. He stated that the PW 5 called him on 6th September 2011 and informed him they were taking the child to hospital. He went to hospital to see the child and to confirm that his semen was not in PW 1's blood. After the tests were done, he was arrested.
13. In order to secure a conviction for the offence of defilement under **section 8(1)** of the ***Sexual Offences Act***, the prosecution must establish that the person has committed an act which causes penetration with 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.*"
 14. The testimony of PW 1 was clear and consistent as to how she was sexually assaulted by the appellant whom she knew and who was her headteacher. The fact that she was at school on the material date is confirmed by the testimony of PW 4 who testified that PW 1 was called by the appellant to collect a letter. The appellant denied that PW 4 was a teacher at the school but PW 4 gave detailed and credible testimony about the school which left no doubt he was a teacher. The fact that PW 1 did not report the incident immediately did not undermine her testimony; it is understandable as she stated that she was threatened by the appellant.
 15. The appellant submitted that the P3 form ought to be rejected as it was not stamped. The P3 form was produced under **section 77** of the ***Evidence Act*** by PW 3 who testified that he knew the clinical officer who prepared the same and had worked with him was also familiar with his handwriting and signature. There is no requirement that the P3 form be stamped and the testimony PW 3 confirms its authenticity. Moreover, on the day PW 1 was examined, the appellant admitted that he was in the hospital. I therefore reject this argument. In any case, the medical examination was carried out 5 days after the incident and after the complainant had started having her monthly period hence the tests were inconclusive. Under the proviso to **section 124** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)***, the testimony of PW 1 did not require corroboration if the magistrate was convinced that the complainant was truthful and recorded the reasons hence the medical evidence was not necessary to support the prosecution case.
 16. The appellant's conduct adverted to by the complainant's father, PW 5, is consistent with his guilt. The appellant called him to seek forgiveness and also went to his place of work. The fact of the communication is confirmed in the defence testimony. His alibi defence could therefore not stand in light of the credible testimony of PW 1 and that of PW 4 who saw him at the school on the material day.
 17. The appellant complained that the court relied on contradictory evidence as regards the date on which the incident took place. The P3 form stated that the incident took place on 1st September 2011 yet the testimony of PW 1 testified that she was defiled on 25th August 2011. In my view, the testimony of PW 1 as relates to the date was credible as it was confirmed by PW 4 who saw her at the school on the material day. In the circumstances I do not find the inconsistency material. The original charge sheet was later amended to reflect the date of the sexual assault and in view of that the appellant was not prejudiced at the trial.
 18. The age of a child is a question of fact. For purposes of the offence of defilement, the prosecution must prove that PW 1 was a child. The fact that she was a student in primary school was admitted by the appellant. Proof of her actual or apparent age is necessary for determining the sentence and was indeed proved by the production of a dedication certificate which showed that she was born on 28th August 1999. She was therefore 12 years old at the time of the incident. Under **section 8(3)** of the ***Sexual Offences Act*** the sentence imposed of 20 years imprisonment is mandatory.
 19. The prosecution also proved that the appellant was a person in authority as the headteacher of the Academy where PW 1 went to school. The evidence is clear that he procured sexual intercourse and as such I find and hold that he was properly convicted on the second count.
 20. The convictions and concurrent sentences were sound and are accordingly affirmed.

21.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 the Director of Public Prosecutions for the respondent.