



REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL NO. 45 OF 2015

BETWEEN

SCOFFIELD BIKO OGWENO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 804 of 2014 at Senior Resident Magistrates Court at Mbita, Hon.S.O.Ongeri, SRM dated 8th December 2015)

JUDGMENT

1. The appellant, **SCOFFIELD BIKO OGWENO**, was charged with the offence of defilement contrary to **section 8(1) and (4)** of the ***Sexual Offences Act, 2006*** in the subordinate court. He was convicted and sentenced to 15 years imprisonment. The particulars of the charge were that on 2nd February in Suba District within Homa Bay County he caused his penis to penetrate into the vagina of AOO, a child aged 16 years old. 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.
2. The prosecution called 3 witnesses and its case was as follows. The complainant, PW 1, testified that she was born on 25th September 1994 and that when the incident took place in 2011 she was 16 years old. She stated she had recently joined the school where the appellant was the principal and that on 2nd February 2011 at around 5.00pm she went with him to collect school uniform from the tailor. The tailor had not completed making the uniform so they waited until 8.00pm when she collected it. The appellant took her to a hotel to eat after which they went back to school. Since there was nowhere to sleep, he took her to his house. He gave her beddings to sleep in the sitting room while he slept in the bedroom. During the night, the appellant went for a call of nature and when he came back he proceeded to have sexual intercourse with her. When she went home, she did not inform her mother what had happened but her sister later discovered she was pregnant. Her sister and elder brother were unhappy with her and they took her to the police station and persuaded her to report the report to the police at Mbita Police Station. She later delivered a child on October 2011. She further testified that when the accused was reported he owned up to the being the father of the child and offered to take care of the child. She recorded her statement and was issued with a P3 form.
3. The investigating officer, PW 2, testified that on 6th September 2011, PW 1 in the company of her brother and sister came to report to the Police Station that she had been defiled by the appellant on 2nd February 2011 and that she was 7 months pregnant at the time. PW 2 issued a P3 form. He

further testified that PW 1 left and returned after she had given birth to a baby girl. He arrested the appellant on 10th July 2012 and escorted him to Mbita District Hospital. His blood together with that of PW 1 and the child was extracted and sent to the Government Chemist to confirm the paternity of the child. As the samples were spoilt in the processing, he arranged for buccal swabs to be taken from the appellant, PW 1 and her child on 15th July 2013. The DNA samples were processed and according to a report prepared by Dr A. W. Nderitu, the appellant was excluded as the biological father of PW 1's child.

4. The final prosecution witness was the clinical officer, PW 3, from Mbita District Hospital who examined PW 1 on 16th July 2012. He found that there was major scarring on the labia majora. Although he concluded that there was defilement, he recommended a DNA test be done to establish the paternity of the child.
5. In his sworn defence, the appellant admitted that the PW 1 was a form 1 student at his school and that on 2nd May 2011 at 8.30pm, he was supervising his school preps and he thereafter proceeded home at 10.00pm. He testified that nothing took place at the time and he was only arrested in July 2012. He denied that he had impregnated PW 1 and that he voluntarily gave his blood and saliva for the DNA test.
6. The learned magistrate found the prosecution had proved its case and convicted the appellant principally on the ground that he believed the testimony of PW 1 and that under the provisions of **section 124** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*, he was entitled to enter a conviction without the necessity of corroboration. The appellant now appeals against conviction and sentence based on the grounds set out in the petition of appeal dated 14th December 2015. Although the appeal raised several grounds of appeal, the substance of his appeal is the totality of the evidence creates doubt as to the veracity of the evidence and that such doubt should have been resolved in favour of the appellant.
7. The respondent opposes the appeal on the ground that the offence was proved and that the testimony of PW 1 did not require corroboration in light of **section 124** of the *Evidence Act*.
8. 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." The only evidence in support of the prosecution case on the issue of penetration is that testimony of PW 1. The DNA test excluded the appellant as the biological father of the child and the medical examination carried out on 16th July 2012 was too remote to connect the appellant to the defilement as it was carried out a year and 5 months after the incident
9. Thus the magistrate could only rely on the testimony of PW 1 to convict the accused hence reliance on the proviso to **section 124** of the *Evidence Act* which provides;

Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for any offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth. [Emphasis mine]

10. In his conclusion, the learned magistrate found that PW 1 was telling the truth in the manner she narrated the events of 2nd February 2011 and that she was honest. He rightly pointed out the DNA evidence was only crucial in establishing the paternity of the child.
11. 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). It has also been stated that appellate court will not lightly interfere with the trial court findings on demeanor where such findings accord with the evidence before the court merely because it could have taken a different view of the matter. The court may however intervene if the observations on demeanour are inconsistent with the evidence (see *Mwangi v Wambugu* [1984] KLR 453).
12. In considering whether PW 1 was honest, the court ought to have considered the entirety of the evidence. The learned magistrate did not address why the incident was reported on 6th September 2011 while the incident took place on 2nd February 2011 and then the accused arrested in July 2012. PW 1 stated in her testimony that her brother and sister were angry that she was pregnant and in cross-examination she stated that she was aware that her brother had been demanding money from the appellant to stop the case. Although the prosecution was not obliged to call all or any witnesses, it strange that her brother and sister, to whom she first informed of the incident and who had pressured her to report to the police were not called to testify. The learned magistrate could properly draw an adverse inference on this issue.
13. The learned magistrate did not weigh the issues I have outlined against PW 1's testimony. Had he done so he would probably have arrived at a different conclusion on the credibility of PW 1's testimony. As he failed to do so, I find the conviction unsafe.
14. I allow the appeal and quash the conviction and sentence. The appellant is set free unless otherwise lawfully held.

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.