REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL NO. 46 OF 2012

BETWEEN

DANCAN OMONDI OMOLLO … APPELLANT

AND

REPUBLIC……..... RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. P. C. Biwott, PM dated 28th March 2012 at Principal Magistrates Court at Winam in Criminal Case No. 445 of 2011)

JUDGMENT

[1] In the subordinate court, the appellant **DANCAN OMONDI OMOLLO** faced a charge of defilement contrary to **section 8(1)** and **(4)** of the ***Sexual Offences Act, 2006.*** The particulars were that on 10th April 2011 at [Particulars withheld] Centre, [Particulars withheld] Sub-location within Nyanza Province, he intentionally caused his penis to penetrate the vagina of A B A, a child aged 16 1/2 years. He also faced an alternative charge of committing an indecent act with a child contrary to **section 11(1)** of the ***Sexual Offence Act***. After the trial he was convicted and sentenced on the alternative charge and sentenced to 10 years' imprisonment. He now appeals against conviction and sentence.

[2] In the petition of appeal filed, the appellant contended that the evidence adduced did not establish that prosecution case beyond reasonable doubt, that the learned magistrate admitted evidence without adhering to the rules of evidence, that the prosecution evidence was full of contradictions and inconsistencies and that his defence was not considered. The appellant also filed written submissions to support his case. The respondent opposed the appeal and submitted that the prosecution proved all the elements of the offence of defilement.

[3] Before I consider the issues raised in this appeal, I must restate the principles applicable in considering a matter such as this. The duty of the first appellate court is to review the evidence, evaluate it and reach an independent conclusion as to whether to uphold the conviction. In so doing, the court must make an allowance for the fact that it never saw or heard the witnesses testify (see ***Okeno v Republic*** **[1973] EA 32)**. The facts that emerged at the trial were as follows.

[4] After a *voire dire* examination, A B A (PW 1) testified that she was 16 years old and was attending school in Class 6. She told the court that on 10th April 2011 at 2.00pm she was at home when other children had gone to church. As the toilet in her compound was damaged she went to the school, which was nearby. As she was coming back home she saw a Kshs. 100/- note. The appellant who asked her whose money it was. What happened next was detailed as follows;

He grabbed me and led me to a dormitory (dorm) ……. In the dorm he removed my skirt and shirt. He also removed my sweater. He removed my underwear too, He removed all his clothes. He took me to a bed……. He took his penis and inserted into my vagina.

[5] After the ordeal, PW 1 went home and informed her sister who took her to Kondele Police Station where she recorded her statement and was referred to New Nyanza Provincial General Hospital where she was treated.

[6] The complainant's father, PW 2, recalled that he had left PW 1 and other children at home as he went to Church. He came back home and found that PW 1 had a problem, looked fearful and could not speak to him. He could not tell what happened by to her. On the night of 11th April 2011, PW 1 sister told him that PW 1 had been defiled. The complainant's sister, PW 3, recalled that on 10th April 2011, she went to Church but when she returned, she found PW 1 sleeping. When she drew close to her she found her crying. PW 1 told her that she had been defiled by a boy after she collected Kshs. 100/-. She told her father and they went to Kondele Police Station and thereafter to the hospital.

[7] The investigation officer, PW 4, testified that PW 1 accompanied by PW 2 came to report the incident of defilement on 11th April 2011 at about 9.40am. She reported that she had been defiled by a student at [Particulars withheld] Vacational Centre. He issued the a P3 and escorted them to hospital. He recorded statements and arrested the appellant who was identified by PW 1.

[8] The P3 form was produced by PW 5 on behalf of his colleague, a medical doctor, under the provisions of **section 77** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)***. According to the medical report, the doctor examined PW 1 on 14th April 2011. He found that PW 1 had changed clothes and all examination did not yield any result showing penetration. He noted that examination of the external genitalia was not done on the date of defilement. He also recorded that no spermatozoa, pus cells or yeasts were seen when a high vaginal swab done on 11th April 2011.

[9] When put on his defence, the appellant elected to give sworn testimony. He told the court that he was a student at the institution and that on 10th April 2011 at about 2.00pm he was away for prayers and returned to the school at about 3.00pm. He explained that he continued with his activities normally until 13th May 2011, when PW 2 came to the school at about 5.30 pm and asked for him. He started beating him while accusing him of stealing his phone whereupon a car emerged and the complaint and her sister came out and stated that he had assaulted their father.

[10] Due to the nature of medical evidence, the learned magistrate found that the principal charge of defilement was not proved and proceeded to convict him on the alternative charge. He found the fact of undressing the PW 1 an indecent act and the fact of inserting his penis into her vagina involved touching.

[11] PW 1 gave clear testimony on how she was dragged by the assailant and subjected to sexual assault. Her detailed testimony left no doubt that she was sexually assaulted. The consistency and veracity of her testimony is confirmed by the fact that she narrated her ordeal to PW 2 and PW 3 who had been away in church at the earliest opportunity.

[12] The fact that the medical evidence produced by PW 5 did not corroborate the testimony PW 1 does not undermine the prosecution case. **Section 124** of the ***Evidence Act*** permits the court to act on such evidence of a child if it is satisfied that that the child is telling the truth thus the medical evidence would be merely corroborative when the testimony of the child is clear and convincing (see ***Kassim Ali v Republic,* MSA CA Cr. App. No. 84 of 2005 [2006]eKLR)**. In any case the appellant was convicted on the alternative charge of an indecent act which does not require proof of penetration. An *"indecent act"* under **section 2(1)** of the ***Act*** is defined as an unlawful intentional act which causes, *"(a) any contact between any part of the body of a person with genital organs, breasts or buttocks of another, but does not include an act that causes penetration."*

[13] The other issue is whether the appellant was the person who sexually assaulted PW 1. The incident

took place in broad daylight at the school which was near the complainant's home. According to PW 4, PW 1 reported the assailant was a student at the [Particulars withheld] Vacational Centre. PW 4 reported that when the complaint was reported PW 1 told him that she knew the appellant and could identify him and indeed when they went to the arrest him, PW 1 positively identified him. In his defence the appellant admitted he was a student at the Centre but denied that he committed the act. There was no reason for the child to implicate the appellant in a such a serious offence and nothing of the kind was suggested to the witnesses in cross-examination. When called upon to cross-examine PW 2, the appellant did not suggest to him that he was being framed. His alibi, when considered alongside the prosecution evidence, was an afterthought and was properly dismissed

[14] For the charge under **section 11** of the ***Sexual Offences Act*** to stand, all the prosecution needed to prove was that the complainant was below 18 years of age. She testified that she was 16 years old and her birth certificate was produced in evidence. As I stated elsewhere, PW 1 testimony was clear that the appellant's genital organ touched her genital organ. The medical evidence did not add or subtract from the proof of the alternative charge. The appellant was properly convicted. Since the mandatory minimum sentence is 10 years' imprisonment, the sentence was within the law.

[15] I affirm the conviction and sentence. The appeal is dismissed.

DATED and DELIVERED at KISUMU this 6th day of September 2016

D.S. MAJANJA

JUDGE

Appellant in person.

Ms Nyamosi , Senior Assistant Director of Public Prosecutions, instructed by the Office of the Director of Public Prosecutions for the respondent.