



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL NO. 48 OF 2013

BETWEEN

MICHAEL OTIENO KARIUKI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. P.M.Wechuli, RM dated 4th April 2013 at Principal Magistrate's Court at Nyando in Criminal Case No. 734 of 2012)

JUDGMENT

[1] The appellant, **MICHAEL OTIENO KARIUKI** was charged with the offence of defilement contrary to **section 8(1)** as read with **section 8(2)** of the ***Sexual Offences Act, 2006***. The particulars of the charge were that on 27th July 2012 at [particulars withheld] in Nyanza District January, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of TAD, a child aged 6 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*** based on the same facts. He was convicted on the principal charge and sentenced to life imprisonment. Aggrieved by the conviction and sentence, the appellant has now filed this appeal.

[2] In his petition of appeal, the appellant avers that the trial magistrate erred by basing the conviction solely on the evidence of identification by PW 1 under difficult and uncondusive circumstances. He complained that he was not allowed to cross-examine the complainant and that the age of the child was not proved. In the amended grounds of appeal, the appellant contended that the charge sheet was defective and that his constitutional rights were violated as he was not furnished with the charge sheet and the witness statements. He further contended that the charges against him were not proved beyond reasonable doubt. The appellant supplemented the grounds of appeal with written submissions.

[3] Ms Osoro, learned counsel for the respondent, opposed the appeal. She submitted PW 1 gave unsworn evidence in which she detailed the manner in which she was defiled and she identified the accused as "Mzee." That her testimony was corroborated by that of PW 2 in material respects who also confirmed that she knew the appellant. She submitted that the prosecution established all the elements of the offence of defilement.

[4] This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced so as to reach its own independent determination whether or not to uphold the conviction of the appellant (see ***Njoroge v Republic* [1987] KLR 19, 22**). In order to carry out this task it is necessary to outline the evidence as it emerged at the trial.

[5] The complainant (PW 1) gave unsworn testimony after a *voir dire*. She stated that she was 6 years old and was attending primary school. She narrated her ordeal as follows;

I remember what happened on 27/7/12 at 1 pm, I was at home with Mzee. He is in court. It is the accused person. He did bad things to me. I had come from school. He came. My mum had gone to look for omena at her in law. He grabbed me outside and did bad things to me. He was looking after cattle. He just grabbed me outside and did bad things to me. He took me in the house. I had clothes on but I didn't have pants on. He didn't push me down. He caught my hand. He did a bad thing. (shows the crotch). I cried. I got hurt in my vagina. I bled. He left on his own. Mum came and I told her.

[6] The complainant's mother (PW 2) recalled on the material day she had gone to look for *omena* and she left the appellant and her son at home. The appellant was looking after her neighbour's cattle. When she came back, she found PW 1 crying. PW 1 told her what the appellant had done to her and when she examined her vagina, she was bleeding. She took PW 1 to the hospital for treatment. She also reported the matter to the police.

[7] PW 2's complaint was received by PW 4, a police officer, at the police station. She recorded the complaint and escorted the PW 1 and PW 2 to hospital for examination. She also took possession of the school uniform PW 1 was wearing. She also testified that the Chief of Kotieno Location (PW 3) brought the appellant to the Police Station on the same day whereupon he was re-arrested. PW 3 told the court that he received a call from his Assistant Chief informing him of a rape incident. He rushed to the scene of the incident and found the appellant whom he arrested.

[8] PW 5, a medical doctor at Ahero Sub District Hospital confirmed that PW 1 was brought to the hospital on 27th July 2012 on a complaint of sexual assault. He noted that her school uniform was blood stained without tears. The significant finding on examination was that the vagina had lacerations and that the hymen was freshly broke due to penetration and she was still actively bleeding.

[9] The appellant gave unsworn testimony in his defence. He denied that he had any sexual intercourse with PW 1. He told the court that on day he met his in-law who asked him whether he had heard that he had slept with PW 1. He told her he could not have done so since he had gone to water the animals. When he returned he met the Chief who arrested him and took him to the police station.

[10] The main issue for determination in this appeal is whether the prosecution proved, beyond reasonable doubt, that the appellant defiled the complainant. 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."

[11] Although PW 1 gave unsworn testimony, she was clearly explained what the accused did to her. Her testimony was corroborated by that of PW 2 who found her immediately after the incident in a state of distress and bleeding in her genital area. On the very same afternoon she was taken to the hospital where PW 4 confirmed that she was injured in her genitalia. All this evidence taken together with the evidence of her blood stained dress shows that the prosecution proved penetration.

[12] As to the identity of the accused, PW 1 identified the appellant as *Mzee*. This incident took place at day time and he was a person she knew as he was working in the vicinity. Her testimony was also corroborated by PW 2, who confirmed that she left the appellant taking care of a neighbour's cows. The fact that he was in the area is further confirmed by the PW 4 who arrested him immediately he received the report of the incident. This evidence leaves no doubt that it is the appellant who committed the felonious act.

[13] In light of the clear prosecution evidence, the accused's defence could not withstand scrutiny. The appellant was given an opportunity to cross-examine both PW 1 and PW 3, he did not have any question for them. Their testimony remained uncontested. Flowing from this is the appellant's complaint that he

was not furnished with a copy of the charge sheet and witness statements. According to the record, the court directed that the accused be furnished with a copy of the charge sheet and witness statements at his cost.

[14] Although the matter was mentioned several times after that direction, the accused did not raise any issue on this subject. When he was invited to cross-examine PW 1 and PW 2, he did not have any question. I would only fault the learned magistrate for ordering that witness statements be provided to the appellant at his own cost when such an obligation falls on the State under **Article 50(j)** of the Constitution. In *Simon Githaka Malombe v Republic* NYR CA CRA No. 314 of 2010 [2015]eKLR, the Court of Appeal held that the State must provide witness statements free of charge. As the appellant did not raise the issue further and proceeded with the hearing, I cannot say that his rights were violated or that he suffered prejudice.

[15] The age the child is a question of fact. PW 1 testified that she was 6 years old and PW 2 produced the birth notification which showed that she was born on 21st July 2005 and that she was 6 years going to 7. There was no suggestion that PW 1 was not a child and indeed her age fell within the bracket that attracts a mandatory sentence of life imprisonment under **section 8(2)** of the *Sexual Offences Act*.

[16] The appellant challenged the charge sheet on the ground that the charge sheet stated that he was charged with defilement contrary to, "**section 8(1)(2) of the Sexual Offences Act**" which is a non-existent provision of the law. Although the charge is defective on its face, **section 382** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)* renders such an error curable in so far as it does not lead to a failure of justice. **Section 134** of the *Criminal Procedure Code* states the following about charges:

Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged." [emphasis mine].

[17] The charge as drawn contains a statement of a specific offence, namely defilement, and such particulars as they may be necessary for giving reasonable information as to the nature of the offence charged. The only error is the manner the section of the law creating the offence and the penalty is quoted. The appellant clearly knew the nature of the offence he was facing hence I am satisfied that there was no miscarriage of justice or prejudice on his part due to the manner the charge is drafted.

[18] The totality of the evidence is that the appellant defiled PW 1. The prosecution proved all the elements of the offence of defilement.

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

DATED and DELIVERED at KISUMU this 6th day of October 2016.

D.S. MAJANJA

JUDGE

Appellant in person.

Ms Osoro, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.