



REPUBLIC OF KENYA

IN THE HIGH COURT

AT HOMA BAY

CRIMINAL APPEAL NO.47 OF 2014

BETWEEN

ATHUMAN MUSA JUMA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 235 of 2013

at the Principal Magistrate's Court at Ndhiwa, Hon. B. O. Omwansa, Ag PM

dated on 23rd April 2014)

JUDGMENT

1. The appellant **ATHMAN MUSA JUMA** was charged with the offence defilement contrary to **section 8(1) and (3)** of the ***Sexual Offences Act, 2006***. The charge before the court alleged that on 21st October 2013 at [Particulars Withheld] within Suba District, Homa Bay County, he intentionally and unlawfully caused his penis to penetrate the vagina of LAO, a girl aged fourteen years. He also faced a third count of committing an indecent act with a child contrary to **section 11(1)** of the ***Sexual Offences Act*** based on the same facts.

2. On the second count, the appellant was also charged with the deliberate transmission of HIV Disease contrary to **section 26(1)** of the ***Sexual Offences Act***. He was accused that having knowledge that he was infected with HIV, he intentionally, knowingly and wilfully caused his penis to penetrate the vagina of LAO.

3. The appellant was tried and convicted. He was sentenced to 20 years imprisonment on the first count and to 15 years imprisonment on the third count with both sentences to run concurrently. He now appeals against the conviction and sentence set out in the petition of appeal filed on 30th July 2014 which may be summarised as follows; that the prosecution failed to prove the offence against him, that the medical evidence relied upon was not conclusive as to whether penetration took place, that the prosecution failed to prove that there was a deliberate attempt to infect the complainant with the life threatening disease and that the age of the child was not proved. The appellant supplemented the petition of appeal with written submissions.

4. Mr Oluoch, learned counsel for the respondent, opposed the appeal. He submitted that PW 1, the

complainant, gave clear evidence as to how she was defiled during the day and that this was clearly a case of recognition as she knew the appellant. That although her testimony did not require corroboration by reason of **section 124** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*, it was readily corroborated by other evidence including the medical evidence. Counsel submitted that the complainant's age was clearly proved and that the appellant knew that he was HIV positive when he had sexual intercourse with the complainant.

5. In considering the grounds of appeal outlined above this court is enjoined to follow the principle established in *Okeno v Republic* [1972] EA 32 where the Court of Appeal held that the first appellate court is enjoined to conduct an independent evaluation of all the evidence and reach an independent conclusion as to whether to uphold the conviction taking into account that it neither heard nor saw the witnesses testify.

6. 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."

7. The issue of penetration is not in doubt and it is to be found in the testimony of PW 1 which is corroborated by the testimony of PW 2 and medical evidence presented by PW 7. PW 1's testimony was clear, precise and consistent as to what had happened to her and was not shaken on cross-examination. She testified that on 20th October 2013 at about 2.00 pm she was playing with other children when the appellant called her and told her he wanted to send her. When she went to him, he pulled her to a room where a boat engine was kept and proceeded to have sexual intercourse with her until about 6.00 pm. She stated that the appellant threatened that he would beat her if she raised alarm. She reported the incident to her mother when her mother, PW 2 came home at 8.00 pm that night. PW 2 testified that when she was informed about what happened, she reported the matter to the chief who advised her to go the hospital. She went to hospital where PW 1 was examined and treated and later reported the matter to the police who issued a P3 Form.

8. PW 7, a clinical officer at Ndhiwa District Hospital, is the one who attended to PW 1 on 24th October 2013. Although this was four days after the incident, he noted that PW 1 had bruises on the right elbow, the genitalia had bruises on the vaginal walls with reddening and swelling. Tests conducted confirmed that she was HIV negative. He also testified that he relied on treatment notes from [Particulars Withheld] Clinic and Magunga Dispensary. PW 8, a nursing officer at [Particulars Withheld] Dispensary, confirmed that PW 1 came to the 21st October 2010. On the basis of the testimony of PW 1, PW 2, PW 7 and PW 8, I find and hold that penetration was proved.

9. The substantial issue in this appeal is whether it is the appellant who committed the act of defilement. On this issue I find that that the appellant is the person who defiled PW 1 for several reasons. First, the incident happened at daytime therefore minimising the chances of mistaken identity. Second, PW 1 knew the appellant as Athumani who used to stay at the market centre. She also testified that the appellant had initially tried to seduce her. Third, when PW 1 reported the incident to her mother, PW 2, she identified the appellant by his name hence she was able to report the matter which led to his arrest. In the circumstances, it was not necessary to call the other children who were playing with PW 1 to confirm the identity of the appellant or that the incident took place as the appellant contends.

10. In his unsworn statement the appellant informed the court that on the material day he was at [Particulars Withheld] with an injury on his left foot and he went to the hospital for treatment and then came to where his motor boat was, fixed it and proceeded to go fishing until 22nd October 2013. His own statement put him in the motor boat engine room which is the same room that PW 1 stated that the incident took place. In light of the prosecution evidence, I agree with the learned magistrate that his defence could not stand. Moreover, there is nothing in the evidence to show that there was a grudge between PW 1, her family and the appellant or that there was any reason for PW 1 to lie.

11. Proof of age of a child is a question of fact and as regards the offence of defilement it is necessary on

two grounds. First, to establish the offence of defilement which is committed if the victim is below the age of 18 years and second, to establish the penalty applicable. In this instance, there is no doubt that PW 1 was a child and she testified that she was in Standard 4 at the material time and when cross-examined about her age she stated that she was 14 years old. PW 2, her mother testified that she was born on 27th March 1997 and produced a clinic card to confirm PW 1's age. In my view, the age of the child was sufficiently proved and as such the penalty imposed for the offence of defilement, being the minimum prescribed by the law, cannot be faulted.

12. As regards the offence of deliberate transmission of HIV disease, the appellant contends in his submissions that the offence was not proved as he was not examined to ascertain that he was HIV positive. The basis for the finding that the appellant was HIV positive was that PW 8 testified that he worked there and that the appellant came for treatment for HIV. I have examined the record and it does not show any document that confirms that the appellant was HIV positive. He was not tested and as such I find that the offence was not proved beyond reasonable doubt.

13. I agree with the learned magistrate that the third count of an indecent act ought to have been an alternative count but in view of the conclusion I have reached, nothing in this appeal turns on that issue. The appeal succeeds only to the extent that I therefore quash the conviction on the 2nd count.

14. I affirm the conviction and sentence on the 1st count.

DATED and DELIVERED at HOMA BAY this 6th day of March 2015.

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.