



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT HOMA BAY**  
**CRIMINAL APPEAL NO. 127 OF 2014**

**BETWEEN**

**RICHARD OUMA OMBUI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the original conviction and sentence in Criminal Case No. 63 of 2010 at Resident Magistrates Court at Ndhiwa, Hon. B. O. Omwansa, RM dated on 30<sup>th</sup> September 2010)*

**JUDGMENT**

1. In the subordinate court, the appellant faced a charge of defilement contrary to **section 8(1) and (2)** of the ***Sexual Offences Act, 2006***. The particulars were that on 12<sup>th</sup> November 2009 in [Particulars Withheld] within Ndhiwa District he caused his penis to penetrate the vagina of on EA, a child aged 8 years. He also faced a charge of committing an indecent act with a child contrary to **section 11(1)** of the ***Sexual Offences Act*** based on the same facts.
2. The appellant was convicted after trial and sentenced to life imprisonment. He now appeals to this court against the conviction and sentence based on the petition of appeal filed on 13<sup>th</sup> October 2014. In summary he avers that the conviction was unsupported by the evidence and the learned magistrate relied on hearsay evidence. That the learned magistrate relied on the evidence of the child without conducting a *voir dire* and that the age of the child was not ascertained. He accuses the learned magistrate of failing to consider his defence. The appellant supplemented his petition of appeal with written submissions.
3. In opposing the appeal and supporting the conviction, Mr Oluoch, learned counsel for the State, submitted that prosecution proved its case. He stated that the complainant gave a vivid account of her ordeal which was corroborated by other witnesses although this was not necessary by reason of **section 124** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)***.
4. As this is a first appeal, it is the duty of the court to examine and evaluate all the evidence and come to an independent conclusion whether or not to uphold the conviction. In doing so it must make an allowance for the fact that it neither heard nor saw the witnesses testify. In light of the grounds of appeal outlined by the appellant, it is necessary to outline the evidence before the trial court.
5. The complainant, PW 1, gave unsworn testimony where she stated that on the evening of 12<sup>th</sup> November 2009 she went to collect sugarcane from the appellant's place. She referred to him as

- George. She testified how the appellant found and proceeded with her to the sugarcane plantation. He told her he would cane her and also told her to lie down, remove her pants and then he proceeded to have sexual intercourse with her. She went home and told her mother that she was in pain as a result of what had happened to her.
6. The complainant's mother, PW 2, testified that on the material evening she asked PW 1 why she had not attended to some household chores. PW 1 narrated to her what had happened. She examined PW 1's genital area and saw some stains and that her pants were wet. She went to the home of the appellant, whom she referred to as Baba Omondi, and confronted him about the incident but he denied it. PW 2 then took her daughter to the hospital for examination and treatment. PW 2 and PW 1 reported the matter to the Police Station where they were issued with a P3 form which was filled by PW 4, a clinical officer.
  7. PW 4, the clinical officer, examined PW 1 on 15<sup>th</sup> November 2009, he examination revealed that the hymen was perforated. He also conducted an age assessment and concluded that PW 1 was 8 years old. PW 3, the investigating officer, testified that the complainant lodged the report on 15<sup>th</sup> November 2009 and it took sometime before the appellant was arrested on 30<sup>th</sup> January 2010. She investigated the matter and caused the appellant to be charged.
  8. After the close of the prosecution case, the appellant was put on his defence and he elected to give unsworn testimony. He stated that on 12<sup>th</sup> November 2011, he was at home when heard someone cutting sugarcane near his house. He went outside and found PW 1. He then took a stick and caned her. Later that night at about 8 pm, PW 2 came and accused him of defiling PW 1 but he denied committing the offence.
  9. Under **section 8(1)** of the **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.*"
  10. The first issue is whether the appellant is the one who defiled PW 1. Although PW 1 referred to the appellant as George and PW 2 as Baba Omondi, the evidence is clear that it is the appellant who committed the felonious act. Both PW 1 and PW 2 knew him and there was no reason to lie about the incident. Furthermore, the accused's unsworn statement corroborates the testimony of PW 1 and PW 2 in material ways. The accused admits that he was with PW 1 at the shamba and that PW 2 later came to see him.
  11. As regards the element of penetration, I find that although the testimony of PW 1 was unsworn, it was clear and consistent. She testified in vivid terms what the appellant did to her. PW 1's testimony was corroborated by the testimony of PW 2 who saw her immediately after the incident and examined her genitalia and pants and that of PW 4 who confirmed that the hymen was perforated and that there were bruises on the vagina. In his unsworn testimony, the appellant stated that he caned the PW 1. He did not suggest this to the appellant on cross-examination. Moreover, PW 1 did not report that she had been caned. His defence was properly rejected.
  12. The appellant complains that when he was medically examined by PW 4, nothing positive was found to link him to the offence. PW 4 testified that he examined the appellant on 1<sup>st</sup> February 2010. As the defilement incident occurred on 12<sup>th</sup> November 2009, it unlikely that anything would have been detected. After considering the evidence, I find and hold that the prosecution proved penetration.
  13. The appellant complains that the age of the child was not proved. There was sufficient proof of age as PW 2 testified that her daughter was 8 years old and PW 4 conducted a medical assessment to confirm her age and opined that PW 1 was aged 8. This ground therefore fails.

14.As regards the sentence, under **section 8(2)** of the *Sexual Offences Act*, a person who defiled a person who is 11 years or less shall be sentenced to life imprisonment. As the child was 8 years old, the sentence imposed was the mandatory sentence. I therefore affirm the sentence.

15.The appellant complains that he did not understand the language of the proceedings. I have studied the court record and it is clear that the proceedings were conducted in English and Dholuo. The appellant cross-examined the witnesses and gave an unsworn statement. The fact of failure to understand the proceedings was not raised at the trial court and the accused participated fully in the trial. I do not find merit in the complaint.

16.The conviction and sentence are affirmed. The appeal is dismissed.

**DATED and DELIVERED at HOMA BAY this 9<sup>th</sup> day of March 2015**

**D.S. MAJANJA**

**JUDGE**

Appellant in person.

Mr Oluoch, Senior Assistant Director of Public Prosecution instructed by the Office of the Director of Public Prosecutions for the respondent.