



REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL NO. 133 OF 2014

BETWEEN

BARNABA ONYANGO OYUGI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 1182 of 2012 at Chief Magistrates Court at Homa Bay, Hon. N. W. Kariuki, RM dated 31st October 2014)

JUDGMENT

1. The appellant, **BARNABA ONYANGO OYUGI**, was charged with the offence of defilement contrary to **section 8(1) and (3)** of the ***Sexual Offences Act, 2006*** in the subordinate court. He was convicted and sentenced to 20 years imprisonment. The particulars of the charge were that on diverse dates between 4th and 28th April 2010 at [Particulars Withheld] area of Rangwe Division, Homa Bay County, he caused his penis to penetrate into the vagina of DAS, a child aged 15 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 appellant appeals against conviction and sentence based on the grounds set out in the grounds of appeal filed on 24th November 2014. The substance of his appeal is that the age of the complainant was 19 years and that she was an adult and that in any event the prosecution did not prove that she was a child. He also submitted that there was insufficient evidence to sustain a conviction as an essential witness was never called to testify.
3. Mr Oluoch, counsel for the respondent, submitted that the prosecution proved all the elements of the offence. He contended that the evidence was clear that the complainant and the appellant lived together for a period of two years. He further submitted that the age of the complaint was proved by production of the birth certificate of the child.
4. 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***).
5. The prosecution case was that the complainant and the appellant were living together as husband and wife. PW 1, the complainant, testified that she was married by the appellant in 2010 and that they lived together. During that period they had sexual intercourse. She stated that she was arrested by village elders and taken to Rangwe Police Station and issued with a P3 form. She was

examined at Homa Bay District Hospital.

6. PW 2, the complainant's father, confirmed that PW 1 was in Standard 6 and she stopped going to school in 2011. He testified that her child failed to come to home causing him to go to the school but she was not there. He also reported the matter to Rangwe Police Station whereupon the appellant was arrested after investigations. After her arrest, PW 1 informed him that she was staying with the appellant and was married to him. PW 3, the complainant's mother, also testified that after she went missing together with PW 2, reported the matter to the school. They also reported to the police station. She confirmed that the appellant and PW 2 were found living together and had been living together for two years.
7. PW 4 assisted PW 2 in searching for the PW 1. He recalled that PW 1 came to see him on 2nd September 2012 about PW 1's disappearance. After making inquiries, he finally located the appellant and PW 1 who were living together at the appellant's mother's home. He caused both of them to be arrested and handed them over to the police.
8. The totality of the evidence of PW 1, PW 2, PW 3 and PW 4 is clear that PW 1 and the appellant were living together as husband and wife. Although, PW 6, a doctor working at Homa Bay District Hospital at the material time, examined the appellant on 29th October 2012 and found no evidence of defilement, the testimony of the PW 1 was very clear that they had sexual intercourse during the time they were living together. The appellant did not contest this testimony in cross-examination and when called upon to cross-examine PW 3, he informed the court that, "*This is my mother-in-law. I can't ask her questions.*" The appellant also contended that the PW 1's teacher, to whom the complaint was first made, ought to have been called to give evidence. In my view, this was not necessary as the teacher would neither add nor subtract from the prosecution case as the all the evidence pointing to the "marriage" was sufficient.
9. The appellant elected to give an unsworn statement after he was put on his defence. The thrust of his statement was that he was arrested and taken to the Police Station when he had gone to visit a male friend. He denied that he was married to PW 1 and that his grandmother's home was next to the girl's home and therefore according to tradition he could not marry her. In light of the overwhelming prosecution evidence and having referred to PW 3 as his mother in law, the appellant's defence was a sham. He never put any questions to any of the witnesses to suggest that he was not married to PW 1 or that he could not marry her under customary law.
10. The age of a child is a question of fact. Although PW 1 initially testified that she was 18 years old, she later stated that she was 16 years old. Both PW 2 and PW 3 testified that she was born on 11th April 1997 which was confirmed by the production of the birth certificate. As such she was 14 years old at the time of the offence. The appellant did not put any questions to her to suggest that she was not 14 years old at the time the offence was committed. I agree with the learned magistrate that even though the charge sheet stated that the complainant was 15 years old, this defect did not cause any prejudice and was curable under **section 382** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)***. In any event under **section 8(3)** of the ***Sexual Offences Act*** the sentence provided upon conviction for person who defiles a child aged between 12 and 15 years is the same and the minimum mandatory sentence is 20 years imprisonment.
11. For the foregoing reasons, the conviction and sentence are affirmed.
12. The appeal is dismissed.

DATED and DELIVERED at HOMA BAY this 9th day of June 2015

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.