



REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL NO. 115 OF 2014
(FORMERLY KISII HCCRA NO. 4 OF 2012)

BETWEEN

DUNCAN OCHIENG ONGONGE APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case (SOA) No. 12 of 2010 at the Principal Magistrates Court at Oyugis, Hon. C.L. Yalwala, SRM dated 30th December 2011)

JUDGMENT

1. The appellant, **DUNCAN OCHIENG ONGONGE**, was convicted of the offence of defilement contrary to **section 8(1) and (2)** of the ***Sexual Offences Act, 2006***. The particulars of the charge were that on 23rd April 2010 in East Kakdhimu, North Rachuonyo District, he intentionally and unlawfully committed an act that caused penetration with his genital organ namely his penis into the genital organ namely the vagina of JAO, a child aged 12 years. He also faced an alternative 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 complainant, PW 1, testified that she was 12 years old and in Class 5. She recalled that on 23rd April 2010, she was pulled by the appellant into his house where he proceeded to defile her. She spent the whole night at the appellant's house until the next day when her father, PW 2 came and found them and took them to the chief. On the previous day, 22nd April 2010, PW 1 had been with her friend PW 4 who confirmed that she had gone with PW 1 to the appellant's house where PW 1 and the appellant talked but they left together after a while. On the next day when PW 2 was looking for PW 1, PW 4 told him that PW 1 had been at the appellant's house. She went to the appellant's house on the morning of 23rd April 2010 where she found him but she left when PW 1's father arrived.
3. PW 3, the Chief of East Kakdhimu Location, recalled that PW 2 came to his office on 24th April 2014 at about 10.00am. He was accompanied by PW 1 and the appellant. PW 2 came to report that his daughter had been missing on the evening of 23rd April 2010 and that she had been found at the appellant's place. PW 3 called AP officers to arrest the appellant. PW 5, the investigating officer, recalled that on 26th April 2010, the complainant made a report of having been defiled. He recorded statements and caused the P3 form to be issued to PW 1. He also caused the appellant to

be arrested and charged.

4. PW 6, a clinical officer at Kendu Bay Sub-District Hospital, testified that he examined PW 1 on 28th April 2010. He noted that PW 1 did not have any external injuries and that her genitalia were normal while the laboratory tests did not give any significant results. He concluded that PW 1 may have had prior exposure to sex and that there may have been use of protection during sex. He also noted that there was breach of the hymen but the breaching was not recent. He also examined the appellant but he did not record any injuries or significant findings.
5. When put on his defence, the appellant gave a sworn statement in which he denied committing the offence. He testified that on 24th April 2014, PW 2 came to his house armed with a panga and threatened to kill him. He stated that PW 2 accused him of cultivating land that had been sold to him by the appellant's father. He testified that PW 2 struck him with the panga on the left arm and head whereupon he fell down and ran away. PW 1 followed him but did not catch up with him. He went to report the matter to the chief but found the PW 2 already there. Shortly thereafter, AP officers arrived and he was arrested and taken to Kendu Bay Police Station. He was later taken to Rachuonyo District Hospital for treatment and arraigned in court to answer to charges he denied.
6. The learned magistrate was convinced that the prosecution had made its case against the appellant. He now appeals against conviction and sentence on the grounds set out in the petition of appeal filed on 7th September 2012. In summary the appellant contends that the prosecution did not prove the offence beyond reasonable doubt. In his written submissions, he stated that the medical evidence did not prove penetration and that vital ingredients of the offence were not proved. Mr Oluoch, counsel representing the respondent, opposed the appeal and submitted that the prosecution proved all the elements of the offence.
7. As this is a first appeal, I am obliged to review and evaluate the evidence afresh and reach an independent conclusion as to whether to uphold the conviction. In so doing an allowance should be made for the fact that I neither heard nor saw the witnesses testify (see *Pandya v Republic* [1957] EA 336 and *Kariuki Karanja v Republic* [1986] KLR 190).
8. 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.*"
9. I have evaluated the evidence presented before the subordinate court and I find that the prosecution proved its case beyond reasonable doubt. As regards penetration, PW 1 gave clear and credible evidence of how she was at the appellant's house and how the appellant sexually assaulted her. The fact that PW 1 was with the appellant was confirmed by PW 4 who saw her with the appellant on the previous day at his house and PW 2 who found PW 1 in his house on the following day, arrested them and took them to PW 3. This evidence negates any notion of mistaken identity.
10. The learned magistrate found the testimony of PW 1 credible and trustworthy and there is no reason to believe that she could have lied about what had transpired while she was at the appellant's house overnight. Although, the medical evidence was inconclusive as to whether there was penetration, I find that such evidence could only be corroborative of the fact of penetration otherwise and in light of **section 124** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*, the testimony of PW 1 was sufficient. In *Andrew Cauri Ndungu v Republic* NAI CA Criminal Appeal No. 132 of 2008 [2013]eKLR, the Court of Appeal pointed out that;

We agree that there are instances in which an accused person ought to be medically examined before a court of law can positively connect him to commission of an offence, but we do not think that in this particular case there was dearth of evidence to enable the two courts below reach a conclusion that it was the appellant who defiled the complainant.

Even in the absence of a medical examination on the appellant, there was sufficient evidence to enable the trial court reach the finding that it arrived at. We must, therefore, reject the third ground of appeal.

11. In light of the cogent prosecution evidence, the defence proffered by the appellant lacks merit. It only confirms that the prosecution case in several ways; that there was a confrontation between PW 2 and the appellant when PW 2 found him in his house with PW 1 and the fact that he was arrested by the Chief. The appellant was examined by PW 6 who confirmed that he had no injuries. The appellant did not inform PW 6 that he had been injured. His defence was properly dismissed.

12. Proof of age is a question of fact. For purposes of the offence, it is not in doubt that PW 1 was a child. As regards her age for purposes of the sentence, PW 2 testified that PW 1 was born in 1997 while PW 6, who conducted an age assessment, concluded that the child was 12 years old. The age of PW 1 fell within the bracket provide in **section 8(3)** of the ***Sexual Offences Act*** where the minimum sentence is 20 years imprisonment. The appellant was therefore not prejudiced by the charge sheet referring to **section 8(2)** of the ***Sexual Offences Act*** which provides for the penalty where the child is aged 11 years and below.

13. I therefore affirm the conviction and sentence.

14. The appeal is dismissed.

DATED and DELIVERED at HOMA BAY this 10th day of June 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.