



REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL NO. 96 OF 2014
(FORMERLY KISII HCCRA NO. 208 OF 2012)

BETWEEN

KENNEDY OCHIENG RABILOAPPELLANT

AND

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case (SOA) No. 8 of 2010 at the Principal Magistrates Court at Oyugis, Hon. C.L. Yalwala, SRM dated on 28th August 2012)

JUDGMENT

1. The appellant 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 10th February 2010 at Kanyipir Location in Rachuonyo North District, he intentionally committed an act that caused penetration with his genital organ namely his penis into the genital organ namely the vagina of EAO, 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 Offences Act*** based on the same facts.
2. The prosecution marshalled 5 witnesses. PW 1, the complainant, testified under oath that she was in Class one. She recalled that on 10th February 2010 at about 6.30 pm while on the way home, she met the accused whom she knew as “Ken”. He approached her and took her to a nearby thicket where he proceeded to have sexual intercourse with her. He threatened to kill her if she told anyone what had happened and as a result she did not tell anyone but was later taken to Kandiege Health Centre where she was found to have been defiled. She identified and produced in evidence her green panty which was blood stained as a result of the defilement.
3. PW 3, the complainant’s grandmother, testified that on 12th February 2010, he saw PW 1 walking with her legs astride and when he asked her what the problem was, she told her that she had a bruise on the hip. She continued complaining of pain and when she examined her private parts on the next day she observed bruises and swelling and white pus. She confirmed that PW 1 was taken to hospital by her mother, PW 2. PW 2 testified that on the material day, she had been attending night prayers but was informed by her mother, PW 3, that PW 1 was not walking properly and had complained of pain in the vagina. She took PW 1 to Kandiege Health Centre on 14th February 2012 where she was examined. Upon interrogation, she informed the doctor that she had been defiled by “Ken”. The doctor gave her a letter to take to Kendu Bay Police Station, which she took and was issued with a P3 form to take to hospital.

4. PW 4, a clinical officer from Kendu Bay Sub District Hospital, recalled that he prepared the P3 form for PW 1 aged 6 years. He examined her on 15th February 2010 and confirmed that there was redness on the vaginal wall and the hymen was broken. There was a yellowish discharge on the external genitalia. He noted that that PW 1 had initially been seen at Kandiege Health Centre. PW 5, the Investigating Officer, recalled that the complainant and her aunt came to report the incident of defilement on 15th February 2010. She took statements and PW 1's blood stained panty. She issued a P3 form and caused the accused to be arrested.
5. When put on his defence, the appellant gave an unsworn statement. He denied committing the offence and stated that at the time the offence took place, he was to his place of work and that is where he was arrested and informed of the offence.
6. The learned magistrate was convinced that the prosecution had proved its case and hence convicted and sentenced him. The appellant now appeals based on the grounds set out in the petition of appeal filed on 7th September 2012. In summary the appellant contends that the trial magistrate relied on inadmissible evidence to convict him. He attacked the learned magistrate for dealing with matters not canvassed before him in the judgment and that he did not even consider his defence at all. The appellant contended that the prosecution evidence was full of contradictions and could not support a conviction. He stated that he was never taken for a medical examination to rule out the possibility that he is the person who committed the offence. He urged that there was insufficient evidence to support the conviction. Mr Oluoch, counsel representing the respondent submitted that the prosecution proved the offence and that the appellant was known to the complainant and the incident occurred at 6.30 pm hence there was not mistaken identity.
7. As this is a first appeal, I am obliged to review and evaluate the evidence afresh and reach an independent conclusion as 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. As regard the identity of the appellant, PW 1 identified the appellant as "Ken". She only disclosed his name after she was interrogated as she had been threatened by the appellant. This fact is confirmed by the treatment notes from Kandiege Health Centre which records that PW 1 was sexually assaulted by a person known to her. PW 1 gave clear and consistent testimony of how the appellant defiled her and those who saw her thereafter that is PW 2 and PW3, observed that she had suffered assault by the manner she was walking. Likewise, the PW 4 confirmed that PW 1 had been sexually assaulted.
10. I therefore find that the prosecution proved that it is the appellant who sexually assaulted the complainant not only through the testimony of PW1 but also through PW 3 and PW 4 who saw her in a distressed after the ordeal. Her testimony was also augmented by the production of her blood stained panty. Although there was sufficient corroborative evidence, PW 1's testimony was credible enough to sustain a conviction by reason of the proviso to **section 124** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** which provides that it was not necessary that her testimony be corroborated as long as the learned magistrate was satisfied that she was telling the truth and recorded the reasons. The appellant's defence, which was a mere denial, could not withstand the hurricane of the prosecution evidence. I therefore affirm the conviction.
11. In ***Moses Nato Raphael v Republic NRB CA CRA No. 169 of 2014 [2015] eKLR*** the Court stated as follows about proof of age for purposes of the ***Sexual Offences Act***;

On the challenge posed by the uncertainty in the complainant's age, this Court had occasion to deal with

*a similar issue in **Tumaini Maasai Mwanyanya v. R, Mombasa C.R.A. No. 364 of 2010**, where we held that proof of age for purposes of establishing the offence of defilement which is committed when the victim is under the age of 18 years should not be confused with proof of age for purposes of appropriate punishment for the offence in respect of victims of defilement of various statutory categories of age. As long as there is evidence that the victim is below 18 years, the offence of defilement will be established. The age, which is actually the apparent age, only comes into play when it comes to sentencing. The contradictions in respect of the child's age cannot therefore assist the appellant to avoid criminal culpability.*

12. It was not in doubt that the offence was proved as the complainant was a child. Although the learned magistrate initially recorded that the child was aged two years, PW2, her mother, testified that she was born on 3rd May 2003 and she produced a clinic card to confirm this fact. PW 1 was therefore 6 years old at the time the offence was committed which attracts the mandatory penalty of life imprisonment under **section 8(2)** of the **Sexual Offences Act**. I therefore affirm the conviction.

13. 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.