



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT HOMA BAY**

**CRIMINAL APPEAL NO. 79 OF 2014**

**BETWEEN**

**ZADOCK OUMA NGARE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal from the original conviction and sentence in Criminal Case No. 1027 of 2009 at Chief Magistrates Court at Homa Bay, Hon.O. J. Ong'ondo, RM dated 17<sup>th</sup> June 2010)***

**JUDGMENT**

1. The appellant, **ZADOCK OUMA NGARE**, 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 the 19<sup>th</sup> and 20<sup>th</sup> June 2009 at [Particulars Withheld] Trading Centre, [Particulars Withheld] Sub-location, Gwassi North location in Suba District, he caused his penis to penetrate into the vagina of RCS, a child aged 16 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 prosecution called 5 witnesses and its case was as follows. PW 1, the complainant, testified that she was aged 16 years old and in class 7. She recalled that on 19<sup>th</sup> June 2009 at about 4.00pm, while she was going home from the music festival at [Particulars Withheld], she met the appellant who greeted her and told her he wanted to marry her. She agreed and went to his home in Ratang'a, Ndhiwa and spent the night there. She later returned to his rural home, met his mother and stayed there for 3 weeks. She testified that the appellant defiled her for 2 days.
3. In the meantime, PW 2, the complainant's father, recalled that on 19<sup>th</sup> June 2009, PW 1 had gone for the music festival at [Particulars Withheld] and she did not come back. He reported her disappearance to her teacher and after three weeks, he was informed by one of the teachers that PW 1 had been seen in the company of a young man. PW 3, the Chief of Kitawa Sub-location, confirmed that he received a letter from the headmaster of the school where PW 1 was learning that she was missing. He went to see PW 2 and made inquiries at [Particulars Withheld] AP and started looking for PW 1. One 10<sup>th</sup> July 2009, he got a report that PW 1 was with the appellant. He found the appellant, who admitted to him that he had taken PW 1 to his home at Ratanga, Ndhiwa. They went together to his home where they met PW 1, the appellant's mother and daughter. He took appellant to the police station at Magunga.

4. PW 4, a clinical officer at Magunga Health Centre, testified that he received PW 1 on 11<sup>th</sup> July 2009. He found her genital organ oozing with pus but it had no injuries. Laboratory tests confirmed that she was suffering from gonorrhoea.
5. When the appellant was put on his defence, he testified that on 10<sup>th</sup> July 2009 he was at [Particulars Withheld] beach when he was surprised to see the Assistant Chief and some young men. The Assistant Chief requested him to produce PW1 and that if he failed to produce her he would be arrested. He claimed that he Assistant Chief has been demanding ropes from him and wanted him to vacate the beach. When he refused to meet these demands, the Assistant Chief caused him to be arrested. He denied that he was found with PW 1 on 10<sup>th</sup> July 2009.
6. The learned magistrate found the prosecution had proved its case and convicted the appellant. The appellant now appeals against conviction and sentence based on the grounds set out in the petition of appeal filed on 16<sup>th</sup> October 2011. The substance of his appeal is the magistrate failed to appreciate the nature and ingredients of the offence, that the age of the complainant was not proved and that the sentence was harsh and excessive.
7. Mr Oluoch, counsel for the respondent, submitted that the prosecution proved all the elements of the offence. He contended that the complainant gave clear evidence on how the appellant promised to marry her and took her to his home and that the evidence of the chief who found her in his home was unchallenged.
8. 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**).
9. 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.*”
10. PW 1’s testimony was that she was taken by the appellant, resided at his home and during which time they had sexual intercourse. The learned magistrate recorded that, “*He defiled me for the (2) two days.*” It is unlikely PW 1 used the word defiled in her testimony. It would have been appropriate for the learned magistrate to record the precise words the child used to describe the act which the appellant did so that the court may determine whether the act amounts to penetration within the meaning of the **Sexual Offences Act**. In **Samson Ayinga Ayieyo v Republic KSM CA Crim. App. No. 165 of 2006 [2006]eKLR**, the learned magistrate recorded that the child stated she had been defiled. The Court of Appeal stated as follows, regarding the necessity of recording the precise words of the child;

*“Defiled” is a technical term. It is quite improper to use such term or any other technical term when recording the evidence of a witness unless the witness himself or herself has used it. The correct approach is to use the words used by the witness.*

11. Notwithstanding what I have stated about the use of the word “defiled”, I find that from the totality of the testimony there was penetration. The fact that she had been taken as a wife and was residing in his mother home, irresistibly leads to the conclusion that the appellant had sexual intercourse with the appellant. The complainant’s testimony was credible and sufficient to establish the fact of penetration and in light of the proviso to **section 124** of the **Evidence Act (Chapter 80 of the Laws of Kenya)**, it did not require corroboration to support a conviction. The medical evidence of PW 4 confirmed that the PW 1 had been infected with gonorrhoea which was not necessarily conclusive of sexual intercourse with the appellant. However, this fact did not weaken the prosecution case when taken with the entire evidence. As the Court of Appeal noted in **Geoffrey Kioji v Republic, NYR Crim. App. No. 270 of 2010 (UR)** ;

*Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.*

I therefore find and hold that the prosecution proved penetration.

12. The age of a child is a question of fact. Although no documentary evidence was produced, PW 1 testified that she was 16 years old and that at the material time she was in primary school and when she met the appellant she had gone for a school activity. That part of her testimony was uncontested and that the appellant did not suggest in any questions put to her or her father that she was an adult. I therefore find that her age was 16 years.

13. In the circumstances, the sentence imposed ought to have been under **section 8(4)** of the **Sexual Offences Act** which provides a minimum sentence of 10 years imprisonment upon conviction for person who defiles a child aged between 16 and 18 years.

14. For the foregoing reasons, the conviction is affirmed. The sentence of 20 years imprisonment is substituted with a term of 10 years imprisonment.

15. Save for the sentence, the appeal is dismissed.

**DATED and DELIVERED at HOMA BAY this 9<sup>th</sup> 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.