REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL NO. 109 OF 2014

(FORMERLY KISII HCCRA NO. 137 OF 2012)

BETWEEN

JOSIAH MIAWA ABUTO …….…… APPELLANT

AND

REPUBLIC ……....……RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case (SOA) No. 23 of 2010 at the Senior Principal Magistrates Court at Oyugis, Hon. G.M. Ongondo, SRM dated 23rd May 2012)

JUDGMENT

1. The appellant, **JOSIAH MIAWA ABUTO**, 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 4th August 2010 at Kendu Bay within Rachuonyo District, he caused his penis to penetrate the vagina of TA, 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. He was convicted and sentenced to life imprisonment.

2. The appellant appeals against the conviction and sentence on the grounds set out in the petitioner of appeal filed on 31st May 2012 and which may be summarized as follows; that the learned magistrate erred in holding that the prosecution had proved its case beyond reasonable doubt, that the prosecution case was full of contradictions and inconsistencies, that the sentence was harsh and excessive. In prosecuting the appeal, Mr Nyauke, learned counsel for the appellant, relied entirely on the petition of appeal and urge the court to re-valuate the evidence and allow the appeal. Mr Oluoch, counsel representing the respondent, opposed the appeal and submitted that the prosecution proved all the elements of the offence.

3. 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**).

4. 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."*

5. The complainant (PW 2), aged 6 years old, gave unsworn testimony where she narrated how the appellant defiled her. She stated as follows;

> *I know the accused. I saw him running. The accused injured me. He found me on the way while I was coming from the posho mill. It was becoming dark. I was still able to see the road. I had seen the accused before. I had seen accused person near out home. I had seen him once.*
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> *When I met him while coming from the posho mill, he asked me to go and help him carry mangoes from a house he was showing me. I asked where the mangoes were and he said they are in that house. When we reached there he put flour in a corner of the house. The house didn't have a door. I had worn a yellow dress, biker and pant. He removed all my clothes. He strangled my neck and warned me against making noise. He also removed his trouser ….. it was a white trouser.*
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> *After removing his trouser he came on top of me and told me to put my legs apart. He penetrated his penis in my vagina. I felt pain. After having carnal knowledge of me, he told me to wear my clothes …..*
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> *The incomplete house where he defiled me was near his house. I knew his house as I had seen the house before. He told me that if I tell my parents he would beat me …*

6. Notwithstanding the testimony of PW 2, there was sufficient corroborative testimony and material evidence from the other witnesses to implicate the appellant. PW 1, the complainant's mother, testified that on the evening of 4th August 2010 at about 6.00pm, she left PW 2 and her brother, and went to the market. When she returned, she did not find PW 2. She inquired from her neighbour about the whereabouts of PW 2 and the neighbour informed her she had sent her to the posho mill. She went to look for her and found along the way looking sick and had blood on her clothes. While washing her, she examined her private parts and found that she had a tear on the vagina. She took her to a clinic at Radienya where PW 2 narrated her ordeal to the attending clinician. PW 2 described the person who had defiled her. In particular, she mentioned that he had a white trouser, a black T-shirt and box cut hair. PW 1 proceeded to make inquiries about the person PW 2 had described at the posho mill and on the next morning the appellant was arrested. PW 2 also took her to the incomplete brick house where the incident took place. PW 3, a neighbour to PW 1, testified that after PW 2 gave the description of the appellant who was arrested and when he was brought to the PW 1's home, PW 2 identified him. She also confirmed that PW 2 took them to the incomplete house where the felonious act took place. PW 1 later took PW 2 to New Nyanza Hospital where she was treated for her injuries.

7. PW 4, the clinical officer from Kendu Bay Sub-District Hospital, produced the P3 Form which he filled after examining PW 2 on 22nd September 2010. He testified that PW 2 was brought on 5th August 2010 with a history of having been defiled. According to the initial examination her clothes were soiled with blood and she had a tear on the vaginal orifice. There was an opening between the rectum and vagina from which stool was leaking. PW 2 was confirmed that PW 1 was referred to New Nyanza Provincial General Hospital for treatment. A vaginal swab taken confirmed the presence of pus cell. PW 4 concluded that PW 2 had been defiled.

8. PW 5, the investigating officer, was stationed at Kendu Bay Police Station. She testified that on 8th August 2010, the appellant was brought to the station by members of the public on suspicion of having defiled a child. The child was also present. She recorded the report and commenced investigations. She took both the PW 2 and the appellant for medical examination to Kendu Bay Sub-District hospital. PW 2 stated that the appellant was wearing a black T-shirt and a white trouser when he defiled her. At the time of his arrest the appellant was wearing a white trouser which was blood stained. PW 5 took the white trouser as well as a sample of the appellant blood and forwarded to the Government Chemist, Kisumu. The Government Analyst's report confirmed that the trouser had the appellant blood.

9. In his sworn defence, the appellant denied that he had committed the offence. He testified that he did not know the PW 1, PW 2, PW 3 and that on the day when the PW 2 is said to have been defiled fishing in Lake Victoria. On the day he was arrested he was taking food and was beaten by a mob. He ran to Kendu Bay Police Station when he regained consciousness whereupon he was re-arrested and charged for an offence he knew nothing about.

10. I have evaluated the evidence presented before the subordinate court and I find that the prosecution proved its case beyond reasonable doubt. The testimony of PW 2 is clear and consistent evidence on how she was defiled by the appellant who she knew. When she was re-called for cross-examination, her testimony remained unshaken. The learned magistrate who heard the testimony considered her testimony and concluded that, *"The evidence of PW 2 was quite clear, coherent, cogent and consistent. She impressed the court as a candid witness."* Under **section 124** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)***, the court may convict a person on the basis of such testimony so long as it is satisfied that the children are telling the truth. I find therefore find that the testimony of PW 2 established that element of penetration and the fact that it is the appellant who perpetrated the felonious act.

11. The complainant's testimony as to the sexual act was further corroborated by the testimony of her mother PW 1, who saw and confirmed her injuries and PW 4 the medical officer. Although PW 2 was examined by PW 4 long after the incident, PW 5 explained that this was because the P3 form was issued after PW 1 had undergone treatment in Kisumu from 17th August 2010 to 25th October 2010 for her injuries. As regards the issue of identity, the appellant was someone well known to PW 2 and the act occurred in the evening when there was sufficient light and the fact that the appellant was with PW 2 for a sufficiently long time negative any chance of mistaken identity. This case was therefore one of recognition rather than identification. Furthermore, PW 1 gave a clear description of her assailant to the clinician in presence of PW 1 which led to his arrest. The white trouser, which the appellant was wearing at the time he defiled the PW 2, was produced in evidence and it is the same one he was wearing when he was arrested. In light of the cogent prosecution evidence, the defence proffered by the appellant lacks merit. His alibi was threadbare when considered alongside the prosecution evidence. I therefore find and hold that that it is the appellant who defiled the PW 1.

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. PW 2 testified that she was 6 years old and produced her clinic card to confirm that she was born on 24th April 2004. During the *voir dire* examination, PW 2 confirmed that she was in Standard 1. I therefore find that the complainant was 6 years old. Under **section 8(2)** of the ***Sexual Offences Act*** the mandatory sentence in the event of conviction for defiling a child below the age of 11 years is a life sentence.

13. I therefore affirm the conviction and sentence.

14. The appeal is dismissed.

DATED and **DELIVERED** at **HOMA BAY** this **9th day of July 2015**.

D.S. MAJANJA

JUDGE

Mr Nyauke instructed by Nyauke and Company Advocates for the appellant.

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