



REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL NO. 20 OF 2014
(FORMERLY KISII HCCRA NO. 238 OF 2009)

BETWEEN

ABDUL AMIN AURO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 718 of 2009 at the Senior Resident Magistrates Court at Homa Bay, Hon. O. J. Ong'ondo, RM dated 12th November 2009)

JUDGMENT

1. The appellant, **ABDUL AMIN AURO**, was charged and convicted of the offence of defilement contrary to **section 8(1) and (3) of the *Sexual Offences Act, 2006***. The particulars of the charge were that on 26th April 2009 in Suba District, he unlawfully and intentionally had carnal knowledge of BAO, a child aged 13 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 by touching her private parts namely her vagina and breasts. He was sentenced to 20 years imprisonment.

2. The appellant appeals against the conviction and sentence on the grounds set out in the supplementary grounds of appeal in which he complained that the learned magistrate failed to hold that the age of the child, which is an essential element of the offence, was not proved, that the complainant's blood stained clothes were not produced as evidence and that the prosecution failed to call an essential witness whose evidence would have been adverse to its case. The appellant also relied on written submissions to amplify these points. Mr Oluoch, counsel representing the respondent, opposed the appeal and submitted that the prosecution proved all the elements of the offence and that all the witnesses gave evidence which implicated the appellant.

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. The prosecution case was as follows. On 26th April 2009, the complainant (PW 1) and her friend (PW 2) delivered firewood to a hotel where they expected to be paid. While they were at the hotel, the appellant came in, ordered some food but said he would pay later. The owner of the hotel said she was

feeling unwell so she sent them to collect the money. PW 1 and PW 2 followed the appellant to the butchery where he worked and asked for the money but he said it was in his house. When the appellant asked them to go with him to his house, PW 2 declined to go with him while PW 1 went alone.

5. PW 1 stated that when she got to the appellant's door, the appellant asked her to get into the house but she refused. He grabbed her, forced her into the house, closed the door and threatened to kill her by holding the knife by her throat. He pinned her down and removed her clothes. He also removed his clothes and proceeded to have sexual intercourse with her. After her ordeal, she gathered her clothes and proceeded to report the matter to the District Officer's office where she met a police officer.

6. PW 2, aged 14 years old, testified that she was with PW 1 on the material day and when PW 1 went with the appellant. She waited for a while but when PW 1 took too long to come, she went to look for her. She met her crying with her clothes soaked in blood. PW 1 told her what had happened to her.

7. The father to PW 1, PW 3 recalled that he was tilling his shamba on the material day when he was called to go to the District Officer's office at Sindo. He met PW 1 there with dirty and blood stained clothes. PW 1 told him that she was defiled. He took her to Sindo District Hospital where she was treated by PW 4, a doctor working at Suba District Hospital at Sindo. He testified that he treated PW 1, who was escorted by PW 3 and a police officer, on 26th April 2009 at 10.30 am. When he examined PW 1 she was in a state of fear. He observed that her clothes were dirty but they did not have blood. Her panties had blood drops and stains. Her vagina had a tear on the posterior part about 5 mm. It was painful and bleeding and her hymen was torn. He noted that there was live sperm as the sexual act had occurred four hours earlier. He was of the opinion that there was forced penetration. The final prosecution witness, PW 5, a police officer from Mbita Police Station, investigated the matter, recorded the witness statements, issued the P3 form and caused the appellant to be charged.

8. When the appellant was put on his defence, he elected to make an unsworn statement. He stated that he was a butcher at Sindo Market and on the material day he went to work as usual. At about 9.30 am, he found PW 1 waiting at his butchery amongst other customers. He sold her 1 kg of meat for which she paid Kshs. 200/-. As he did not have Kshs. 30/- change, he told her to wait as he dealt with other customers. He further stated that a person came there and started insulting PW 1 and PW 2, who had also come there. The person asked them why they had not been home on the previous day. The man then slapped PW 2. The appellant got annoyed, went out and slapped the man who then disappeared. The man later appeared with two men, at about 12 pm, who caused him to be arrested and charged for an offence he stated he did not commit.

9. 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.*"

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 1 is clear and consistent evidence on how she was defiled by the appellant. The incident occurred in the morning and she was with him for a sufficiently long time. The appellant also admitted in his defence that he knew her hence the issue of mistaken identity could not arise. Her testimony remained unshaken in cross-examination. Under **section 124** of the **Evidence Act (Chapter 80 of the Laws of Kenya)**, the court may convict a person on the basis of uncorroborated testimony of a child so long as it is satisfied that the child is telling the truth. I find therefore find that the testimony of PW 1 established penetration and the fact that it is the appellant who perpetrated the felonious act.

11. PW 1's testimony was further corroborated by the testimony of PW 2, who was with her that morning and who saw her in a distressed state after the ordeal. PW 4, the medical officer, examined PW 1 within four hours of the incident when the injuries were still fresh. The medical evidence confirmed the element of penetration and enhanced the credibility of the testimonies of PW 1, PW 2 and PW 3. In light of the clear testimony of the prosecution witnesses, it was unnecessary to produce PW 1's clothes or other

evidence. Furthermore, I reject the appellant's submission that the owner of the hotel where PW 1 and PW 2 ought to have been called. Under **section 143** of the **Evidence Act**, it is not necessary to call all the witnesses to prove a fact. The hotel owner's testimony would not shed any more light on the act of defilement which was so clearly narrated by PW 1 and corroborated by other evidence.

12. As for the appellant's defence, it only lends credibility to the prosecution case. The appellant confirmed that he was with PW 1 and PW 2 at the butchery and that he was arrested on the material day. I reject his contention that there was a grudge between him and another person who was insulting the girl, as this incident was not put to PW 1, PW 2 and PW 3 in cross-examination. In other words his defence, when considered alongside the prosecution evidence, was a sham. I therefore find and hold that that it is the appellant who defiled the PW 1 and his conviction was sound.

13. Proof of age is a question of fact. For purposes of the offence, it is not in doubt that PW 1 was a child. When she was examined by the learned magistrate, she stated she was 14 years and in class 6. Although PW 3 did not testify as to her age, there is no reason to believe that a child of 14 years in primary school would not know her age or was lying about it. Under **section 2** of the **Children Act**, age means the apparent age where the exact age is not known. I therefore find that the apparent age of the child was 14 years old. Under **section 8(3)** of the **Sexual Offences Act** the mandatory sentence in the event of conviction for defiling a child aged of 14 years is 20 years imprisonment.

14. Although the issue was not raised, I would like to deal with the manner in which the charge was framed. It referred to "*carnal knowledge*" yet such a phrase does not exist in the **Sexual Offences Act** which defines defilement by reference to act which causes penetration of the genital of one person to another person (see para. 10 above). I however do not find this error fatal as the appellant knew the charge he was facing as evidenced by the fact that he was able to cross-examine witnesses and defend himself. I also find that this error is curable under **section 382** of the **Criminal Procedure Code** which provides;

382. Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

15. I affirm the conviction and sentence. The appeal is dismissed.

DATED and DELIVERED at HOMA BAY this 4th day of September 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.