



REPUBLIC OF KENYA

IN THE HIGH COURT

AT HOMA BAY

CRIMINAL APPEAL NO. 4 OF 2015

BETWEEN

STEPHEN OUMA OGOLLA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in

Criminal Case No. 276 of 2014 at the Senior Resident Magistrates Court

at Mbita, Hon. S.O. Ongeru, SRM dated 30th January 2015)

JUDGMENT

1. The appellant, **STEPHEN OUMA OGOLLA**, was charged with the offence of defilement contrary to **section 8(1) and (4)** of the **Sexual Offences Act, 2006**. The particulars of the charge were that on diverse dates between 11th April 2014 and 13th May 2014 in Mbita District of Homa Bay County, he intentionally and unlawfully did an act which caused his genital organ namely his penis to penetrate the genital organ namely the vagina of LAO, a child aged 16 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 intentionally and unlawfully touching the vagina and breasts of LAO. The appellant was convicted of the alternative offence and sentenced to 10 years imprisonment.

2. The case against the appellant is that he lured the complainant, PW 1, to have sexual intercourse with him then stayed with her for a while as his wife. PW 1 testified that she was 16 years old and in Class 7. She recalled that on 11th April 2014, one SO called her and told her that the appellant had been looking for her to join the choir. Through SO, she talked to the appellant and finally went to his house where he proceeded to sexually assault her. Later on the appellant took her to Gwassu where he stayed with her for one week. Thereafter he took her to stay with his aunt in Ochodororo where they stayed for 2 weeks. During this time, the appellant continued to have sexual intercourse with her. She testified that Chief (PW 3) found them in Ochodororo and brought them to Mbita.

3. The complainant's mother, PW 2, testified that PW 1 went missing on 21st April 2014. She reported to the school and to the Children's Officer that PW 1 was missing. She managed to trace the appellant and was informed that he had gone with PW 1 to Transmara. She was given the number of the appellant's sister and confirmed the fact. On 13th May 2015, she received information that PW 1 and the appellant

had been found, arrested and brought to Mbita Police Station.

4. PW 3, the Assistant Chief of Kasungu East Sub-location recalled that PW 2 reported to him that her daughter was missing. After receiving information of the appellant's whereabouts, he proceeded to Ochodororo, North Kamagambo, found them and brought them to Mbita Police station. The investigating officer, PW 5, testified that on 14th May 2014, he received a complaint from PW 2 that her daughter was missing. She informed him that PW 1 had been lured to join the church choir by the appellant and then taken her Transmara as his wife. On 14th May 2014, PW 3 brought PW 1 and the appellant to the police station. He issued the P3 form and caused her to be taken for a medical examination at Mbita District Hospital. PW 4, a clinical officer at Mbita District Hospital, testified that he examined PW 1 on 15th May 2014. Her vital signs were normal. He examined her genitalia and observed that the hymen was broken and he concluded that there was evidence of penetration.

5. When put on his defence, the appellant elected to give sworn testimony. In his testimony he denied that he knew PW 1, or that he was arrested by PW 3 or that he had committed the offence.

6. The learned magistrate was convinced that the prosecution had established the lesser charge of committing an indecent act with a child and convicted him. He now appeals against the conviction based on the petition grounds filed on 13th February 2015. In summary he contends that the prosecution did not prove the offence to the requisite standard, that the age of the complainant was not established and in any event the available evidence showed that she was 18 years old, that the person who arrested him was not called and that the prosecution evidence was contradictory. The appellant supplemented the grounds of appeal with written submissions.

7. On the part of the respondent, Mr Oluoch, learned Senior Assistant Director of Public Prosecutions, submitted that there was overwhelming evidence in support of the conviction and any contradiction in the evidence relating to the age of the complainant was immaterial in the circumstances. He further urged that the prosecution proved the principal offence and the learned magistrate erred in convicting the appellant of the lesser offence.

8. 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**).

9. I have reviewed the evidence and I find testimony of PW 1 clear, consistent and detailed hence excluding any possibility that she did not know the appellant. She testified that she knew the appellant before as she used to see him in church where he was the music teacher. Furthermore, the appellant was with PW 1 when he was arrested by PW 3 and brought to the Police Station. The appellant raised the issue whether he was found in Ochodororo in North Kamagambo or in Transmara. From the evidence, PW 1 stated that she was in Ochodororo in Transmara while PW 2 also alludes to the fact that she heard information that he was in Transmara. Although the evidence of the place she was contradictory in this respect, I do not think this was material as the fact is clear that appellant was found with PW 1 and arrested by PW 3. There is no reason to believe that PW 3 was lying that he arrested the appellant with PW 1 and brought them to the police station in Mbita. In light of this evidence, it was not necessary to call any other witness to further confirm that the appellant was indeed arrested in Transmara. The totality of this evidence is that the appellant was with the PW 1 for the entire time she was missing and his defence that he did not know her or had nothing to do with her was a sham.

10. As to whether there was penetration, the testimony of PW 1 was that she was subjected to sexual intercourse while she was with the appellant. In her testimony she stated that, "*I was staying with him. We used to have sex at night and day.*" Her testimony was thus clear and precise as to what happened and in view of **section 124** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)***, it did not require any corroboration. If any corroboration were required, it is to be found in the testimony and evidence of PW 4 who concluded that there was evidence of recent penetration. I would also add that for purposes of proving the offence of defilement, it was not necessary to examine the appellant. After evaluating the

evidence, I find that the prosecution proved penetration.

11. The appellant submitted that the age of the complainant was not proved as there was contradictory testimony on the issue. PW 1 testified that she was 16 years old and that she was born on 8th August 1998. Her baptismal card which shows she was born on 14th August 1998 was produced. Although the PW 1 had a birth certificate which showed that she was born on 1st August 1996, PW 2 stated that the same was issued in error as her brother in law had applied for it as she was illiterate. The learned magistrate found that in view of the conflicting evidence, he was unable to find the correct date of birth and that since the age is an essential ingredient of the offence of defilement, he acquitted him on the principal charge.

12. I find and hold that the learned magistrate erred in acquitting the appellant on the principal charge on the basis of the apparent contradiction in the age of birth. The age of child is an important element of the offence of defilement in two respects. First, as concerns the conviction for defilement, all the court needs to be satisfied is that the victim is below the age of 18 years. Secondly, for purposes of sentence, the age of the victim determines the magnitude of the sentence. Under **section 2** of the **Children Act**, age means the apparent age where the exact age is not known. Before imposing the sentence, the magistrate has to determine the apparent age. In **Moses Nato Raphael v Republic NRB CA CRA No. 169 of 2014 [2015] eKLR** the Court of Appeal explained such a situation as follows;

*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 Mwanja v. R, Mombasa CR.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.*

13. Taking the most favourable evidence contained in the birth certificate which showed that the accused was born on 1st August 1996 and the fact that the offence was committed in the month of May 2014, PW 1 was therefore aged 17 years old at the time. The birth certificate is a public document which was issued on 16th September 2011. If indeed there was a mistake on the birth certificate, it would have been rectified. In light of such evidence, I would give the appellant the benefit of doubt.

14. As PW 1 was a child, it follows that the learned magistrate erred in convicting the appellant on the lesser offence on the basis that age was not proved. I therefore set aside the conviction on the charge of an indecent act with a child and substitute the same with a conviction for the offence of defilement. Since the age of the child was 17 years, the sentence falls within **section 8(4)** of the **Sexual Offences Act** where the mandatory minimum prescribed sentence is 15 years imprisonment.

15. I therefore allow the appeal to the extent that I substitute the original conviction with a conviction for defilement contrary to **section 8(1)** and **(4)** of the **Sexual Offences Act** and sentence the appellant to 15 years imprisonment.

DATED and DELIVERED at HOMA BAY this 19th day of October 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.