



IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL NO. 26 OF 2013

BETWEEN

JOHNSON AJWANG OKEYO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 598 of 2011 at Principle Magistrate's Court at Rongo, Hon. Z. J. Nyakundi Ongeru, PM dated on 30th November 2013)

JUDGMENT

1. The appellant was charged with defilement contrary to **section 8(1)(4)** of the ***Sexual Offences Act, 2006***. The particulars were that on 8th November 2011 at [Particulars Withheld] in Migori County within the Republic of Kenya, he intentionally caused his penis to penetrate the vagina of MAO. a child aged 16 years. He was tried and convicted and sentenced to serve 15 years imprisonment.

2. He appeals on the following grounds set out in the petition of appeal dated 19th September 2013.

1. *?The learned trial magistrate erred in law when he gave a conviction founded on evidence adduced by a clinical officer who was an incompetent person to adduce such evidence.*
2. *The learned trial magistrate erred in law when he gave a conviction based on evidence which was wrongly and/or improperly adduced and admitted into court.*
3. *The learned Hon. Trial magistrate meted out a sentence which was excessive and harsh in the circumstances.*
4. *The learned trial magistrate erred in law by relying on unproved and unsubstantiated evidence on an alleged pregnancy.*
5. *The learned trial magistrate relied on evidence which otherwise was unsafe for a conviction.*
6. *The learned trial magistrate erred in law and in fact.*
7. *The learned trail magistrate gravely erred in law and in fact by failing to consider mitigating circumstances and other options while sentencing the appellant.*

3. Mr Nyauke, counsel for the appellant, relied entirely on the grounds set out in the petition of appeal to advance the appeal. The State, through its counsel, Mr Oluoch, supported the conviction and sentence.

4. In considering this matter, I am guided by the principles set out in ***Okeno v Republic [1972] EA 32*** where it was stated that, "An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the Appellate Court's own decision on the evidence. The first Appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate Court merely to scrutinize the evidence to see if there was some

evidence to support the lower Court's findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses."

5. The prosecution called 6 witnesses. PW 1, the complainant testified that on 7th April 2011 she went to the appellant's house at about 6.00pm after she had come home late and had been canned by her father. She stated that the appellant was her friend and that they had sex on that night and that in fact it is not the first time they had sex. In the morning her father came and arrested the appellant. On 8th November 2011, PW 3, PW1's father testified that he came to the appellant's house. He reported the matter to Angaga Police Post and the appellant was arrested. He took PW 1 to Awendo hospital for examination.

6. PW 4, a police officer, working at Angaga Police Post at the time received a report from PW 3 about a person who had defiled PW 1. They proceeded to the scene and he re-arrested the appellant. He took PW 1 and the appellant to Awendo Sub-District Hospital where both were examined and P3 form issued. He also produced PW'1 birth certificate which shows PW 1 was born on 4th May 1995.

7. PW 6, the Clinical Officer, confirmed that he examined both PW 1 and the appellant. His examination of PW 1 remained that her head and neck were bruised. He noted that the complainant was pregnant. His examination of the appellant did not reveal any indication of sexual intercourse.

8. The appellant was placed on his defence. He gave sworn evidence. He testified that on 8th November 2011, he was at home when the complainant came to his house at about 9.00pm. He stated that the complainant told him that she had been chased by per parents. He stated that he slept on the chair but she slept on his bed. In cross examination, he stated that he knew the complainant as they had been friends for two months.

9. DW 2, the accused's in-law confirmed that she was with the appellant at his mother's house when a lady came to his house. She saw the lady but she did not know her nor did she know if the lady slept there. DW 2 stated in cross examination that the appellant slept in her house.

10. I have considered the entire evidence and it is clear that PW 1 knew the appellant and the appellant admitted as much. The appellant and PW 1 were together in the appellant house in the night of 7th November 2011. DW 2, confirms that she saw the complaint in the appellant's house.

11. The next issue is whether there was sexual intercourse between the PW 1 and the appellant. There is no reason not to believe what the complainant stated that she had intercourse with the appellant. The appellant's defence was rightly dismissed learned magistrate on the ground that DW 2 stated that the appellant slept in her house yet the appellant himself confirmed he slept in his house but on a chair in the sitting room while the complainant slept in his bedroom. The learned magistrate had good reason to expect that indeed there was sexual intercourse hence the element of penetration was proved. I likewise find that the complainant was truthful in her testimony that there was sexual intercourse.

12. Although I agree with the appellant counsel, that the pregnancy could not, in the normal course of events, be attributed to the offence of which the appellant was charged, the medical evidence of PW 6 confirms that there was intercourse between the parties.

13. The appellant contested the fact that a clinical officer could not conduct the medical examination. As submitted by counsel for the State, **section 11** of the ***Medical Practitioners and Dentists Act (Chapter 253 of the Laws of Kenya)*** does not exclude clinical officers from conducting a medical examination. I would do no better than quote the case of ***Isaac Njuguna alias Manga v Republic Machakos HCCRA No. 110 of 2012 [2014]eKLR*** where it was stated as follows, "[11] *The complainants herein were examined by a clinical officer. It is submitted that such an officer is not a medical officer hence not capable of giving evidence within the legal meaning of the term. Section 2 of the Clinical Officers Act (Training, Registration and Licencing Act, Cap 260(K) defines a Clinical Officer as, "A person*

who, having successfully undergone a prescribed course of training in an approved training institution is a holder of a certificate issued by that institution and is registered under the Act...” **Section 7(A)** of the Act states, “A person who is registered by the council shall be entitled to render medical or dental services in any medical institution in Kenya approved for the purposes of this section by the Minister by Notice in the Kenya Gazette”. In the case of **Raphael Kavoi Kiilu v Republic Criminal Appeal No. 198 of 2008**. It was held that this is an area of competency of a Clinical Officer and there is no requirement in the **Sexual Offences Act** that a P3 form must be produced by a medical officer. [12] In the circumstances it cannot be said as argued by the appellant that the evidence adduced by the clinical officer was unsatisfactory. The officer who filled the P3 form was qualified and his evidence was correctly admitted.”

14. The age of the complainant was proved by the production of the birth certificate which showed that she was 16 years old. Under **section 8(4)** of the **Sexual Offences Act**, the minimum sentence is not less than fifteen years imprisonment. In the circumstances, the sentence was neither harsh nor excessive.

15. Having evaluated and analysed the evidence, I find that the conviction was sound, it is affirmed and the appeal dismissed.

DATED and DELIVERED at HOMA BAY this 17th July 2014

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 the Director of Public Prosecutions for the respondent.