REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL NO. 1 OF 2014

BETWEEN

ROBINSON ODHIAMBO MWALIMU ……..APPELLANT

AND

REPUBLIC …….RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 6 of 2012 at Chief Magistrate's Court at Rongo, Hon. Z. J. Nyakundi, PM dated on 13th January 2014)

JUDGMENT

1. In the subordinate court, the appellant faced the following principal and alternative charges;

1. ***Defilement contrary to section 8(1) and (3) of the Sexual Offences Act, 2006.***

   The particulars were that Robinson Odhiambo Mwalimu on the 30th day of December 2011 at Ongo Village, South Kamagambo Location in Migori County within the Republic of Kenya intentionally caused his private part (penis) to penetrate the vagina of one EAO, a girl child aged 14 years.

2. ***Committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act, 2006.***

   The particulars of the charge were that on 30th day of December 2011 at Ongo Village, South Kamagambo Location, Migori County within the Republic of Kenya intentionally touched the breasts and vagina of EAO, a girl child aged 14 years with his penis.

2. The prosecution called four witnesses. The complainant, PW 1, stated that she was in class 7 and born in 1999. On 30th December 2011 at about 7.00pm, she left Nyaondu market to go home she met the appellant, a watchman at Ongo Health Centre. He told her to bring a bucket if she needed water. She went home and came with the bucket to collect water. She was directed to the water tank. The appellant left to see another person, came back and told her to pick a phone from a house. While she was in the house, he came in, hugged her, threw her on the bed and had intercourse with her. Her attempts to scream were stopped when he covered her mouth. After the ordeal she collected her water and went home. She found her grandmother at home and told her what happened. Her grandmother then informed her father. She testified that she was taken to hospital but not examined because the laboratory was not working. The following day they went to Migori for treatment. She stated that she was earlier examined at Awendo sub-district hospital

where treatment notes were issued. She confirmed the incident was reported and a P3 form issued. She testified that she knew the appellant as he worked at the dispensary with her step mother.

3. PW 2, the father of PW 1, testified that PW 1 was in standard 7 and was born on 30th January 1999. He produced the birth certificate. He recalled that on 30th December 2011 at about 7 pm when he arrived home his wife told her that the appellant had defiled PW 1. He reported the matter to a clan elder who told them to inform the assistant chief. He was told to take the child to hospital. He took her to Awendo but it did not have laboratory equipment. He then took her to Rongo District Hospital. She was treated on 31st December 2012. He reported the matter at Ukumba Police Post and was issued with a P3 form.

4. PW 3, a police officer at Kamagambo Police Station, was the investigating officer. He confirmed that PW1's parents made the report of the incident on 5th January 2011. He issued the P3 form. He arrested the appellant, who was identified by PW 2, and escorted him to Kamagambo Police Station. He was identified by PW 2.

5. PW 5, a clinical officer attached to Awendo District Hospital at the material time, testified that on 30th December 2011, he examined PW 1 aged 13 years. She gave him the history of defilement. He stated that the underpants had semen which was coming out and smelled foul. She sustained injuries on her body, swollen tender part of the lead, tenderness on the lower abdomen. He stated that he examined PW 1 3 hours after the incident. He filed the P3 form.

6. The appellant when put on his defence opted to give sworn evidence. He also called one witness. He stated that on 30th December 2011 at 7.00pm he was at his place of work with a fundi and a motor cyclist when he found PW 1 had gone through the fence to fetch water. When she saw him she started running away. He did not follow her but went instead to inform the Hospital administration.

7. DW 2, bodaboda rider, testified that he knew the accused as a watchman at Ongo Hospital. On 31st December 2011, he went to the Hospital to collect an electrician who had gone to do repairs. Upon arrival he found the appellant talking to the repair man. He stated that he saw a child who had gone to steal water. He saw the child pouring the water and running away. He stated that the appellant came back and informed his that the electrician he had come to pick up had left.

8. After considering the evidence the learned magistrate concluded that on the evidence, the prosecution had established the office for which he was charged. He dismissed the defence as doubtful. He convicted and sentenced the appellant to a term of 20 years imprisonment. He now appeals against the conviction and sentence.

9. In the petition of appeal dated 24th January 2014, counsel for the appellant, Mr Ongoso, set out the following grounds of appeal;

1. *The Learned Magistrate erred in fact in Law as the offence was not proved to the required standard concerning the evidence adduced in Court and the defence offered by the Appellant.*
2. *The Learned Trial Magistrate erred in fact and in Law when he failed to evaluate the evidence on record and wrongfully convicted the Appellant.*
3. *The Learned Trial Magistrate erred in Law and in fact when he failed to consider the grave contradictions and inconsistencies in the prosecution evidence as tendered by PW3 and also especially as pertaining the time and day when the complainant stated she went to health facility for examination and also to have said to undergone the same.*
4. *The Learned Trial Magistrate erred in fact and Law when he convicted the Appellant in total disregard of calling a crucial witness who was the complainant's grandmother.*
5. *The Learned Trial Magistrate misdirected himself in Law and fact on convicting the accused based on PW3 - The clinical officers assumption that the dry liquid which was found smelling*

could have been 'semen' without actually taking caution to note that no tests were actually carried to verify the same and neither were any exhibits produced before Court to support the prosecution case.

6. *The Learned Trial Magistrate misdirected in Law and fact by convicting the Appellant in total disregard that neither the Appellant had undergone any medical examination to link him to the offence.*
7. *The Learned Trial Magistrate failed to give the benefit of doubt to the Appellant despite the existence of bad motive or malice.*
8. *The judgment was full of misdirection and errors resulting in miscarriage of justice. The Learned Trial Magistrate erred in fact and in Law in admitting the Birth Certificate (EXP.3) yet it was at variance with the P3 evidence.*
9. *The Learned Trial Magistrate erred in fact and Law by convicting the Appellant based on an identification done by PW2 and not the complainant.*

10. A summary of the grounds outlined in the petition of appeal call upon the court to independently review the evidence and reach its own conclusion allowance being made for the fact that it never saw or heard the witnesses testify.

11. Mr Ongoso abandoned ground No. 10 which concerns identification of PW 2 and not the complainant. PW 1 confirmed that she knew the appellant as he worked with her step mother at the hospital. The issue for consideration is whether the appellant committed the felonious act.

12. Mr Ongoso submitted that evidence of the time which the offence was committed was inconsistent. PW 1 stated that the act of defilement occurred at 7.30 pm but PW 2 stated that the act occurred at 12.30pm. I do not think that this inconsistency is material. PW 1, the primary witness gave the time as 7.30 am while PW 3 was only stating what he was told. In any case, PW 3 further testified that the act occurred when PW 1 went to fetch water from the Hospital which is the time PW 1 stated she was defiled.

13. The other variation in the evidence pointed out by the appellant is the time of treatment. Although the evidence of PW 1 is not very clear at who examined her or treated her first, PW 2 stated that he first went to Awendo but it did not have laboratory equipment. PW 4, the clinical officer, confirmed that he examined PW 1, 3 hours after the incident. This is confirmed by treatment notes which were recorded contemporaneously. The inconsistencies pointed out by the appellant were therefore not material.

14. The appellant also contested the evidence of penetration. Mr Ongoso submitted that the examination of the genital area did not disclose evidence of penetration and it was best inconclusive. He submitted the existence of vaginal discharge could be attributed to normal infection for example yeasts. Counsel noted that the Clinical Officer could not conclude that the foul smell and semen stains were as a result of the sexual act without a forensic examination. He relied on several cases; ***Peter Mwangi Muthauya v R*** **Nakuru HCCRA No. 154A of 2005 (unreported)** and ***Joseph Fundi and Another v Republic*** **Embu HCCrA No. 26 & 9 of 2013 [2013] eKLR.** Mr Oluoch countered that penetration was the issue and not ejaculation and the evidence of PW 1 was sufficient to prove penetration.

15. The prosecution bears the burden of proving penetration as an essential ingredient of the offence under **section 8(1)** of the ***Sexual Offence Act***. The evidence of penetration is confirmed by the testimony of PW 1 which was clear and consistent. The appellant was a person known to her and the defence and his witness put him at the scene of the incident. The evidence of penetration is clear and the learned magistrate was correct in so finding.

16. The appellant faulted the prosecution's failure to call PW 1's grandmother whom he considered a crucial witness for the prosecution case. The grandmother is the person PW 1 first informed her ordeal and would ordinarily lend credence to PW 1's testimony. **Section 143** of the ***Evidence Act*** **(Chapter 80 of the Laws of Kenya)** states, *"No particular number of witnesses shall, in the*

absence of any provision of law to the contrary, be required for proof of any fact." In ***Bukenya and Others v Uganda*** **[1972] EA 549**, the Court held that that where essential witnesses were not called, the court was entitled to draw an inference that if their evidence had been called, it would have been adverse to the prosecution case. I hold that the evidence of PW 2 and PW 4 confirms that PW 1 was examined 3 hours after the incident. It was thus unnecessary, in my view, to call PW 1's grandmother to prove the prosecution case.

17. Mr Ongoso also raised the issue of the age of the complainant. According to the charge sheet she was aged 14 years. PW 1 testified she was born in 1999 which would make her 12 years of age. The P3 form and the treatment notes state that she was 13 years. In view of the inconsistent ages, Mr Ongoso submitted that the charge was defective. Counsel further submitted that the P3 form showed that the disclosed offence was rape hence the complainant could have been an adult. Mr Oluoch countered that the evidence of the doctor who examined the PW 1 was conclusive as it was expert evidence or was not rebutted. Although the officer who filled the P3 form stated that the offence was rape, his statement as to the nature of the offence is a matter of opinion which does not bind the court. In the same document, the same officer stated that the child was 13 years old. In my view the age of PW 1 was conclusively proved by the birth certificate produced by PW 2. It shows that PW 1 was born on 30th January 1999 hence on the date of the offence she was aged 12 years old.
18. An analysis of the entire evidence confirms that PW 1 was defiled by the appellant and the conviction was sound and is therefore upheld.

19. As regards the sentence, the age of PW 1 was 12 years old. Under **section 8(3)** of the ***Sexual Offences Act***, *"a person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than 20 years."* In the circumstances, the sentence being one that is mandatory cannot be impugned as harsh or excessive.

20. The appeal is dismissed.

DATED and DELIVERED at HOMA BAY this 10th day of July 2014.

D.S. MAJANJA

JUDGE

Mr Ongoso, instructed by Ayoma Ongoso Advocates for the appellant.

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