



**IN THE HIGH COURT AT HOMA BAY**

**CRIMINAL APPEAL NO. 8 OF 2013**

**BETWEEN**

**SAMMY ODHIAMBO ODINDO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the original conviction and sentence in Criminal Case No. 421 of 2012 at Principal Chief Magistrate's Court at Rongo, Hon. Z.J Nyakundi, PM dated on 6<sup>th</sup> January 2013)*

**JUDGMENT**

1. The appellant **SAMMY ODHIAMBO ODINDO** appeals against a conviction and sentence of life imprisonment imposed after he was found guilty of defilement contrary to **section 8(1)(4)** of the ***Sexual Offences Act, 2006***. The particulars of the offence were that on the 24<sup>th</sup> day of August 2012 at [Particulars Withheld] in Migori County the appellant intentionally and unlawfully caused his penis to penetrate into the anus of one TAO, a boy aged 10 years.
2. The prosecution marshalled seven witnesses to prove its case. PW 1, the complainant testified that he was a student aged 11 years old. He recalled that on 24<sup>th</sup> August 2012, he left church with PW 3 and went home where they found the appellant. The appellant took them to the forest and when they got to a bush, the appellant told PW 1 to remove his shorts so that he could see his penis. The appellant proceeded to penetrate the anus of PW 1. Later at home, PW 1 reported the ordeal to his grandmother. His parents came the following day and his mother took him to hospital while his father reported the matter to the police.
3. PW 2, a child aged 5 years old, also testified that the appellant took him and PW 1 to the forest. He stated that when they got to the forest, the appellant started smoking a cigarette and told PW 1 to remove his shorts and bend. He knew the appellant as Sammy and that he did not tell anyone of PW1's ordeal.
4. PW 3 testified that PW 1 was her nephew and together with PW 2 they went to visit her mother. She testified that on 24<sup>th</sup> August 2012 they went to church with PW 1 and PW 2 but the two children left early. When she returned home, she found that PW 1 and PW 2 had come from the forest where the appellant had taken them. She stated that PW 1 informed her of the ordeal. They reported the matter to PW 1's father the following morning.
5. PW 4, PW1's mother, produced his birth certificate and his child dedication certificate. She testified that on 22<sup>nd</sup> August 2012 she escorted PW1, PW2 and PW3 to the bus stage where they left to visit their grandmother. She recalled that PW 1 informed her and her husband that a man had touched his buttocks and told him to bend over. She checked and found that PW 1 had a crack

on his anus she took the boy to hospital while her husband went to report to the police.

6. PW 5, the investigating officer, testified that he was at the Awendo Police Station when PW 1's father made a complaint that his son had been defiled. He arrested the appellant. PW 1's father brought PW 1 and PW 2 to the station where they physically identified the appellant. He issued two P3 Forms and took both PW 1 and the appellant to Migori District Hospital for examination.
7. PW7, a clinical officer at Migori District Hospital, testified and produced medical reports prepared by Dr W. who examined the appellant and PW 1. He confirmed that PW 1 was treated on 27<sup>th</sup> August 2012. He stated that the injuries on PW 1 were 29 hours old. Dr W. observed that PW 1 had normal genitalia with a crack and blood stains in his anus. Dr W. examined the appellant and observed that his penis was bruised which signified that he had had forced penetration. Further examination revealed that PW 1 was HIV negative and his rectal swab showed some epithelial cells while the appellant was found to be HIV positive. He produced the two P3 forms as exhibits.
8. When put on his defence, the appellant gave an unsworn statement where he denied the charge. He stated that on 24<sup>th</sup> August 2014 he had been sent to cut grass at the children's grandmother's place. When the two small boys saw him, he was dressed in ragged clothes, had a panga and was pushing a wheelbarrow, they ran away saying that he was mad. He denied knowledge of the offence and stated that he was arrested on the same day while having lunch.
9. The learned magistrate found that the prosecution had proved its case beyond reasonable doubt. He convicted the appellant and sentenced him to life imprisonment. The appellant now appeals against the conviction and sentence on the following grounds which may be summarised as follows; that the learned magistrate erred in convicting the appellant against the weight of evidence, that the learned magistrate erred by failing to conduct any proper *voire dire* examination of the witnesses thus compromising the appellant's right to a fair trial, that the appellant did not understand the proceedings as the court did not provide any or any adequate translation and that the court imposed a sentence that was manifestly harsh and excessive.
10. Before I proceed to consider the substance of the appeal, I will deal with the argument that the language of the proceedings in which the proceedings were conducted was unclear. Mr Ongoso, learned counsel for the appellant pointed to the record which shows that in some instances, for example on 27<sup>th</sup> August 2012, the language was recorded as "English/Kiswahili/Dholuo" hence it was not clear which language the proceedings were conducted. On other dates the language of the court is not recorded. In response, Mr Oluoch, learned counsel for the State, submitted that the appellant understood the proceedings and indeed actively participated.
11. I have read the entire proceedings and I am satisfied that the appellant understood the nature of the proceedings against him and was able to follow the same. The Court of Appeal in ***Kyalo Kalani v Republic CA Criminal Appeal No. 586 of 2013 [2013]eKLR (supra)*** noted that the right to understand the proceedings is a fundamental right under **Article 50(2)(m)** of the Constitution. The issue whether an accused understands the proceedings is not one of form but of substance and the record shows the appellant understood the proceedings against him. He participated in the trial and was able to cross-examine witnesses. He also opted to give unsworn testimony in his defence. He did not raise the issue during the trial. This ground is therefore dismissed.
12. Mr Ongoso also attacked the conviction on the basis that the *voire dire* examination was not properly conducted. The mode of examination of children of tender years is not set out in **section 19** of the ***Oaths and Statutory Declaration Act (Chapter 15 of the Laws of Kenya)***. In the case of ***Johnson Muiruri v Republic [1983] KLR 445***, the Court of Appeal stressed the need for setting out the questions put by the court to the minor and the responses given to those questions by the child but in ***Mohammed v Republic [2005] 2KLR 138*** the Court held that it is not mandatory to record both questions and answers from the witness unless in the circumstances of any particular case there is need for the setting out of the particular questions and answers.

13. In this case both PW 1 and PW 2 were asked questions which they answered. The answers were recorded and the court concluded that they were fit to give evidence and they were duly affirmed. I therefore dismiss this ground of appeal.
14. As to whether there was sufficient evidence to support the conviction, this Court, as this is the first appellate court, is enjoined to consider the entire evidence, evaluate it and reach an independent conclusion bearing in mind that it neither heard nor saw the witnesses testify (see **Okeno v Republic [1972] EA 32**).
15. In order to prove the offence of defilement under **section 8(1) (3)** of the **Sexual Offences Act**, the prosecution must establish that the appellant committed an act which caused penetration. Penetration is defined at **section 2** of the **Act**, to mean the partial or complete insertion of the genital organs of a person into the genital organs of another person.
16. The first issue is whether the appellant is the person who did the felonious act. In this regard PW 1 and PW 2 were familiar with the appellant as he was working at their grandmother's house. PW 1 identified him to PW 3 when he reported the ordeal. This aspect of the prosecution evidence is confirmed by the appellant's unsworn statement where he admitted working at the children's grandmother's house on the material day and that the boys saw him. Furthermore, the incident happened at daytime hence the issue of mistaken identity does not arise. Finally, when the appellant was arrested, PW 5 testified that the PW 1 and PW 2 were able to identify him at the police station.
17. The learned trial magistrate relied on the testimony of PW 1 to convict the appellant. It was corroborated by the testimony of PW2, who was present when the sexual act occurred, and the medical evidence of PW 7. The P3 form for PW 1 produced in evidence showed that PW 1's anus had a crack and epithelia cells were present in a swab from his anus. The medical evidence also showed that the appellant's penis was bruised which is a sign of forced penetration. PW4, who had seen PW 1's anus also noticed the crack. PW1's evidence was clear and consistent and did not require corroboration in light of the proviso of **section 124** of the **Evidence Act** which states that, "*Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.*" However, as I have outlined above, the evidence of the fact of penetration was corroborated by the other evidence.
18. I note that the medical testimony by PW7 was given on behalf of a Dr W. who was not called as a witness. PW 7 testified that it is the said doctor who examined by PW 1 and the appellant was away for studies in Kisumu and that he had worked with him for a period of two years and was familiar with his handwriting. He thus produced the P3 medical reports. In my view, the procedure adopted accords with **section 77** of the **Evidence Act** which provides as follows;
- 77. (1) In criminal proceedings any document purporting to be report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.*
- (2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.*
- (3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.*
19. In examining the proceedings I noted that after PW 2 had testified the learned magistrate noted

that, “*the child is of tender years aged 5 and is therefore not liable to be cross examined.*” I find that this was an error on the part of the learned magistrate. This is a violation of **Article 50(2)(k)** of the Constitution which protects the right of every accused person to challenge evidence against him. Even where the victim is young or vulnerable the right to challenge evidence through cross-examination should not be denied. The accused should always be given an opportunity to put forth his questions. It is for the court to provide sufficient safeguards to the vulnerable witness under **section 31** of the ***Sexual Offences Act*** by for example asking the questions through an intermediary. In this case, however, no prejudice was occasioned to the appellant. Other than the evidence of PW 2, there was sufficient evidence, as I have outlined above, to implicate the appellant.

20. Having analysed the evidence, I find that that the appellant penetrated PW 1 through the anus. I therefore affirm the conviction.

21. Age is crucial ingredient to be proved in sexual offences as it determines the penalty imposed. The age of a child is a question of fact to be proved by evidence. In this case, the Acknowledgment of Birth Notification of the Child issued under the provisions of the ***Births and Deaths Registration Act (Chapter 149 of the Laws of Kenya)*** was produced and it showed he was born on 27<sup>th</sup> September 2001 hence at the time of the offence he was 10 years old. This evidence of age was buttressed by the Child Dedication certificate issued by the SDA Church.

22. **Section 8(2)** of the ***Sexual Offences Act, 2006*** provides that, “*A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.*” As the child was 10 years old, the sentence imposed was therefore within the law. It was neither harsh nor excessive. I uphold the same.

23. The conviction and sentence are affirmed. The appeal is dismissed.

**DATED and DELIVERED at HOMA BAY this 9<sup>th</sup> day of October 2014.**

**D.S. MAJANJA**

**JUDGE**

Mr Ongoso, Advocate, instructed by the appellant.

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