**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CRIMINAL APPEAL NO E013 OF 2020**

**DAVID OTIENO OLUM..... APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Being an Appeal from the Judgment of Hon J. Mitey (SRM) delivered at Winam in the Senior Principal Magistrate's Court in SOA Case No 53 of 2018 on 6th November 2020)**

**JUDGMENT**

## INTRODUCTION

1. The Appellant was tried and convicted of the offence of defilement contrary to Section 8(1) and (3) of the Sexual Offences Act No 3 of 2006. The particulars of the offence were that on 1st September 2018 in Kisumu County within the Republic of Kenya intentionally caused his penis to penetrate the vagina of HAO, a child (hereinafter referred to as PW 1) aged fifteen (15) years. He was sentenced to serve twenty (20) years imprisonment.

2. He had also been charged with an alternative offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The particulars of the offence were that on 1st September 2018 in Kisumu County within the Republic of Kenya, he intentionally touched PW 1's vagina. Having convicted him on the main count, the Learned Trial Magistrate dismissed the alternative charge.

3. Being dissatisfied with the said Judgement, on 17th November 2020, he lodged the Appeal herein. He set out nine (9) grounds of appeal challenging both conviction and sentence. Through his advocates, he filed Written Submissions dated 1st July 2021 on 5th July 2021. He filed Further Written Submissions on 15th June 2021 on his own. The State's Written Submissions were dated 19th August 2021 and filed on 1st October 2021.

4. Both parties relied on their respective Written Submissions in their entirety. This Judgment is therefore based on the said Written Submissions.

## LEGAL ANALYSIS

5. This being a first appeal, it is the duty of this court to evaluate afresh the evidence adduced before the Learned Trial Magistrate in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

6. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd [1968] EA 123** and **[1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

> **"It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses…But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion…"**

7. Having looked at the Appellant's and State's Submissions, it was this court's considered view that the issues that have been placed before it for determination were:-

**a. Whether or not the Prosecution had proved its case beyond reasonable doubt.**

**b. Whether or not, in the circumstances of this case the sentence meted upon the Appellant by the Learned Trial Magistrate**

**was lawful and or warranted**.

8. The court dealt with the said issues under the following distinct and separate heads.

**I. PROOF OF PROSECUTION'S CASE**

9. Grounds of Appeal Nos (1), (2), (3), (4), (5), (6), (7) and (8) were dealt with together under this head as they were all related.

10. The Appellant submitted that standard of proof in criminal cases is proof beyond reasonable doubt and that the burden and incidence of proof lay with the prosecution as provided in Sections 107 and 108 of the Evidence Act Cap 80 (Laws of Kenya).

11. He argued that the medical evidence that was adduced by the Prosecution fell below that which could be relied upon for a sound conviction. He pointed out that although the P3 Form showed that PW 1's hymen was broken, the examination did not show that she had had any injuries on her vagina but rather that the same was normal. He relied on the case of **Arthur Mshila Manga vs Republic [2016] eKLR** where the Court of Appeal found that the medical evidence on record did not prove that the complainant therein had been defiled.

12. He also asserted that PW 1 also conceded that the said P3 Form did not show that she attended St Elizabeth's Hospital for treatment and that her evidence when she went to the said hospital was contradictory. He referred this court to the case of **Ndungu Kimanyi vs Republic 1980 KLR 282** where the court therein held that it was unsafe to accept evidence of a witness who created an impression that he was not a straight forward person.

13. He further stated that the age of the injuries was about seventy two (72) weeks which did not fall on 1st September 2019. It was his contention that PW 1 did not raise the issue of defilement on her own volition but that the same came about after she was questioned about the drugs that were found in the house. He relied on the case of **Paul Kanja Gitari vs Republic [2016] eKLR** where the court therein observed that the complainant therein did not make a complaint on her own volition which after analysis of the evidence in totality led the court to the conclusion that the conviction of the appellant therein was unsafe.

14. He placed reliance on Section 309 of the Criminal Procedure Code Cap 75 (Laws of Kenya) which provides that if the accused person raised a new matter and the prosecution could not by reasonable diligence have foreseen, the court could allow the prosecution to adduce evidence to rebut such new evidence. He was emphatic that the Trial Court shifted the burden of proof to him thus lowering the standard of proof of an alibi defence. In this regard, he placed reliance on the case of **Benson Mugo Mwangi vs Republic [2010] eKLR** where the court held that once an accused person raises an alibi, it is the duty of the prosecution to disprove it.

15. On its part, the State submitted that the Prosecution proved its case beyond reasonable doubt and urged this court to dismiss the Appeal herein. It pointed out that it had demonstrated that all the ingredients of the offence of defilement being, identification or recognition of the offender, penetration and age of the victim as was set out in the case of **George Opondo Olunga vs Republic [2016] eKLR**, were proved.

16. It argued that a copy of the birth certificate showing that PW 1 was born on 25th December 2003 and was thus a child aged fourteen (14) years and nine (9) months at the material time was adduced in evidence.

17. It added that a P3 Form and PRC Forms were tendered in evidence and showed that PW 1 had been defiled. It was its further submission that her mother, SHW (hereinafter referred to as "PW 2"), the Clinical Officer, Brenda Luvembe (hereinafter referred to as "PW 4"), Nursing In Charge Ben Matete Wafula (hereinafter referred to as "PW 5") and Dr Ombok Lucy (hereinafter referred to as "PW 7") all corroborated PW 1's evidence.

18. It pointed out that PW 1 positively identified the Appellant herein through recognition as the perpetrator.

19. As the State correctly pointed out, the ingredients of the offence of defilement are proof of complainant's age, proof of penetration and identification of the perpetrator.

20. It was clear from the Written Submissions by both parties that PW 1's age was not in issue. She was slightly shy of fifteen years as she was born on 25th December 2003 and the alleged defilement was said to have occurred on 1st September 2018. This court was thus persuaded that for all purposes and intent, PW 1 was a child.

21. Turning to the issue of the Appellant's identification, PW 1 testified that on the material date at about 8.00 pm, she left her home to go to the shop which was two hundred (200) metres from her home. There was moonlight at the time. She met three (3) men, two (2) of whom she did not know. The Appellant held her hand, removed a knife and threatened to stab her if she screamed. The other two (2) men went ahead while the Appellant dragged her into a bush and after tearing her clothes and removing his trouser, he defiled her. After he finished he took her phone and left.

22. PW 1's evidence was that she slept and went to St Elizabeth Hospital the following morning. She further stated that she passed by the Appellant's house to collect her phone which he threw at her and she took and then went home. She testified that the Appellant's home was about two hundred (200) metres from her home.

23. In his sworn testimony, the Appellant denied ever having known PW 1 previously. He also denied PW 1 having gone to his house. His evidence was that that evening he was riding a boda boda and retired home to rest at 8.00 pm.

24. This was clearly one person's word against the other. When she was cross-examined, PW 1 admitted that she never mentioned about

moonlight in her Witness Statement. On her part, PW 2 was emphatic that the Appellant was her neighbour at home. She positively identified him in the dock. No 255297 PC Benjamin Mwanzia (hereinafter referred to as "PW 3") also positively identified the Appellant at the dock and told the Trial Court that he arrested him from his house.

25. The Appellant did not deny that he was a neigbour to PW 1. He merely asserted that he did not know her. Faced with the two (2) conflicting testimonies, this court was persuaded to believe that PW 1 knew the Appellant by recognition and where he lived. If she did not know him, she would not have been able to lead PW 3 to his house where he was arrested two (2) days after the alleged incident.

26. This court came to the same conclusion with that of the Trial Court that both PW 1 and the Appellant herein were not strangers to each other and that identification was by way of recognition. However, it was not lost to the court that identification of the Appellant under the moonlight was not interrogated to provide a water proof case of his identification.

27. Having said so, whereas PW 1's age had been proven and she may have identified the Appellant, it was necessary to establish whether indeed the Prosecution had proved the offence of defilement. Indeed, all the ingredients of the offence of defilement must be proved before a finding of conviction can be returned. If any one ingredient has not been proven, then the court must give the benefit of doubt to the alleged perpetrator.

28. In her evidence, PW 1 stated that after the Appellant defiled and left, she covered herself with the torn pieces of clothes and carried her pant by hand. She was given some drugs at St Elizabeth Hospital. She informed her mother of what had transpired on 13th September 2018, a fact that was corroborated by PW 2. They both went back to St Elizabeth Hospital and were referred to Russia (Jaramogi Oginga Odinga Teaching and Referral Hospital (JOOTRH)). They then went to Kondele Police Station and collected the P3 Form which they again took to Russia to be filled. She then recorded her statement. Her evidence in this regard was corroborated by PW 2 and PW 6.

29. PW 4 testified that worked at the Gender Based Violence Recovery Centre of JOOTRH where PW 1 visited on 17th September 2018 with a history of having been defiled by the Appellant herein. The examination showed that although the external genitalia and other orifices were intact, PW 1's hymen was broken. Her evidence was that two (2) weeks had passed since the alleged incident. She admitted that the hymen could be broken without penetration.

30. PW 5 corroborated PW 4's evidence and testified that PW 1 visited St Elizabeth Hospital on 17th September 2018 complaining that she had been raped by a person she knew. He tendered in evidence a Report dated 17th September 2018 on behalf of Clifford Otieno who could not attend court as he was away.

31. PW 7 also tendered in evidence the P3 Form on behalf of Dr Opiyo who had since moved to another department and could not therefore attend court. The P3 Form also showed that PW 1's genitalia was normal and there was no discharge. Her evidence was that there was no clinical defilement save for the history. During her cross-examination, she admitted that the age of the injuries was seventy two (72) weeks.

32. This court noted that the date of the P3 Form was 17th September 2018. The said P3 Form was completed by the doctor on 20th September 2019. As the P3 Form was completed almost a year later, the age of the injuries, if at all, was about fifty two (52) weeks. There was an inconsistency in the number of weeks that was indicated by the doctor.

33. Whereas that inconsistency was not too material so as to have affected the conclusion of the court, this court noted that the treatment notes and PRC Form were completed two (2) weeks after the alleged incident. In both reports, the external genitalia were normal and intact. As PW 7 pointed out save for the medical history, there was nothing to show that there had been any defilement.

34. A perusal of the PRC Form showed that PW 1 had changed her clothes by the time she was being examined, she did not hand over the clothes she wore on the material night to the police, she had a bath after the incident and that she did not leave any marks on the Appellant.

35. The fact that the hymen was broken did not mean that the same was broken by the Appellant herein. As PW 4 had testified, the hymen could be broken by any other cause other than penetration.

36. After carefully analysing the evidence that was adduced by the Prosecution, this court came to the firm conclusion that although PW 1's age was proven and she may have identified the Appellant as the person who defiled her, there was no tangible medical and scientific evidence that could connect the Appellant to the offence of defilement against her.

37. Whereas the Appellant's evidence was weak and hopeless, he was under no obligation to assist the Prosecution prove its case. Indeed, as was correctly pointed out by the Appellant, the burden and incidence of proof lie with the person is bound to fail if no evidence is called by either side as provided in Section 107 and 108 of the Evidence Act.

38. Whilst this court could not completely exonerate the Appellant, it could also not convict him on the evidence that had been presented before the Trial Court. The lack of proof to connect him to the offence of defilement led this court to entertain doubts. In such a case, it would be best to give him the benefit of doubt. It would be better to acquit a guilty person than to convict an innocent.

39. Due to lack of certainty of what really transpired, this court thus came to the firm conclusion that the Prosecution did not prove its case beyond reasonable doubt and in the premises foregoing, it found and held that there was merit in the Grounds of Appeal Nos (1), (2), (3), (4), (5), (6), (7) and (8) and the same be and are hereby upheld.

**II. SENTENCE**

40. As the court had already found that there was merit in the Grounds of Appeal Nos (1), (2), (3), (4), (5), (6), (7) and (8), it did not also find it necessary to address itself to Ground of Appeal No (9) regarding the legality or otherwise of the sentence that was meted upon the Appellant herein.

**DISPOSITION**

41. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 10th February 2019 be and is hereby allowed. The effect of this decision is that the judgment of the Learned Trial Magistrate be and is hereby set aside and the conviction and sentence set aside set aside as it was unsafe.

42. It is hereby directed that the Appellant be and is hereby released from custody forthwith unless he be for any other lawful cause be held.

43. It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF JANUARY 2022**

**J. KAMAU**

**JUDGE**