



**REPUBLIC OF KENYA**

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

**HIGH COURT APPEAL CRIMINAL NO. 32 OF 2016**

**HUMPHREY ALISA INYOLO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

*(Being an appeal from the decision of; Hon. B Ochoi (PM) delivered on 15<sup>th</sup> January, 2016, vide S.O case No. 55 of 2014 at the Chief Magistrate Court at Kibera)*

1. On the 29<sup>th</sup> day of May 2014, the appellant was arrested and arraigned in court on; 30<sup>th</sup> May 2014, charged vide, Criminal Case S.O No. 55 of 2014, with the offence of; defilement contrary to section 8(1) as read together with; section 8(2) of the Sexual Offences Act No. 3 of 2006 (herein “the Act”), in count 1 and an alternative count of; committing an indecent act with a child contrary to section 11(1) of the Act. The particulars of each charge are as per the charge sheet.
2. The appellant took a plea of not guilty on both counts, and the case proceeded to a full hearing. The prosecution called a total of four witnesses. The prosecution’s case in brief is that; on 8<sup>th</sup> May 2014, (PW4), the complainant (herein “GA.”), a child aged 4 ½ years, went to play with other children within their residence, after leaving school. She was attending pre-unit class at [Particulars Withheld] School.
3. That, the appellant called her into his house and she obliged. He then removed her shoes and clothes and asked her to climb on the bed. He also removed his clothes and inserted his “dudu” inside her organ for urinating. That, after defiling her, he told her to write, numbers one to three on a piece of paper used for carrying flour. She did. Thereafter she put on her clothes and shoes and went home.
4. At 9.40pm her mother (PW3) EM, told her to go for a short call, before retiring to bed. She went and then reported to the mother that, she was feeling pain while urinating. Upon enquiry, she informed the mother that, one Baba D called her to his house and defiled her.
5. The mother examined her private parts and realized she had dirt and emitting substance therefrom. She took her to a private chemist nearby and later to; Kibera South Health Clinic, where she was informed that, her daughter had been defiled. The matter was then reported to Hardy Police Station. The suspect was arrested and charged accordingly. The complainant identified the appellant as the one who defiled her.
6. At the close of the prosecution’s case, the appellant was put on his defence. He testified through an unsworn statement, to the effect that, on 8<sup>th</sup> May 2014, he was attending to his normal duty as a security guard, when his cousin, one John Tendwa, informed him that, the door to his house had been broken into, by a group of youth from [Particulars Withheld] village, where he was residing.
7. That, later he received information that, his mother had been informed that, he had allegedly defiled a child and had fainted. However, he told his mother that, he had not committed the offence and she advised him to go to Hardy Police Station. The following day, he went to Hardy Police Station, where he found the complainant’s mother. He was then arrested and placed in the cells. That, even then, the complainant denied having been defiled and told the Police officers that, her mother had instructed her to say she had been defiled.
8. That, on 13<sup>th</sup> May 2015, his mother spoke to the Investigating Officer and he was released on free bond to return home until the investigations were over. Later, on 29<sup>th</sup> may 2014, the Investigating Officer told him he was under a lot of pressure from the villagers and politicians to take him to court. He was then arrested and charged.
9. At the close of the entire case, the trial court rendered its final decision vide judgment delivered on; 15<sup>th</sup> January 2016, whereupon the appellant was acquitted on the main count of defilement but was convicted on the alternative count of; indecent act with a child.
10. The trial court, thereafter considered the records produced by the prosecution, indicating that the appellant was a first offender and taking into account the mitigations he offered seeking for leniency, sentenced him to serve a custodial sentence of; ten (10) years.

11. However, the appellant is aggrieved by both the conviction and sentence and appeals against the same on the following grounds, as verbatim reproduced: -

a) *That, the learned trial Magistrate erred in matters of law and facts by convicting the appellant while relying on fabricated evidence that had no truth in it.*

b) *That, the learned trial Magistrate erred in both law and fact by convicting the appellant without considering that no investigations were ever conducted by the prosecution but instead, the appellant was charged barely because of the mounting pressure exerted on the O.C.S. (Hardy Police Station) by the member of County Assembly and the complainant, as opposed to proper investigations required to warrant a conviction.*

c) *That, the learned trial Magistrate erred in both law and facts by failing to consider that a grudge existed between the appellant and the complainant.*

d) *That, the learned Trial Magistrate erred in both law and facts by failing to observe that, no offence was committed by the appellant herein but he was framed to cover up theft in his house committed by the complainant.*

e) *That, the trial Magistrate erred in both law and facts by convicting the appellant when the victim had clearly indicated that the appellant is not the one who committed the offence and that she knew who did it.*

f) *That, the trial Magistrate erred in both law and facts by failing to observe that the charge sheet was defective.*

12. However, the appeal was opposed by the Respondent, vide submissions filed in court. The appellant also filed submissions. The submissions have been considered herein. Be that as it were, in considering the appeal, this court, is conscious of the fact that, the role of the 1<sup>st</sup> appellate court is to, review the evidence adduced in the trial court afresh and draw its own conclusion, save for the fact that, it should not lose sight of the fact that, it did not have the benefit of the demeanor of the witnesses.

13. The aforesaid was well articulated by the Court of Appeal in the case of; ***Okeno vs. Republic (1972) E.A. 32*** as follows: -

***“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding 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, see Peters vs. Sunday Post (1958) E.A 424.”***

14. In the instant matter, the appellant was convicted on the alternative count of indecent act with a child. The subject offence is established under section 11 of the Act, which states as follows:

***“(1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years”.***

15. It follows from the aforesaid that, for the subject offence to be proved, evidence must show that, the perpetrator used any object of his body or an object under his control to touch the genitalia, buttocks or breasts of the complainant.

16. In the instant matter, I find that, there is no dispute that, the complainant was taken to; Kibera South Health Clinic on the material date when the offence is alleged to have been committed. (PW1), Tabitha Ochieng Oyoo, a Nursing Officer who examined her, found that, she had: -

***“Abrasion on the right labia majora”. The vagina was reddened and there was tenderness on touch. There was discharge with bad smell. The hymen had regular margin and hyperaemic. The anus was intact”***

17. The question is: what caused the abrasion and reddened vagina? The victim (PW4) testified that, the appellant defiled her. She referred to him as “Baba D”. The victim’s mother testified that, the appellant is her neighbour, obviously then, the victim knew the appellant as a neighbour, prior to the incident. Furthermore, according to the evidence of; (PW1) Tabitha Ochieng Oyoo, and (PW3) EM, the complainant told them the same day of the incident that, it was the appellant who had defiled her.

18. Similarly, it suffices to note that, the complainant maintained both in her evidence and information to the witness PW1 and PW3, that, the appellant used his “dudu” which he uses to urinate and inserted in her private parts. The aforesaid evidence was not rebutted by the appellant and in my considered opinion, proves beyond reasonable doubt that, the appellant’s penis came into contact with the complainant’s private parts.

19. In addition, I find that, there is no dispute that, the complainant was a child. A child is defined under; section 2 of the children Act, as a human being below the age of eighteen (18) years. The complainant’s age was proved by the birth certificate which showed that, she was born on, 25<sup>th</sup> November 2009, whereas the offence was committed on 8<sup>th</sup> May 2014. Therefore, she was just about five (5) years by then.

20. The appellant's defence was dismissed by the trial court as lacking merit. It was described as "holding no water" as there was no proof of; alleged grudge between him and the victim's mother. I concur with the finding of the trial court as, the evidence of (PW1) Tabitha who examined the complainant indicated possible defilement or indecent assault. She was unknown to the appellant. Therefore, the history of sexual assault rebuts the appellant's defence of framed charges.

21. Furthermore, I find that, although the evidence of; Dr. Maundu, is different in finding from that of the Nursing Officer, this is because the examination of the complainant was done seven (7) days after the alleged incident and, obviously, by then, the abrasion and redness may have healed as the complainant was on treatment. Therefore, in my considered opinion, the appellant's defence is a mere denial.

22. However, before I conclude, I find that, although the appellant was convicted of a charge of committing an indecent act with a child, had the investigations in this matter been properly done, and the court not allowed Investigating Officer and the Government Analyst to "distort" evidence, probably, the offence of defilement would have been established.

23. This is informed by the fact that, on 21<sup>st</sup> May 2015, the prosecutor informed the court that, he had received a report that the victim's clothes were taken to the Government Analyst for DNA analysis. On 10<sup>th</sup> September 2014, he sought for time to get the results. He was granted an adjournment. On 10<sup>th</sup> June 2016, Corporal Charity Muturi, the Investigating Officer, told the Court that, the results would be ready on the next hearing date, 2<sup>nd</sup> of September 2015.

24. On that date, the prosecution sought for an adjournment to call the Government Analyst. He was granted the same and the case adjourned to; 6<sup>th</sup> October 2015. On 9<sup>th</sup> October 2015, the prosecutor told the court that, he had one witness and was ready to proceed. The case was stood over to 10.50am. At that time the prosecutor, addressed the court as follows: -

*"I had indicated I had one witness in court. However, I have perused the witness statement and not found it necessary to call the witness. I therefore close the prosecution case at this stage".*

25. The prosecution's case was closed. It suffices to note that, the Government Analyst had not testified and neither did the Investigating Officer. The question is; why were these witnesses not called to testify? Why didn't the court enquire into the same? With utmost respect, that was a rather casual way of dealing with serious court matters, which puts the entire criminal justice system into ridicule, denies the victims justice and makes the public lose confidence in the Judiciary.

26. To revert back to the subject matter, I find that, there is adequate evidence to sustain a conviction on the alternative count, and uphold the conviction thereon. The sentence provided for the offence is a minimum of ten (10) years. The appellant was sentenced to ten (10) years imprisonment.

27. However, the learned trial Magistrate did not indicate as to whether the period the appellant was in custody while on trial was considered. The provisions of section 333(2) of the Criminal Procedure Code requires that, the same be considered, unless there are good reasons not to. The appellant's warrant of commitment on remand shows he was in custody throughout the trial. He was committed on; 30<sup>th</sup> May 2014 and sentenced on; 15<sup>th</sup> January 2016. He was in custody for a period of about one and a half (1 ½) years. That period should have been considered.

28. He has so far served about five years. I direct that, the sentence imposed be reduced by a period of; one and half (1 ½) years he was in custody. In other words, the sentence shall take effect from; 30<sup>th</sup> May 2014.

It is so ordered.

**DATED, DELIVERED VIRTUALLY AND SIGNED ON THIS 21ST DAY OF DECEMBER 2021.**

**GRACE L. NZIOKA**

**JUDGE**

**IN THE PRESENCE OF;**

**NO APPEARANCE FOR THE APPELLANT**

**MS CHEGE FOR THE RESPONDENT**

**APPELLANT PRESENT IN PERSON**

**EDWIN OMBUNA: COURT ASSISTANT**