



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT SIAYA**

**CRIMINAL APPEAL NO. 9 OF 2019**

**MICHAEL KIRA ODHIAMBO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Appeal from the judgment, conviction and sentence in Bondo Principal Magistrate's Court***

***SO case No. 46 of 2018 delivered on 8/2/2019 by Hon. E.N. Wasike, SRM.)***

**JUDGMENT**

1. The appellant **MICHAEL KIRA ODHIAMBO** was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006. He also faced the alternative count of committing an indecent act with a child contrary to section 11(1) of the same Act. Particulars of the main charge for which the appellant was convicted and sentenced to serve twenty-20 years imprisonment by Hon. E.N. Wasike, SRM in proceedings conducted by Hon. M. Obiero, Principal Magistrate were that on the 5<sup>th</sup> day of August 2018 at Milenga Village, West Sakwa Location in Bondo Sub County within Siaya County he intentionally caused his penis to penetrate the vagina of Q.A.O. [full name withheld] a juvenile of 15 years.

2. Aggrieved by the said judgment, conviction and sentence, the appellant filed this appeal on 13/2/2019 but filed amended grounds at the hearing accompanied by written submissions canvassing the appeal, complaining that:

1. *The trial court failed to observe that the prosecution case was not proved beyond reasonable doubt;*
2. *The trial court failed to consider that there was no medical evidence linking me with the alleged offence;*
3. *The trial court failed to observe that I was not subjected to any medical examination;'*
4. *The trial court failed to consider that the prosecution case was full of contradictions.*

3. This being a first appeal, this court is obliged to re-evaluate the evidence before the trial court and arrive at its own independent conclusion bearing in mind the fact that it neither saw nor heard the witnesses as they testified.

4. Revisiting the evidence for the prosecution and the defence before the trial court, Q.A. a minor testified as PW1 on oath after *voire dire* examination and stated that she was 15 years and in class five at M Primary School. She recalled that on the 5<sup>th</sup> day of August 2018 at 11 am she was at her home as her mother had gone to church and left her with the assignment of going to wash her clothing. The complainant went and washed her clothes and upon her return, she found when her siblings had gone to the lake so she went to fetch firewood. It was while she was collecting firewood that she saw the appellant whom she referred to as Kira who told her to accompany her to his house to collect pumpkin seeds for his mother. She obliged and went with him as directed. On reaching the appellant's house, she stood at the door and waited for him as he entered his house.

5. As she waited for him to avail the pumpkin seeds, he came and grabbed her hand and pulled her into his house where he put her on his bed as she was screaming, removed her pant and told her that Nyasembo would hear he screams then he removed his trouser and inserted his penis into her vagina. That she felt pain and continued screaming which screams attracted her father who went and found them inside the appellant's house. She stated that the appellant told her father to forgive him and that her father entered the house and she explained to him what had happened to her. She then went home and left her father with the appellant. That her father called the chief and the appellant was arrested and she was taken to hospital where she was treated and examined. She recorded her statement with the police. She identified the appellant and stated that he was their neighbour and that that was the third time that he was defiling her. She stated that he had earlier

threatened her not to disclose and also promised to give her money on dates that she could not remember.

6. In cross examination she reiterated her evidence in chief.

7. **WOO** the complainant's father testified as PW2 and stated that on the 5<sup>th</sup> day of August 2018 at about 11am he was at home and that PW1 went to fetch firewood. He stated that he went to the appellant's home because he had received information that she could be having a relationship with the appellant. On arrival he found the door to the appellant's house open. As the house was one roomed, he entered therein and found the two having sex and that PW1 had pulled her skirt while the appellant was naked. PW2 called the Chief on phone who went to the scene and they escorted the appellant to Bondo police Station while the complainant was escorted to Bondo Sub county Hospital where she was treated and examined. He later took her to the police station where she was issued with a P3 form which was filled on 8/8/2018. He stated that the appellant was their neighbour and that the complainant was aged 15 years old as she was born on 20.4.2003. He identified copy of her birth certificate in court. The witness reiterated his evidence in chief during cross examination.

8. **PW3 J A O** testified that he suspected the appellant to be having a relationship with her daughter the complainant so she informed her husband. This was after the appellant on previous occasions from the month of April 2018 insisted on the complainant taking to him vegetables which he had been borrowing from PW3. On the material day, she went to church and was called and informed that the complainant had been found in the appellant's house. She stated that when she inquired from her she denied having any relationship with the appellant.

9. **PW5 Kennedy Opiyo Omondi** testified and stated that he was a clinical officer. He filled the P3 form for the complainant aged 15 years who alleged that she was defiled by an old man who found her in the bush. On examination the complainant was found with dark old bruises on the vaginal wall; the hymen was torn; she had an inflamed cervix; pregnancy test was negative; there were no spermatozoa but there were multiple pus cells. He concluded that there was penetration. He filled her P3 form and prepared PRC. He produced the same as exhibits.

10. On being cross examined by the appellant, PW4 stated that the appellant was never taken to hospital for examination. He reiterated his evidence in chief and denied seeing any blood.

11. **PW5 PC Julian Otieno** based at Bondo Police Station investigated the case. She recorded witness statements on 6<sup>th</sup> August 2018 after receiving the report of defilement on 5<sup>th</sup> August 2018 from the complainant who was accompanied by the appellant, her parents and the area Chief alleging that she had been defiled by the appellant. She was escorted to Bondo Sub county Hospital where she was treated and examined and the P3 filled confirming that the complainant child had been defiled, PW5 produced as exhibit the Birth Certificate of the complainant showing date of birth as 20/4/2003.

12. In cross examination she denied telling the appellant that he was not the one who defiled the complainant. She denied talking to the appellant.

13. In his defence, the appellant gave unsworn testimony and stated that on 5<sup>th</sup> August 2018 at 5.30 pm he was at his house when the complainant went to his house as he was preparing maize. He was alone as his wife was deceased leaving him with children who were in school. That after about 15 minutes her father arrived and found the complainant in the house of the appellant and asked her as to what she was doing in his house. He took a stick and beat her and told him that he had found him and that the appellant told him that he had done nothing. He stated that shortly thereafter the village elder arrived and called the Assistant Chief and together they took the appellant to Bondo Police Station. He denied committing the offence saying he had no grudge with the complainant's father and that he could not tell why he gave false evidence against the appellant. He stated that he was 80 years old and that his penis was not functional.

## SUBMISSIONS

14. In support of his appeal, the appellant filed written submissions asserting that the prosecution's case was full of contradictions. That the trial court relied on circumstantial evidence without sufficient proof. That the evidence adduced by PW1, 2 and 3 did not match that of PW4 who stated that on examining the complainant he found nothing indicative that penetration took place. That no spermatozoa was seen and that there was no fresh penetration as the bruises on the vaginal walls were old which showed that the complainant had been having sex and not on the alleged date of defilement. That the Clinical Officer never disclosed his qualifications hence he was not competent to carry out examination on the complainant. That the date when medical examination was done on the complainant and when the P3 form was signed were different. Further, it was submitted that there was no indication of approximate age of injury and the probable type of weapon used to cause the injury.

15. In his oral highlights, the appellant maintained his innocence saying that the complainant was his grandchild and that his wife died the previous year.

16. Opposing the appeal, Senior Principal Prosecution Counsel Mr Okachi submitted that the evidence adduced proved the charge against the appellant beyond reasonable doubt and that the appellant was caught ready handed.

## DETERMINATION

17. I have considered the evidence adduced in the trial court for the prosecution and the defence. I have also considered the appellant's grounds of appeal and the submissions for and against the appeal. In my humble view, the main issue for determination is whether the prosecution proved its case against the appellant beyond reasonable doubt to warrant his conviction and if so, whether the sentence imposed was lawful and warranted. There are other ancillary questions to be answered in line with the appellant's grounds of appeal and submissions which I will consider alongside the main issue.

18. The burden of proof always lie with the prosecution to prove their case beyond reasonable doubt. In this case, what was expected of the prosecution was to prove all the elements of defilement as stipulated in the sexual Offences Act which are: that the complainant was a child as stipulated in section 2 of the Children's Act; that the child's genitalia was penetrated as defined under section 2 of the Sexual Offences Act and finally that the perpetrator of the offence was positively identified.

19. On proof of age of the complainant, a birth certificate for the complainant was produced as an exhibit which showed that she was born on 20<sup>th</sup> April 2003 meaning as at 5/8/2018 she was aged 15 years old. Accordingly the complainant was a child and within section 8(3) of the Sexual Offences Act.

20. On whether the prosecution proved that the complainant's genitalia was penetrated into, the complainant herself testified on oath that when the appellant send her to go and collect pumpkin seeds for the appellant's mother, she followed him into his home. She stood outside the house as he entered but he came out and pulled her hand, took her to his bed, removed her pant and removed his trouser and inserted his penis into her vagina and that she screamed and felt some pain but he continued and told her not to scream as someone would hear her scream. While he was still defiling her, her father came into the house and found him in the act.

21. In addition, the complainant was examined by PW4 who found that she had been penetrated as her cervix was inflamed. She had bruises and the hymen was torn. This evidence was never shaken during cross examination. Iam satisfied that penetration was proved beyond reasonable doubt.

22. On whether the perpetrator was positively identified, PW1, PW2, PW3 all testified that the appellant was their neighbour. The appellant also testified that the complainant was his neighbour's child and that she went to his house. The offence took place in broad daylight and the appellant was found in the act of defiling her. There was evidence that the complainant or her father could have framed the appellant with such an offence. Therefore there was no possibility of mistaken identity.

23. Accordingly I find and hold that appellant was positively identified and recognized as the perpetrator of the crime. He stated in his defence that the complainant's father had no grudge with him. There was indeed no reason advanced why he would be framed for such a crime.

24. On whether the prosecution proved its case against the appellant beyond reasonable doubt, the appellant claimed that the prosecution case was riddled with contradictions and he claimed in his submissions that the evidence of PW1, 2, and 3 did not match that of PW4. I have examined that evidence and I find no contradiction.

25. The appellant also claimed that no medical evidence linked him to the offence. Although no forensic examination or DNA examination was carried out on the appellant, in my humble view, this was not necessary as there was overwhelming evidence of PW2 who found the appellant in the actual act of defiling PW1. There was nothing on record to show that PW1 was lying to the court. Although there were old bruises in the genitalia of the complainant, she explained that the appellant was defiling her for the third time hence the old bruises otherwise PW4 confirmed that there was inflammation of the cervix. He concluded that there was evidence of penetration contrary to what the appellant claims in his submissions. The fact that the complainant had had previous sexual encounter did not in itself water down the evidence that she was defiled on 5/8/2018. Further, although the appellant now claims that the qualifications of the Clinical Officer was not given, nothing stopped him from raising this as an issue during the trial and asking the Clinical Officer questions of his qualifications. The attack is therefore found to be an afterthought as the witness filled and signed a P3 form which is a public document.

26. On the claim that the date when the P3 form was filled is different from when it was signed are different, I have examined the P3 form and it clearly shows that it was issued on 7/8/2018 at Bondo Police Station as per the OB Report made OB/26/5/8/2018. The child was send to hospital on 7/8/2018 and was examined on 8/8/2018. I find no discrepancy that would vitiate the conviction of the appellant.

27. On allegations that there was no approximate age of injury and probable type of weapon used, it is worth noting that the complainant was defiled on 5/8/2018 and she was taken to hospital the same day. She was issued with a P3 FORM on 7<sup>th</sup> and filled on 8th August hence there was sufficient evidence which was self-explanatory on the age of injuries. Further defilement is special category of offences not like simple assault. The probable weapon was not indicated but PW1 stated that she was defiled by insertion of the penis in her vagina hence the weapon of defilement was disclosed in the charge sheet evidence to be the penis.

28. On the whole, I find that the appellant's appeal against conviction lacks merit I proceed to dismiss it. I uphold the decision of the trial court.

29. On sentence the appellant did not say anything but he was handed a mandatory minimum sentence under section 8(3) of the Sexual Offences Act. He maintained his innocence in this appeal. I exercise discretion and resentence the appellant to serve ten (10) years imprisonment to be calculated from the date of arrest in the lower court on 5/8/2018.

30. Orders accordingly.

**Dated signed and delivered at Siaya this 25<sup>th</sup> day of February 2020**

**R.E.ABURILI**

**JUDGE**