



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT SIAYA**

**CRIMINAL APPEAL NO. 59 OF 2017 [SOA]**

**KOO .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Being an appeal from the judgment, conviction and sentence of**

**Bondo PMCR Case No. 739 of 2016 Dated 30.6.2017**

**before M. Obiero – Principal Magistrate)**

**JUDGMENT**

1. The appellant KOO was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006. The particulars are that on the diverse dates between September 2015 and December 2015 at about 7.00 p.m. at South Sakwa Location, Bondo Sub-County, willfully and unlawfully caused his penis to penetrate the vagina of JAO a girl aged 11 years.

2. The Appellant was further charged with the alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars are that on the diverse dates between September 2015 and December 2015 at about 7.00 p.m. at South Sakwa Location, Bondo Sub-County within Siaya County he touched the vagina of JAO a girl aged 11 years with his penis.

3. In Count II, the appellant was charged with the offence of deliberate transmission of HIV contrary to Section 26(1) of the Sexual Offences Act No. 3 of 2006. The particulars are that on diverse dates between September and December 2015 at South Sakwa Location, Bondo Sub-County within Siaya County, having actual knowledge that he was infected with HIV willfully and intentionally had unprotected sexual intercourse with JAO and infected her with HIV.

4. The appellant denied all the charges and the prosecution called four (4) witnesses who testified in support of their case.

5. After the trial the court found the appellant guilty of the main charge of defilement and acquitted him of the charge of deliberate transmission of HIV AIDS to the complainant. The appellant was sentenced to serve life imprisonment after mitigating.

6. Aggrieved by the conviction and sentence, the appellant filed this appeal in person as supplemented by the grounds of appeal filed by his counsel Mr. Kowino Advocate who nonetheless ceased acting for the appellant midway these proceedings.

7. The appeal is therefore premised on the following grounds filed on 06/7/2017:

**1. That the learned trial Court Magistrate erred in law and fact by failing to observe that the age of the complainant was not sufficiently proven.**

**2. That, I cannot recall at that transverse during the trial hence pray for the trial records to adduce sufficient grounds at the hearing thereof.**

**3. That I pray for orders of Habeas Corpus**

8. The appellant also relied on the following supplementary grounds of appeal filed by his advocate on 13/7/2017:

**1. The learned trial magistrate erred in law and fact in convicting the accused of the offence when the medical evidence was inconclusive and insufficient.**

**2. The learned trial magistrate erred in law and fact in convicting the appellant on the basis of a defective charge**

**3. The learned trial magistrate erred in law and fact in convicting the appellant while the medical evidence was unsatisfactory owing to the long time lapse between the date of alleged offence and medical examination**

**4. The learned trial magistrate erred in law and fact in convicting the appellant while the prosecution's case was not proved beyond reasonable doubt**

**5. The conviction was against the weight of the evidence and unsafe.**

9. This being a first appeal I must first reassess and reevaluate the evidence before the trial court and arrive at my own independent conclusion bearing mind the fact that I neither saw nor heard witnesses as they testified. See **Okeno v Republic [1972] EA 32**).

10. Revisiting evidence before the trial court, the complainant, **JAO** testified after voir dire examination as PW1 and stated that she was 12 years old and in class six at **[Particulars withheld] Academy**. She recalled that in the month of September 2015 on a date that she could not remember, she was from the home of her schoolmate LA where she had gone to do homework. That as she was going back home, at about 7 p.m., she heard somebody calling her and she looked back stopped and waited for the person. When the person reached where she was, she realized that the person was one Otis that is the appellant herein.

11. She stated that the appellant told her that he wanted to send her to their neighbor. In the process, the appellant caught her, blocked her mouth and pulled her towards the bush. While in the bush, the appellant undressed her and also removed her pair of trousers and pant and inserted his penis in her vagina and she saw some fluid on her clothes. However, when she went home, she did not disclose the incident to her parents because she was afraid.

12. She further testified that in the month of December, 2015, she went to play with her friend by the name C. When she was going back home at about 6.00 p.m. she saw the appellant standing near a bush. She stated that the appellant called her and told her that he wanted to send her to Christine's home. She stated that she went where the appellant was standing. In the process, the appellant caught her, blocked her mouth and pulled her into a nearby bush. While in the bush, the appellant removed his trouser and he inserted his penis into her vagina. She could not scream because he had blocked her mouth. After that, she went home but did not disclose the incident to anyone.

13. It was her further testimony that on the 23<sup>rd</sup> day of May, 2016, her mother took her to Nyaguda dispensary where she was treated and examined. She stated that it was discovered that she had been infected with HIV. That when the mother asked her how she became infected, she explained to her what had transpired between her and the appellant on the two occasions when he defiled her. She identified the appellant as Otis who was their neighbour and who used to go to her home. She stated that she had never had sexual intercourse with any other person apart from the appellant.

14. In cross examination she reiterated her testimony in chief and gave detailed description of the places and neighbourhood where the appellant allegedly defiled her on the two occasions.

15. **PW2 PC Omudho Okwaro** stationed at Bondo Police Station testified that he investigated this case. He stated that he received the complainant at the police station on the 7<sup>th</sup> day of June, 2016 when the complainant reported that she had been defiled by a person known to her. He stated that during the investigation, he referred the complainant to the hospital for medical examination and treatment.

16. It was his further testimony that during the investigation, the doctor disclosed to him that the complainant had been infected with HIV virus. He further stated that after arresting the appellant, he received information that the appellant had been tested at Nyaguda health center and found to be infected with HIV virus and that the testing was done in the year 2014. He stated that he went there and confirmed the position. He stated that a letter was written to that effect and that the letter is dated the 4<sup>th</sup> day of July 2017. He further stated that he obtained the complainant's certificate of birth showing that she was a child and he produced the same as an exhibit 1.

17. **PW3 AAO** testified that the complainant herein is her daughter. She stated that on the 23<sup>rd</sup> day of May, 2016, the complainant was sick and she took her to Nyaguda health center for treatment. When the complainant was examined, the nurse told her that the complainant had been infected with HIV virus but that when PW3 was examined she was found to be HIV Negative.

18. PW3 stated that when she asked the complainant how she got infected, the complainant declined to disclose. However, after sometime on 31/5/2016 they interviewed her together with the complainant's father and the complainant informed them that it was one **O** who had defiled her on several occasions when she was from school. She stated that after that they went to Bondo Police station where they reported the incident. She stated that the complainant was 12 years old as she was born in 2004. She identified her birth certificate.

19. **PW4 Dr. Willis Ochieng** attached to Bondo Sub County Hospital testified that the P3 in respect of the complainant was filled by Dr. Oginga on the 7<sup>th</sup> day of June, 2016. And that the Dr left the Hospital after the Doctors' strike. He was conversant with Dr Oginga's handwriting. He produced the P3 form and the laboratory report as exhibits. He stated that examination on the genitalia of the complainant revealed that the hymen was torn. The approximate age of in jury was nine months. The probable weapon used was penile penetration. He produced the P3 for the complainant as Exhibit 2. He also produced results of examination on the appellant and request for examination form as Exhibits 5 (a) and 5 (b)

20. The appellant's counsel applied to recall PW1 for cross examination but despite the witness attending court on 13/7/2017 the appellant's

counsel was not in court to cross examine her.

21. Placed on his defence, the appellant adduced unsworn evidence and stated that he was KOO and lived in [Particulars withheld] and worked as a fisherman. He denied ever defiling the complainant. He stated that he had heard rumours going round by women in his neighbourhood about the defilement of the child and later he was arrested when he went to report to the Amoyo Police Station about the said rumours.

22. The appellant filed written submissions in support of the following grounds of appeal:

## **SUBMISSIONS**

23. In his written submissions, the appellant claimed that the age of the complainant was not proved and that the medical evidence was not conclusive. He took issue with the fact that it took long after the incident before the complainant was examined by a doctor.

24. The Respondent opposed the appeal contending that the prosecution proved its case against the appellant beyond reasonable doubt and that all the elements of defilement of the child were established. Mr. Okachi Prosecution Counsel argued that the appellant was well known to the complainant and that he had called her on those occasions when he defiled her. He urged the court to uphold the conviction and sentence and dismiss the appeal.

25. In a rejoinder the appellant claimed that he was framed and that a child aged 11 years could have disclosed that she was defiled. That she could not have remained silent for such a long period of time. There was no submission on the alleged defectiveness of the charge sheet

## **DETERMINATION**

26. I have considered the evidence adduced before the trial court, the grounds and supplementary ground of appeal and the submissions for and against the appeal herein. In my humble view, the main issue for determination is whether the prosecution proved its case against the appellant beyond reasonable doubt. From the grounds of appeal and supplementary grounds of appeal, the appellant mainly laments that the age of the complainant was not sufficiently established and that medical evidence was inconclusive as the complainant was examined after a long time following the alleged defilement.

27. The essential elements or ingredients of the offence of defilement are well settled and the same include.

**1. Whether the victim and/or complainant was a minor as at the time of the alleged incident.**

**2. Whether there was penetration of the complainant's genitalia.**

**3. Whether the person who caused the penetration and/or the perpetrator has been identified.**

**a. Age of the victim and/or complainant.**

28. On whether the complainant was a minor, the charge sheet reads that the complainant was a child aged 11 years. According to the complainant, she was 12 years old as at the time she testified and that was on the 16<sup>th</sup> day of January, 2017. PW2 obtained the certificate of birth in respect of the complainant and he produced the same as exhibit 1 which indicates that the complainant was born on the 19<sup>th</sup> day of February, 2004. The incident is alleged to have occurred between September, 2015 and December, 2015. As at September 2015, the complainant was a minor aged 11 years and within the age bracket of **section 8(2) of the Sexual Offences Act**. Accordingly, I am persuaded that the complainant's age was proved beyond reasonable doubt to be 11 years as she had not attained 12 years when the incident is alleged to have taken place.

29. Accordingly, the contention by the appellant that the age of the complainant was not sufficiently established is a wishful thinking as there was no other evidence to the contrary as to the age of the complainant following production of her birth certificate showing that she was in the age bracket of 11 years and below.

30. On **whether there was penetration** of the complainant's genitalia, the complainant narrated that the appellant had penetrating sexual intercourse with her on two occasions and that on the first occasion she experienced pain because it was the first time she was engaging in sexual intercourse. According to the doctor who examined the complainant and filled the P3 form, at the time of examination, the hymen was torn although the other systems were normal. There was evidence of penetration by the penis albeit nine months had lapsed.

31. I have considered the evidence of the complainant together with the findings of the doctor in the P3 form, that is exhibit 2 and I am persuaded that the same is well corroborated and demonstrate that there was penetration into the complainant's vagina.

32. On **whether the perpetrator was positively identified to be the appellant**, according to the complainant, it was the appellant who defiled her on two different occasions. According to PW3, the complainant became sickly and when she took her to hospital for treatment, the nurse revealed to her that the child was infected with HIV virus and that upon receiving such information, she asked the complainant how she got infected but the complainant was not willing to disclose it at first. However, when they went back home, she interviewed the complainant in the presence of her father and the complainant disclosed to them that it was one Otis that is the appellant who had been defiling her.

33. The trial magistrate in his judgment observed as follows, of the evidence of the complainant and her mother, PW3:

**“I have carefully considered the evidence of the complainant and the evidence of PW3. It is clear that the complainant was firm from the onset that it was the appellant who defiled her. I wish to point out that I had the opportunity of observing the demeanour of the complainant during the testimony. She was firm and categorical and I did not observe anything that would have suggested that she was not telling the truth. Based on the foregoing. I am of the finding that it was the appellant who caused the penetration.”**

34. From the above analysis and findings, I find no reason to depart from the findings and holding of the trial court which had the opportunity of seeing and hearing the witnesses as they testified. There is nothing on record to suggest that the complainant and her mother could have framed the appellant with such a heinous offence. I am satisfied that the complainant positively identified and recognized the appellant as Otis being the person who defiled her on two different occasions.

**35. On the allegation that medical evidence was inconclusive,** I find that the medical evidence adduced was clear that the complainant was defiled and the only question was who was responsible. The complainant knew the appellant very well as her neighbour who used to visit her home and she was clear in her evidence that she was defiled on two different occasions. There was nothing on record to indicate any framing of the offence against the appellant.

**36. On the long period it had taken to examine the complainant,** it is clear on record that the child was told by the appellant not to disclose what the appellant had done to her and she indeed did not disclose the incidents until she fell ill is when her mother took her to hospital and it was discovered that she was infected with HIV. She was interrogated further but she was not willing to disclose what happened, until her mother took her to her father is when she opened up.

37. In my humble view, the evidence of penetration and as to who had penetrated her was sufficient enough to sustain a conviction against the appellant. Being a child, and having been scared of disclosing the ordeal, in my humble view, the discovery of the offence at a later date did not vitiate the trial of the appellant.

38. Furthermore, there was more than sufficient evidence that the appellant was tested for **HIV as per the laboratory report dated 24.6.2016** and had been found positive. The complainant's situation was discovered after she fell ill and on examination she was found to have been infected with HIV Virus. The complainant was assertive that she did not engage in any sexual intercourse with any other person apart from the appellant herein.

39. I am satisfied on the evidence adduced that the prosecution proved its case against the appellant beyond reasonable doubt. I find the conviction of the appellant sound. I sustain it and dismiss the appeal herein against conviction.

40. On sentence, the appellant was given mandatory sentence having regard to the age of the complainant as stipulated in section 8(2) of the Sexual Offences Act. He was a first offender and had children as per his mitigation. However, as the life sentence being minimum is no longer mandatory following the jurisprudence set by the **Court of Appeal in CRA No. 93 of 2014-Jared Injiri Koita v Republic [2019]eKLR**, applying the principles espoused in **Francis Karioko Muruatetu & others v Republic SC Pet No 15 and 16 of 2015**, on the unconstitutionality of mandatory death sentence, I would exercise discretion and resentence the appellant sex pest who took advantage of the innocent child and defiled her, to serve seventy five (75) years in prison.

41. Accordingly, the appeal against conviction is dismissed. The appeal against sentence is allowed to the extent stated above.

**Dated, signed and delivered at Siaya this 18<sup>th</sup> Day of December 2019**

**R.E. ABURILI**

**JUDGE**

**In the presence of:**

The appellant in person

Mr. Okachi Senior Principal Prosecution Counsel

CA: Brenda & Modestar