



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 120 OF 2016**

**(CORAM: D. S. MAJANJA - J.)**

**BETWEEN**

**DAVID OMONDI ODHIAMBO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an Appeal against both the Conviction and Sentence dated 11<sup>th</sup> March 2016 in Criminal Case No. 01 of 2015 at Ukwala Law Courts before Hon. R. M. Oanda, Ag. PM.)***

**JUDGMENT**

1. The appellant, **DAVID OMONDI ODHIAMBO**, is charged with the offence of **Defilement** contrary to **section 8(1) and (4)** of the **Sexual Offences Act**. The particulars were that on the night of 20<sup>th</sup> December 2014 [*particulars withheld*] within Siaya County, he intentionally caused his penis to penetrate the vagina of GAO, a child aged 16 years. He also faced an alternative charge of committing an indecent act with a child contrary to **section 11(1)** of the **Sexual Offences Act** based on the same facts.
2. After trial, the appellant was convicted and sentenced to 15 years' imprisonment. He now appeals against the conviction and sentence. The thrust of his appeal is that the prosecution did not prove the offence beyond reasonable doubt.
3. It is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify so as to form its own opinion on their demeanour (see **Okeno v Republic [1972] EA 32**).
4. The prosecution case was that on the night of 20<sup>th</sup> December 2014 at 9.00pm, GAO (PW 1) had gone to the toilet to relieve herself when she met the appellant who accosted her. She followed him to his house thinking he was going to pay her some money he owed her but at the house, he forcefully put her on the bed and proceeded to sexually assault her. Her screams attracted her brother, PW 3, who came and found the appellant holding PW 1. PW 3 decided to take them to his parents. When PW 3 asked what was happening, they both kept quiet.
5. PW 3 took PW 1 and the appellant to their home where they found PW 1's mother, PW 4. PW 4 confirmed that PW 1 had gone outside to answer to a call of nature but she did not return immediately. She stated that she heard PW 1 screaming whereupon PW 3 went to see what was happening. She recalled that PW 3 returned with both the appellant and PW 1. When she questioned PW 1, she refused to say what happened.
6. PW 4 then took PW 1 to Ukwala Health Centre on 23<sup>rd</sup> December 2014. PW 2, the Clinical Officer examined her and filled the P3 form on 24<sup>th</sup> December 2014. She noted that the *labia majora* was tender, the hymen was absent and there was no tear. The vaginal swab revealed epithelial cells. PW 5, the Investigating Officer, confirmed that PW 3 reported the offence of defilement on 24<sup>th</sup> December 2014. He caused the accused to be arrested and charged.
7. I have considered the entire evidence and I find that the testimony of PW 1, PW 3 and PW 4 confirm that PW 1 went outside that night and in a short while her screaming attracted PW 3 who went and was found her with the appellant in her house. In the testimony, PW 1 stated that she was defiled. **Section 2** of the **Sexual Offences Act** means, "*the partial or complete insertion of the genital organs of a person into the genital organs of another person.*" In **Samson Aginga Ayieyo v Republic KSM CA Crim. App. No. 165 of 2006 [2006]eKLR**, the trial magistrate recorded that the child stated she had been defiled. The Court of Appeal stated as follows, regarding the necessity of recording the precise words of the child;

“Defiled” is a technical term. It is quite improper to use such term or any other technical term when recording the evidence of a witness unless the witness himself or herself has used it. The correct approach is to use the words used by the witness.

8. It would have been appropriate for the trial magistrate to record the precise words PW 1 used to describe the act which the appellant did so that the court may determine whether the act amounts to penetration within the meaning of the *Sexual Offences Act*. From PW 1’s testimony, it is not clear whether there was penetration as defined by **section 2** of the *Sexual Offences Act*.

9. Further, PW 4 did not give any opinion on whether there was penetration. I note that the P3 Form states that the offence was “*attempted defilement*”. When PW 1 screamed, PW 3 arrived and found PW 1 and the appellant holding each other. He did not give their state of dress of any evidence suggesting that there was an act of penetration. I reject the appellant’s defence of a frame up as the evidence is clear that the appellant was caught with PW 1 at the *locus in quo* and the fact of a frame up was not suggested to any of the witnesses in cross-examination.

10. The totality of the evidence leads me to quash the conviction and sentence. I however convict the appellant of the lesser and cognate offence of **attempted defilement** contrary to **section 4** of the *Sexual Offences Act*. Consequently, the sentence is reduced to 10 years’ imprisonment.

**DATED AND SIGNED at SIAYA this 23<sup>rd</sup> day of March 2018**

**D. S. MAJANJA**

**JUDGE**

Appellant in Person

Mr Okach, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the State

Court Assistants: L. Odhiambo and B. Ochieng