



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**CRIMINAL APPEAL NO.59 OF 2017**

**BETWEEN**

**G O O .....APPELLANT**

**AND**

**REPUBLIC..... RESPONDENT**

*(Being an appeal from original conviction and sentence in the CM's court at Oyugis Sexual Offence Act No.19 of 2016 – Hon. S.M. Mokuu, CM, dated 19th January, 2017)*

**JUDGMENT**

[1] The appellant, **G O O**, appeared before the Chief Magistrate at Oyugis charged with defilement, contrary to **Section 8 (1)** as read with **Section 8 (2)** of the **Sexual Offence Act**, in that on the 13<sup>th</sup> August 2016 within Homa Bay County, he defiled DAO, a child aged two (2) years.

There was an alternative count of indecent act with the same child contrary to **Section 11(1)** of the **Sexual Offences Act**.

[2] After a full trial, the appellant was convicted on the main count and sentenced to life imprisonment. However, he was dissatisfied with the said conviction and sentence and preferred the present appeal on the basis of the grounds in the petition of appeal filed herein on 15<sup>th</sup> December 2017. His main complaint is that he was convicted on the basis of prosecution evidence which was insufficient and contradictory.

[3] At the hearing of the appeal, the appellant appeared in person and presented written submissions which he fully relied on in support of his case.

The learned prosecuting counsel, **MR. OLUOCH**, appeared for the respondent/state and opposed the appeal by orally submitting that the evidence of PW1 as corroborated by that of PW2 showed that the appellant was spotted while committing the offence and was as such placed at the scene of the offence.

[4] The learned prosecution counsel, contended that the appellant was properly convicted and considering that the victim was occasioned tremendous suffering and that the appellant was at the material time HIV positive, the sentence meted out against him was proper.

Learned prosecution counsel called for dismissal of this appeal.

[5] This is a first appeal. In the circumstances, this court is called upon to re-consider the evidence adduced at the trial and arrive at its own conclusions bearing in mind that the trial court had the benefit of seeing and hearing the witnesses (See, **OKENO –VS- REPUBLIC (1972) EA 32**).

[6] In that regard, the prosecution case was briefly that the child victim was at the material time aged two (2) years and on the material date at about 5.00 p.m., the appellant proceeded to her cousin's home and found them asleep. He appeared drunk and slept on the floor before making an attempt to strangle **PW3 (R A)**, a sister to **PW1 (A A)**. She (**R A**) ran out of the house leaving the child behind. Her sister (**A A**) proceeded into the house and found the appellant holding the child and having placed it between his legs. She saw some stool and blood on the thighs of the child who was at the time crying and without her clothes. The appellant had his trousers lowered down.

[7] After running out of the house, **R A (PW3)** peeped inside and saw the appellant lowering his clothes standing by the door. She then rushed to her grandmother's home to report the incident.

The child's father, **JOO (PW2)**, was called to the scene by PW1. He then saw the child emerging from the house with faeces and blood from her private parts. He reported the matter to a village elder who arrived at the scene and apprehended the appellant before taking him to

Othoro police post.

[8] PC ROSEMARY NDIEMA (PW4), received the necessary report and commenced investigations. She in the process issued a medical examination report (P3 form) for completion by a doctor and then arrested the appellant.

A Clinical Officer, **SAMWEL OMONDI JUMA (PW5)**, examined the child victim and filled the necessary P3 form (**P. Exhibit 4**) showing that the child was indeed defiled. The present charge was eventually preferred against the appellant.

[9] In his defence, the appellant denied the charge and indicated that he was a motor cycle taxi-operator (boda-boda) from Uyoma and had been asked by the complainant's brother to take a customer to a place where he found people drinking alcohol. He was forced to join the group and in the process got drunk and slept. He was then approached, and beaten up by the complainant's brother who was using a machete (panga). He was warned not to pass through the complainant's brother's land. Members of "**Nyumba-kumi**" were called and took him to Othoro police post where it was alleged that he had defiled a young girl. He contended that he was arrested so that the land at his home could be sold.

[10] From all the foregoing evidence, the basic issue arising for determination was whether the child victim was defiled and if so, whether the appellant was the person responsible for the offence, there was the ultimate finding that there existed sufficient and credible evidence establishing that the child was defiled and that the appellant was the person responsible for the criminal act.

[11] This court, agrees with that finding as it sees no reason to depart from it. There was clear and credible evidence from PW1 and the Clinical Officer (PW5) proving that the child was sexually molested by being defiled. PW1 found the child without her clothes and quite distressed and noted that there was some blood and stool on the child's thighs. The Clinical Officer on examining the child completed the necessary P3 form (**P. Exhibit 4**) showing that indeed an act of defilement was committed against her. The child's father (PW2) confirmed that the child was aged two (2) years at the material time of the offence.

[12] Although the appellant did not dispute that the child was defiled, he contended that he was not responsible for the act and implied that he was implicated after being set up and beaten up by a brother to the complainant. However, this contention was discredited and disproved by the prosecution evidence through PW1 and PW3.

PW1, arrested the appellant while he was holding the child whom he had placed between his legs while she was crying and naked. He had at the time lowered his trousers.

[13] PW3, had escaped from the appellant when he attempted to strangle her. She was with the child whom she left behind as she ran away from the house. She however, peeped inside the house thereafter and saw the appellant at the door and lowering his trousers. She also later found him holding the child.

[14] Clearly, the evidence by PW1 and PW3 indicated that the appellant was actually caught in the act of defiling the child and although he was alleged to have been drunk at the time, he was very much alert and aware that he was involving himself in an unlawful act of defiling a child of very tender years. His defence was in the circumstances unsustainable. His conviction by the trial court was thus proper and safe.

[15] As regards the sentence of life imprisonment imposed by the trial court upon the appellant, it was lawful and compatible with **Section 8 (2)** of the **Sexual Offences Act** which provides for such sentence for a person who commits an offence of defilement with a child aged eleven years or less. It is a mandatory sentence for which a trial court would have no way to exercise discretion.

[16] In the end result, this appeal is lacking in merit and is hereby dismissed.

**J.R. KARANJAH**

**JUDGE**

**26.06.2018**

**[Delivered and signed this 26<sup>th</sup> day of June, 2018]**