



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 5 OF 2017**

**(CORAM: R. E. ABURILI - J.)**

**K O O.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(being an Appeal against both the conviction and sentence dated 10/1/2016 in Siaya PM Cr. Case No 251 of 2015, Hon. T.O.Olando)***

**JUDGMENT**

1. The Appellant herein **K O O** was convicted vide Siaya PM Cr. Case No. 251/2015 for the offence of defilement of a child aged 10 years **contrary to Section 8(1) as read with section 8(2) of the Sexual Offences Act. He had been charged** with an alternative count of committing an indecent act with a child aged 10 years contrary to **Section 11(1) of the Sexual Offences Act. No. 3 of 2006.**
2. He pleaded not guilty and the prosecution called 4 witnesses. PW1, a minor testified on oath after *voire dire* examination by the court that she was S.A. That on 5/3/2015. She was at her home washing dishes when the accused went there while it was raining. She identified the accused as K, an uncle to her. She stated that he carried her and dropped her on the ground and he then lay her down and removed his trousers, removed his penis and **did "tabia mbaya"- bad manners** to her.
3. That he also pulled down her skirt and inserted his penis into her vagina and lay under her and defiled her. That he pushed his penis into her vagina and she experienced a lot of pain. She screamed and her father heard her screams and called her and beat the accused who ran away. She stated that it was about 6.00 pm and still day time and that she knew the accused prior to the incident.
4. Her father took her to hospital where she was treated and the matter was reported to the police. The accused was arrested. She identified her P3 form filled in respect of the ordeal.
5. On cross examination, PW1 stated that her father caught the accused in the act, beat him up and took her to hospital and made a phone call and that the accused ran away. She maintained that the accused defiled her and that it was in their kitchen. She maintained that she knew him prior to the incident.
6. **PW2 S.O.O (name withheld)** testified that he was the father to the complainant PW1 and that on 5/3/2015 he was at work at about 6.00pm and headed home. It was raining and at about 6.30 pm, before he opened the door he heard his daughter PW1 crying in the kitchen. He proceed to the kitchen and found the occurred lying on top of the child (PW1) and that he had a phone which he was showing her phonographic pictures.
7. That the appellant had lifted her skirt up and had removed her pants and his trousers and was laying on top of her. PW2 was shocked. When the accused saw her, he stopped and pleaded with the PW2 to forgive him saying it was Satan who had made him do the act. The accused whom PW2 knew prior to the incident ran away. PW2 reported the incident to the accused's mother and called the area Assistant Chief and then took the child to hospital. The next day he took her to Siaya District Hospital for further treatment. He identified her hospital treatment card.
8. The accused was arrested by the Assistant Chief and a P3 form issued by the Police was filled. He produced her birth certificate showing the child (PW1) was aged 10 years as she was born on 26/9/2003.
9. He identified the accused in the dock as the defiler. On being cross-examined, PW2 stated that he got the appellant lying on top of the child and she was crying and that it was raining and there was no one else around. He reiterated his testimony in chief and added that after the Assistant Chief arrested the accused, he took him to the home of the PW2 at 1.00am.

**10. PW3, Jacob Onyango Ouma**, the Assistant Chief of Kadenge sub-location testified that on 5/3/2015 he received a call from PW2 who hailed from his jurisdiction informing him that when he returned from work at about 6.30 pm he got the accused in the act of defiling PW2's daughter in the kitchen and that the accused had fled the scene. PW3 went to the complainant's home and was briefed of the incident. He went and looked for the accused at his home that night, found him. He escorted the accused to Ratuoro Dominion AP Post and the following day the accused was transferred to Siaya Police Station. He identified the accused person whom he had arrested and handed to the police station.

**11.** On being cross-examined by the accused, PW3 stated that he did not conduct investigations and stated that he only handed the accused to the police who would investigate. He reiterated his testimony in chief and added that he was not aware of any dispute or grudge between PW2 and the accused.

**12.** PW3 stated that the accused had not been staying at home and that he only returned home recently after the demise of the accused's father.

**13. PW4, Jared Obiero** a Clinical Officer working at Siaya Referral Hospital testified that he conducted examination on the victim and filed a P3 form on 6/3/2015. The victim was aged 10 years reportedly defiled on 5/3/2015.

- *On detailed examination, she was in fair general conditions;*
- *There was tenderness in the neck,*
- *On genitals, the hymen was recently broken;*
- *There was minimal bleeding;*
- *Age of injury was 1 day.*

**14.** He took samples of blood for laboratory examination and syphilis was non-reactive. Urinalysis was okay. HIV was non-reactive. The minor was put on treatment and drugs including P.E.P and pain killers were administered; counseling was also done. He concluded that the child was defiled and that there was evidence of penetration. PW4 produced treatment card for the child as an exhibit. He also produced lab report and P3 form as exhibits.

**15.** On cross examination by the accused, PW4 stated that he did not examine the accused and that he drew blood samples from the victim.

**16. PW5, No 239481** APC Samuel Mulungi station at Siaya sub-country Rabuor AP Post testified that he received a report from S.O.O. (PW2), the father of the victim that the accused had defiled his daughter PW1 in the kitchen and that the accused had undressed her and attempted to defile or rather defiled her. He booked the report and later at 3.00 am on 6/3/2015 the accused was escorted to the police post by the Area Chief and the father of the victim and the victim. They escorted the accused to Siaya Police Station and handed him over to the station. He identified the accused as the person he re-arrested and handed over Siaya Police Station.

**17.** On being cross examined by the accused, PW5 stated that the accused was handed over on allegations of defilement and that the child's father got him in the act of defiling the complainant child. He stated that he was not the person who investigated the case and reiterated that he only handed the accused person to Siaya Police Station for investigations. Further, that before the accused was handed over, the victim's father had reported the incident, and that the AP post is about 3kms away.

**18. PW6 No 83796 CIP Karaga** attached at Siaya Police Station testified on oath that on 6/3/2015 he was at the police station when he received the complainant child aged 10 years in the company of her father who reported that on 5/3/2015. She was in the kitchen when one Otieno held her, undressed her and defiled her and the father of the complainant appeared and found him in the act. The accused ran away. The child was taken to hospital. He escorted the child to Siaya District Hospital where she was treated and issued her with a P3 form. The accused was arrested and charged with the offence before court. He identified the accused in court.

**19.** On cross examination by the accused, PW6 stated that he took the complainant to hospital and issued her with a P3 form and that he charged the accused prison after investigation.

**20.** He stated that the child was walking but with some difficulty. He stated that he did not visit the accused person's home since the accused had already been brought to the station and the child too.

**21.** He stated that the Doctor confirmed that there was partial penetration and that he relied on the doctor's evidence and the evidence of the witness. He maintained that the accused was found in the act. He denied the allegation put to him that the child was defiled by her father.

**22.** In his defence the accused testified as DWI and gave a sworn statement of defence and stated that he was K O O. That he lives in Kadenge and works at [particulars withheld] Farm. That on 5/3/2015 he was sleeping and someone knocked on the door and said he was the Assistant Chief. That the Assistant Chief asked him if the accused had gone to the home of Chege and the accused denied and the (Ass. Chief) escorted the accused to Ratuoro Police Station and the following day he was escorted to Siaya Police station where he stayed for 2 days and on the 3<sup>rd</sup> day he was arraigned in court and charged with the offence of defilement which he did not know about. He denied seeing the birth certificate.

**23.** On being cross examined by the prosecution, DW1 stated that he knew the victim but denied being together with her. He also stated that he knew PW2 but denied the allegation that PW2 found the accused with PW2's daughter. He stated that he did not know why PW2 framed

the accused him because the two had no differences. The accused closed his case.

24. In his judgment delivered on 10/1/2016, Hon T.M. Olando framed 4 issues for determination and these are: -

- (a) *Age of the complainant;*
- (b) *Whether she was defiled;*
- (c) *Whether she was defiled by the accused;*
- (d) *Whether the accused was guilty as charged*

25. On issue No. 1, the trial court found that a birth certificate produced by PW2 the victim's father showed that she was born on 26/9/2003 hence she was aged 12 years at the time of the incident.

26. On Issue 2 of whether the complainant was defiled, he found in the affirmative on account of her evidence and the evidence of PW2 who found the accused in the act of defiling the child victim.

27. Further, that the PW4 who examined the child found that there was penetration and a recently broken hymen with minimal bleeding hence the trial court found that there was sufficient evidence that PW1 was defiled.

28. On whether the complainant was defiled by the accused, the trial court restated the testimony by PW1 and PW2 and defence by the accused and concluded that the allegation by the accused that there was a grudge could not be justified since he stated that they had no differences and that he was found in the act of defiling the child and sought for forgiveness from PW2. The trial court found that the complainant was defiled by the accused.

29. On whether the accused committed the offence that he was charged with, the trial court held that the evidence of the complainant was well corroborated and was not challenged by the accused hence he found that the accused committed the offence that he was charged with. He concluded that the prosecution had proved their case beyond reasonable doubt. He found the accused guilty as charged and convicted him with defilement of a child aged 12 years **contrary Section 8(1) read with Section 8(2) of the Sexual Offences Act No. 3 of 2006.**

30. In mitigation, the accused pleaded for a non-custodial sentence as he was taking care of his parents and after considering mitigation, he was sentenced to serve 20 years in jail on 17/1/2017.

31. It is the above judgment and sentence which the appellant herein is challenging vide his Petition of Appeal filed on 18/1/2017 contending that: -

- (1) *The Learned trial magistrate erred in law and fact by denying the appellant right (sic) for fair hearing enshrined in Articles 50(2) of the Constitution of Kenya;*
- (2) *That I was denied the right for fair hearing by denying the appellants' application for denovo (sic).*
- (3) *That I cannot recall all that transverse during the trial hence [ray for the trial proceedings to assist raise sufficient grounds.*

32. The appellant amended his Petition of Appeal filed on 13/9/2018 wherein he withdrew ground No. 2 on *denovo* hearing and added that **the trial magistrate failed to consider that the appellant was a minor and convicted him without ordering for age assessment on the appellant.**

33. He urged the court to quash the conviction and set aside sentence and set him free.

34. In his oral submission he maintained that he was under age in 2015 and that he had documents to that effect.

35. Further, that the trial court did not take him for age assessment yet he was 16 years old when he was arrested. He urged the court to reduce his sentence or to give him a non-custodial sentence as 20 years imprisonment is excessive.

36. He stated that he did not commit the offence and that he was a close friend of the victim's father.

37. The Prosecution represented by Mr. Okachi left the issue of age to the court but maintained that the appellant's conviction was sound and sentence was lawful. That the prosecution proved its case against him beyond reasonable doubt.

38. This court then on its own motion ordered for age assessment to be carried out on the appellant and on 17/10/2018 a report from Jaramogi Oginga Odinga Teaching and Referral Hospital signed by Dr. Odhiambo, a Dental Officer showed that the appellant is now about 19 years which then justifies his claim that he was a minor in 2015 when he was arrested and charged with the offence herein.

39. However, after the age assessment report was filed in court, the appellant urged the court to consider reducing the sentence and giving him a non-custodial sentence as he was not challenging his conviction.

## DETERMINATION

40. I have carefully considered the appeal herein by reassessing the trial court evidence as adduced and the findings and holding by the trial court. I have also considered the appellant's submission, the submissions by the prosecution counsel and the age assessment report. It is clear that the appellant now challenges the 20 years imprisonment and not his conviction.

41. However, having examined the entire prosecution evidence *viz-a- vis* the defence case, I am satisfied that the trial court correctly reached his verdict that the Appellant was guilty of the offence charged and that the prosecution proved its case against him beyond reasonable doubt. The appellant therefore rightly so withdrew his challenge to the conviction.

42. The Prosecution's case was clear that the victim who was aged 12 years and that on 5/3/2015 she was in their kitchen when at or about 6.30 pm the Appellant waylaid her, carried her and put her down then he undressed her and he also removed his trousers and lay on her. He forced his penis into her vagina and she felt pain and screamed. Her father PW2 was fortunately returning from his work that very hour and before he could open the door to his house, he heard his daughter screaming and on rushing to find out what was happening, he found the appellant in the actual act of defiling the child PW1. The appellant ran away and the PW2 went to the appellant's home and reported to his mother. He also called the Area Assistant Chief who came and later that night the Ass. Chief proceeded to the appellant's home and arrested him and escorted him to Ratuoro AP Camp who later escorted him to Siaya Police Station. The victim was taken to the police station who issued her with the P3 form which was filled by the Clinical Officer. She was examined barely 24 hours after the defilement and found to have been defiled. That there was penetration and hymen broken. She had minimal bleeding. The injuries were fresh. The P3 form and her treatment notes together with her birth certificate were produced as exhibits.

43. The Appellant attempted to bring the theory of being framed for the offence but he contradicted himself by saying he had no grudge with the victim's father and that he was friends with the victim's father so he did not understand why he could be framed. Further he tried to suggest to one of the witnesses who was not PW2 that PW2 could have defiled his own daughter which theory again failed miserably because he never asked PW2 that question and neither did he ask the child the question of whether she was defiled by her own father.

44. In his defence, the appellant merely explained how he was arrested which tallies with the evidence adduced by the Assistant Chief who arrested him from his house when he found him asleep at about 1.00 am and escorted him to Ratuoro AP Camp. The Aps rearrested the appellant and escorted him to Siaya Police Station where he was booked.

45. PW1 and PW2 testified that they knew the appellant very well and the incident took place at 6.30 pm which was not dark at all. The circumstance were favourable for recognition of the appellant as the defiler since he was well known to PW1 and PW2 prior to that date.

46. The evidence by PW1, PW2 and the Clinical Officer was never challenged. There was sufficient corroboration of the testimony of PW1.

47. Accordingly, I am persuaded that the Prosecution proved their case against the appellant beyond reasonable doubt and therefore his conviction by the trial court cannot be faulted. Accordingly, I uphold the appellant's conviction and dismiss any grounds and submissions challenging conviction.

48. On sentence, this court having send the appellant for age assessment, it became apparent that from the report by Dr. Odhiambo dated 17/10/2018 the appellant was aged 19 years as at that date. The Appellant maintained that he was underage when he was arrested.

49. Regrettably, the trial court did not take that factor into account by following up to observe the appellant and after ordering for his age assessment report, *suo motu*.

50. There being no contrary evidence, I hold that the Appellant was aged about 15 years when he was arrested hence he was a minor. The only question for determination, therefore is what effect that age would have on the prison sentence of 20 years meted out on him.

51. Going by the appellant's assertion which was not controverted that he was born in 2000 albeit the charge sheet stated that he was 20 years as at 8/3/2015 when he appeared in court, I find that the appellant was about 17 years as at 17/1/2017 when he was sentenced as the trial which started in 2015 was delayed by the transfer of the trial magistrate to another station.

52. Accordingly the trial court ought to have considered the age of the appellant in meting out appropriate sentence. Under **Section 8(7) of the Sexual Offences Act**, where the person charged with an offence under the Act is below the age of 18 years, the court may upon conviction, sentence the accused person in accordance with the provision of the **Borstal Institutions Act and the Children's Act**.

53. In this case, however, the trial court did not sentence the appellant as if he was a minor. He imposed sentence of 20 years imprisonment on purported 20 year old boy. That sentence in my humble view was illegal as it never took into account the provisions of **Section 8(7) of the Sexual Offences Act**. The appellant having committed the offence at the age of 15 years, my view is that he needed to be subjected to the provisins of the Borstal Institutions Act and the Children's Act.

54. In **Dennis Abuya Vs R [2010]eKLR**, the Court of Appeal in Kisumu stated:

*"We do not understand the provisions of the Sexual Offences Act to authorize the imprisonment of minors and we are unable, as the material on record, to rule out the possibility that the appellant was under 18 years on 19<sup>th</sup> June, 2007 when the offence was alleged to have been committed. Section 8(7) of the Sexual Offences Act specifically provides that where the person charged with an offence under the Act is below the age of 18 years, the court may upon conviction, sentence the accused person in accordance with the provision of the Borstal Institutions Act and the Children's Act. The question of imprisoning a minor does not, therefore arise, under the provision of the Sexual Offences Act."*

55. Therefore as the appellant was convicted when he was about 17 years, he should have been committed to a Borstal Institution and not to be sent to jail as was the case here. In addition, **Section 191 of the Children's Act** stipulate for ways through which a child offender should be dealt with including: -

- (a) Discharging the offender under Section 35(1) of the Penal Code;*
- (b) Discharging the offender on his entering into a recognizable, with or without sureties;*
- (c) Making a Probation Order against the offender; committing the offender to the care of a fit person, or a charitable children institution;*
- (d) Ordering the offender to be sent to a rehabilitation school suitable to his needs and attainments if aged between 10 and 15 years;*
- (e) Ordering the offender to pay a fine, compensation or costs;*
- (f) Committing the child who has attained the age of 16 years to a borstal institution;*
- (g) Placing the offender under the care of a qualified counsellor;*
- (h) Ordering the child to be placed in an educational or a vocational training program;*
- (i) Ordering him to be placed in a probation hostel under the provisions of the Probation of Offenders Act;*
- (j) Making a Community Service Order.*

56. *On the basis of the above provisions of the law, I am persuaded that the prison sentence imposed on the appellant was unlawful. The same is set aside and substituted with an order that the Siaya County Director of Probation and Aftercare Services do prepare and present before this court a probation report on the appellant setting out the best option sentence that this court should mete out on the appellant in accordance with section 191 of the Children's Act, whose aim will be to rehabilitate and reform the appellant offender.*

57. *In the end, this appeal against conviction fails. It is dismissed. The appeal against sentence succeeds. The same is allowed. The prison sentence of 20 years is set aside and substituted with an Order that a probation report be filed in court within 21 days of today for appropriate sentence to be pronounced in accordance with section 191 of the Children's Act. Mention on 26<sup>th</sup> February 2019 for resentencing.*

*Dated, Signed and Delivered in open court at Siaya this 17<sup>th</sup> Day of December 2018.*

**R.E. ABURILI**

**JUDGE**

**In the presence of:**

**The appellant in person**

**Mr. Ngetich Prosecution Counsel for the Respondent**

**CA: Brenda and Modestar**