REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

HIGH COURT CRIMINAL APPEAL NO. 70 OF 2016

(CORAM: J.A. MAKAU –J)

GEORGE ONYANGO ODHIAMBO……..APPELLANT

VERSUS

REPUBLIC…….RESPONDENT

(Being an appeal against both the conviction and sentence dated 7.8.2015, in Criminal Case No. 74 of 2013 in Bondo Law Court before Hon. M. Obiero – RM)

JUDGMENT

1. The Appellant **GEORGE ONYANGO ODHIAMBO** was charged with an offence of **Defilement Contrary to Section 8(1) (2) of The Sexual Offences Act No. 3 of 2006**. The particulars of the offence are that on the 29th day of January 2013, at [particulars withheld] sub-location in Gem District within Siaya County intentionally caused his penis to penetrate the vagina of I.A. a child aged 8 years. The Appellant faced an 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 of the Alternative charge are that on the same day at the same place the Appellant intentionally touched the vagina of IA, a Child aged 5 years with his penis.

2. The Appellant was tried, found guilty, convicted and sentenced to serve life imprisonment. Aggrieved by both the convictions and sentence the Appellant lodged this appeal setting out several grounds of appeal which can be summed as follows:-

(i) The prosecution did not prove their case beyond reasonable doubts as required by law.

(ii) The trial court shifted the burden of proof to the defence.

(iii) The trial Court erred in law and in facts by failing to consider the Appellant's defence of alibi without giving reasons.

3. At the hearing of the appeal the Appellant appeared in person. The Appellant submitted that the prosecution did not avail witnesses to the incident, that he was not examined by the Doctor, that the mother of the complainant refused to pay him his salary and hence she framed him for defiling her daughter, that the victim did not give evidence even when she came to court, that PW2 gave evidence and he questioned her and was satisfied.

4. M/s. Mourine Odumba, Learned State Counsel, appeared for the State and opposed this appeal. She

submitted that the prosecution proved the essential ingredients of an offence of defilement, thus penetration, identification and age of the victim and produced the necessary supportive exhibits. On sentence she submitted that the appellant was given lawful sentence. On issue of the appellant being framed she submitted two children of tender years who witnessed the incident had no reason to frame the Appellant adding that the P.3. form showed that the victim had been defiled. The Appellant in response submitted the complainant delayed in lodging her complaint.

5. I am the first appellate court and as expected of me have to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I neither saw nor heard any of the witnesses and have to give due allowance. I am guided by the Court of Appeal case which sets out the principles that apply on a first appeal. These are set out in the case of **ISSAC NG'ANGA ALIAS PETER NG'ANG'A KAHIGA V REPUBLIC CRIMINAL APPEAL NO. 272 OF 2005** as follows:-

> ***"in the same way, a court hearing a first appeal (i.e. a first appellate court) also has duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same. There are now a myriad of case law on this but the well-known case of OKENO -VS- REPUBLIC (1972) EA 32 will suffice. In this case, the predecessor of this court stated:-***
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> ***The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses (See Peters Vs. Sunday Post, (1958) EA 424)"***

6. The facts of the prosecution's case form part of the record of appeal and I need not repeat the same, however, I shall make a brief summary of the prosecution's case and the defence.

7. The facts of the prosecution's case are as follows:- the complainant testified that the appellant took his "Dudu" and put it into the "Dudu" of the complainant while they were at the house of Owino, who was absent. That the victim was with

8. B The victim informed her grandmother about it and the complainant was taken to the hospital, P3 form MFI-P1 was issued and treatment notes MFI-P2. The victim gave the name of the perpetrator as "Yila" thus the Appellant. The P3 form was filled and showed the victim was defiled. Investigations was carried out and the Appellant was arrested and charged with this offence.

9. The Appellant denied the offence. He stated that on 11.1.2013 the victim's uncle started accusing him with having defiled the complainant and assaulting him. That he went to his home and returned after three days and he was arrested and taken to Police. He stated that it is not true he had committed the offence since if that was true, he could not have returned to his employer's home. On cross-examination the Appellant stated he was a herds boy employed by the parents of the victim. He stated that he was assaulted by victim's father using a whip but only reported to his parents.

10. **The Appellant contends the prosecution did not prove their case beyond reasonable doubt as required by law**. The Prosecution in proving such an offence of defilement is bound to prove the three essential ingredients of an offence of defilement, thus penetration, identification/recognition and the age of the victim. PW1 in her evidence stated that the Appellant took his "Dudu" and put it into her "Dudu" and she felt pain. The victim was then aged 8 years and this court takes Judicial Notice of the fact that children of such age may not differentiate different parts of human body and may call them by different names depending on different culture or community on now such body parts, such as genital organs may not be called as in some communities, it may be a taboo to call genital organ whether of a female or male

by its correct name. I have taken into the account of age of the victim and I have taken "Dudu" to mean a male and female genital organs as expressed by the victim. I am of the view that when courts are hearing cases involving such minors the judicial officers should ask the victim to point where such "christened" organ either as "Dudu" or "otherwise" is located in the human anatomy to be sure what part the victim is referring to. In this case I am satisfied the victim meant her "vagina" and the Appellant's "penis" when she referred to her "Dudu" and "Dudu" of the Appellant.

11. PW1 told her grandmother PW2, that the appellant put his "Dudu" into her "Dudu." PW2, testified she left 1A and another minor B with the Appellant at her house. The Appellant used to stay at the house of John Owino. That when PW2 returned she thought as the complainant looked sickly she had malaria. On 31.01.2013 at 9.00 p.m. Brian told PW2, that the Appellant took his thing and put it into complainant's thing. He told her Yila had put his penis into IA's vagina and by that time the Appellant had disappeared. IA was taken to hospital on 12.2.2013 and P3 form issued by Yala Police Station. PW3 testified that Brian told him the Appellant had put his "Dudu" into victim's "Dudu", which PW3 understood meant that the Appellant had defiled the victim. PW3 asked the Appellant about it and he admitted that it was true. PW5, a Clinical Officer who examined the complainant on 11.2.2013 noted a whitish vaginal discharge and a broken hymen. PW5 from the history and physical examination, of the victim formed an opinion that the victim had been defiled. She produced outpatient Book and P.3 form as exhibit P2 and P1 respectively, and confirmed that the victim's hymen was broken, confirming penetration. I now turn to the issue of identification/recognition. PW1 stated that she knew the accused and gave his name as "Yila." PW2 stated she knew the Appellant who is usually known as "Yila" but his real name is **Onyango** who was a herds boy for PW2. PW3 testified that the Appellant was known to him as their herds boy. I therefore find the appellant was not a stranger to PW1, PW2 and PW3. PW1 recognized her assault as the appellant, gave the appellant's name to PW2 who told PW3. I have perused exhibit 3 and I find that the victim as of the time of commission of the offence was aged 5 years 5 months, hence a minor and I am satisfied the prosecution has proved the three ingredients of the offence of defilement.

12. **Whether the trial court shifted the burden of proof to the defence?** The Appellant did not state how the trial Court shifted the burden of proof to the Appellant. I have perused the trial Court's judgment. PW2's evidence was clearly evaluated, in that Appellant was PW2's herdsboy and used to stay at John Owino's house, the son of PW2 where the victim was defiled. PW2 stated when she left for Church, she left the complainant. The minors and the Appellant at her home. The evidence relied mainly on was that of PW1 a minor aged 5 ½ years.

> **Section 124 of the evidence** Act provides:-
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> ***"(124) Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:***
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> ***Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."***

13. Under **Section 124 of the evidence Act** corroboration in criminal case involving a **Sexual Offence** where the only evidence is that of the alleged victim of the offence the court can receive the evidence of the alleged victim and proceed to convict the accused person, without the necessity of corroboration provided reasons are recorded in the proceedings, that the court is satisfied the alleged victim is telling the truth. The trial court in its judgment found the testimony of the victim safe enough for the court to put weight upon it, and stated as follows:-

> ***"Y.A.'s testimony is safe enough for the court to put any weight thereto and I find in the***

affirmative based on the following reasons:- (i) I had no reasons to distrust Y.A. when she said that it is the accused who defiled her."

14. I find the trial Court complied with the provision of **Section 124**, of the Evidence Act in that it believed the alleged victim and recorded reasons for believing the alleged victim was telling the truth. The court can therefore act on the victim's evidence even if there was no corroboration, however in this case the court found, corroboration from evidence of PW5. The court had the opportunity to see and determine the demeanour of the Appellant who it did not believe when he alleged, PW3 just beat him following accusing him of defilement of IA. The Court also found the Appellant did not extricate himself from the events of 29th January 2013. The court rejected his defence. I have very carefully perused and analyzed the appellant's defence and find that contrary to the Appellant's submissions that he gave a defence of alibi, he did not do so. That his defence was not related to events of 29.1.2013, but all the same it was considered and rightly rejected. I find that the trial court did not shift the burden of proof nor did it ignore to consider the Appellant's defence. I find no merits in the Appellant's grounds of Appeal. I dismiss the same altogether.

15. The upshot is that I find no merits in this appeal. The conviction is upheld and sentence meted against the appellant confirmed.

DATED AT SIAYA THIS 30TH DAY OF JANUARY, 2017.

J.A. MAKAU

JUDGE

DELIVERED IN OPEN COURT

IN THE PRESENCE OF:

APPELLANT IN PERSON PRESENT

M/S. M. ODUMBA FOR THE STATE

C.A.

1. PATIENCE BERLYL OCHIENG

2. LEONIDA ATIKA

3. SARAH OORO

J.A. MAKAU JUDGE

JUDGE