REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL APPEAL NO. 32 OF 2016

BETWEEN

JOSHUA OKINYI OWINYO .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. J.S Wesonga, RM, in Oyugis S.O.A. Case No.12 of 2011)

JUDGMENT

1. The appellant **JOSHUA OKINYI OWINYO** was convicted on a charge of defilement of a child contrary to **Section 8 (1)** as read with **Section 8(2)** of the **Sexual Offences Act No.3 of 2006** and sentenced to serve life imprisonment.

2. The prosecution's case was that on 13th August 2011 at [Particulars withheld**]** location in **RACHUONYO SOUTH DISTRICT** within Homa Bay County he caused his penis to penetrate the vagina of PAJ., a child aged 11 years.

3. The appellant denied the charge, and prosecution called a total of 4 witnesses in support of its case whilst the defence had two witnesses.

4. 11 year old PAJ (PW!) narrated to the trial court how on the date in question at about 6.30 p.m. while on her way home after selling groundnuts it begun drizzling and as she went past ST CATHERINE SCHOOL, the appellant whom she knew and who worked as a guard called her, saying he wanted to buy groundnuts. The appellant opened the school gate and PAJ went in to sell the groundnuts.

5. After selling the groundnuts, the appellant suggested to her to sit and wait for the rain to subside – she obliged. The appellant then produced a handkerchief which he used to gag her mouth. He then took her to a classroom within a newly constructed building, removed her underpants, lowered his trouser, laid her down and inserted his penis into her vagina while gagging her mouth. He then let her go saying he would buy groundnuts for her.

6. PAJ went home and reported the incident to her brother E. Eventually the appellant was arrested.

7. On cross examination PAJ stated she had known the appellant from the year 2009 even before the incident as the school watchman because the school was not very far from her home, and it was also close to the school she was attending – sometimes she would even go to St. Christine School to drink water. She explained that her garments got dirty as a result of being laid down as it had rained. The appellant defiled her until 7.00 p.m. and she stated:-

"I became wet. I just felt the watery substance on my private parts ....."

8. She explained that although it was her first sexual encounter she did not bleed. She further explained that at the time of the incident, there were some other people attending a meeting within the school but in a different room. However she did not go there to report her ordeal but went home and informed members of her family.

9. H J (PW2) a brother to PAJ confirmed that PAJ had been sent to sell groundnuts at **RADADA** centre at 2.00 p.m. and had not returned home by 6.30 p.m. He decided to go and look for her as it was getting late and found her selling groundnuts. He gave her kerosene to take home, and also gave her his sweater as it was getting cold. He remained at the centre to watch a match at the video shop, and told PAJ to go home.

10. Later when he got home he learnt that PAJ had been defiled. He and his brother **E** then talked to her and she narrated her ordeal saying the culprit was the watchman at **ANYONA** Orphanage. He observed that PW1 was walking with difficulty – with her legs apart and she also complained of pain in her private parts. He confirmed that he knew the appellant even before, as the watchman at the orphanage is the institution next to the road which leads to their home.

11. PW3 then informed their grandmother **L O O** (PW2) about the incident. Indeed PW2 confirmed that PAJ confirmed that PAJ said the appellant had defiled her. She explained that ANYONA Primary School is adjacent to **ST CHRISTINE SCHOOL** but they have different watchmen and she knew the appellant as a watchman at the latter school.

12. SAMWEL KOECH (PW4) a clinical officer at OTHORO centre examined PAJ and found bruises on both the labia minora and a whitish discharge. A vaginal swab disclosed non mobile spermatozoa and he concluded that PAJ had been defiled.

13. On cross examination he stated:-

> **"Yes I found penetration of the victim. I found bruises on the labia minora. I didn't mention that the hymen was breached (sic) in the P3 form. I didn't indicate that it was a high vaginal swap (sic).**

14. The incident occurred on 13th August 20111 and the examination was carried out on 15th August, 2011 which was within 48 hours from the time of the incident.

15. PW4 explained that the vaginal swab found a discharge of spermatozoa and explained that for spermatozoa to be in the vagina the male sexual organ must come into contact with the vagina.

16. PC ESHENDI SHIKOTI (PW5) who received the report about the incident informed the court that he visited the scene the next day but only saw footprints.

17. The appellant in his sworn testimony confirmed that he worked as a watchman at St Christine Anyona School and on the material date he was in the morning/daytime shift which ran from 6.00 a.m. to 6.00 p.m. He handed over to **BONIFACE ODADA** and **LEONARD ABONGO** and left for his home at Kodada Kabondo. He denied ever seeing PAJ on the date in question and that she was not even known to him before – he just saw her in court.

18. The defence witness **BONIFACE ONYANGO GADA** (DW2), a fellow watchman told the trial court that he indeed took over the shift from the appellant at 6.00 p.m. and there was a handing over process involving signing a book. After ascertaining that all was well, the appellant left. DW2 explained that he was on night shift with **TOM ONYANGO ONDIEK**. They did not detect any odd incident the whole night and said:-

> **"it's not possible that accused defiled the complainant between 6.00 p.m. to 7.00 p.m. because**

he had already left."

19. DW2 also explained during cross examination that the appellant handed to him keys to all the classrooms and he was certain that after handing over process, the appellant left the school premises.

20. The trial magistrate held that PAJ was a child within the meaning of **Section 8 (2)** of the **Sexual Offences Act** because there was an age estimation given in the P3 form which was produced as exhibit. The trial magistrate was of the view that although a birth certificate for PAJ was not produced, she had appeared before a qualified medical officer who estimated her age at 11 years.

21. He was also satisfied that penetration had occurred as shown by the evidence given by PW4 concerning the presence of spermatozoa inside her vagina.

22. The trial magistrate was persuaded that the appellant was the one who defiled PW1 as the incident took place at around 6.30 saying:-

> **".... and at such time there is usually light and visibility is very clear. More so, she complainant had come to talk and sell groundnuts to the accused. Accordingly I do not doubt that the circumstances under which the offence was committed were conducive for proper and error free identification. The accused was positively identified by the complainant. She gave the accused's name to her grandfather and that helped the clan elders to arrest and escort him to the police station."**

23. The appellant's alibi defence was considered and dismissed on grounds that it could not withstand the positive identification.

24. The findings are contested on grounds that the trial magistrate did not critically evaluate the evidence and wrongly shifted the burden of proof to the appellant and that the key ingredients of defilement were not proved.

25. Further, that the sentence meted was excessive in the circumstances of this case.

26. At the hearing of the appeal, Mr. Otieno submitted on behalf of the appellant that no prima facie case was made out against the appellant as there was no proper identification conducted to establish that the appellant defiled the minor.

27. The minor's claim that she knew the appellant was challenged on grounds that PW5 (the police officer) told the court that the appellant was not known to the minor.

28. It was also argued that the evidence was not properly evaluated nor were proper investigations conducted since the appellant was never subjected to medical examination.

29. Counsel also took issue with the evidence of the clinical officer who said PAJ's hymen was not broken and that bruises in the girl's genitalia were as a result of a blunt object and that there was no proof that sexual activity had occurred.

30. Mr. Otieno also submitted that since the clinical officer indicated that the abnormal discharge observed on PAJ could have been caused by a venereal disease, this could confirm her past sexual liaisons with other persons and her parents upon realizing that she had a sexually transmitted disease (STD) decided to frame the appellant. He also lamented that there was no DNA conducted to confirm that the seen traced in PAJ belonged to the appellant.

31. He complained that there was no proper reason given by the trial magistrate for rejecting the appellant's alibi defence. He urged the court to find that the appellant was improperly convicted.

32. In opposing the appeal, Mr. Oluoch on behalf of the State submitted that the medical examination

revealed that the complainant had been defiled and that PW1 gave a detailed narrative as to how the incident took place. Counsel argued that at 6.30 p.m. there was some light which was sufficient to enable PW1 identify her attacker. He also pointed out that the incident lasted some 30 minutes, which gave PW1 time to see and identify the attacker and there could be no issue of mistaken identity.

33. MR. OLUOCH argued that the evidence of PW1 was corroborated by PW2 and PW3 plus the medical evidence – all of which confirmed that PAJ was in distress immediately after the incident. He insisted that the appeal lacked merit and urged for its dismissal.

34. Certainly proof of age is critical in proving offences of defilement as the sentence is pegged to the age of the victim as was indeed pointed out by Gikonyo (J) in the case of **GILBERT MIRITI KANAMPIU –VS- R. 2013 e KLR**. No birth certificate was produced although such document is not the only way to prove age. An assessment of age by a medical person is an acceptable manner of establishing one's age. Did PAJ undergo an age assessment? The trial magistrate believed she did because the age estimate was entered in the P3 form – was this as a result of a medically recognised age assessment? It is not clear what informed the clinical officer of PW1's age as he did not tell the court that he had carried out any age assessment.

35. PW5 the police officer claimed that a birth certificate was presented to him which confirmed that PW1 was 11 years old but this was not produced in court.

36. There was even no observation by the court whether from a physical observation PW1 appeared to fit within that age range.

37. The failure to comprehensively establish PAJ age was prejudicial to the appellant because it had a direct bearing to the nature of the sentence.

38. I have no doubt however that sexual intercourse did take place as evidenced by the presence of spermatozoa found lodged inside PAJ's vagina.

39. The critical question is was it proved that the appellant was the culprit?

40. The offence took place at 6.30 p.m. and according to PW1 on cross examination **"it was starting to get dark"** and it was drizzling. However this was not a chance encounter as:-

> *1. The person called her, asked for the price of groundnuts and said he would only buy a shs.5/= worth groundnut.*
>
> *2. He spoke further telling her to sit and wait for the rain to subside.*
>
> *3. He was no stranger to PW1 as she used to see him guarding the school which was just next to the school PAJ was attending. At times PAJ would even go into the Christine School to drink water*.

41. BUT did she see his face or did she assume that the person she had seen during the day was the same person who had lured her into the school. I query this because both PW4 and PW3 say the appellant had been on duty during the day – which tallies with what DW1 and DW2 say. It is also significant that almost immediately after the incident a report was made and the appellant was found seated inside his house having supper. This seems to resound with the alibi defence the appellant presented that he reported off duty at 6.00 p.m. and handed over the night shift to Boniface and a shift register was actually produced in court to confirm that.

42. If it was beginning to get dark at 6.30 p.m. – what aided the minor to see and identify the appellant. It was her evidence that before that day, she did not even know his name. There was also no evidence that she had ever spoken to him before so as to confirm that she recognised the voice of the person talking to her as the appellant's. Could it be that because both PW1 and PLW3 had seen the appellant on duty at the school during the day when she reported that she had been defiled by the school watchman – it was

concluded that it naturally would be the man they had seen during the day?

43. I find that the opportunity for identification was not conclusive nor fool proof especially in the light of the alibi defence which remained unshaken. It is on account of this that I hold that the evidence did not prove beyond reasonable doubt that the appellant was the culprit and the conviction was unsafe.

44. Consequently the conviction is quashed and sentence set aside. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

Delivered and dated this 30th day of January, 2017 at Homa Bay

H.A. OMONDI

JUDGE