



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.121 OF 2016**

*(An Appeal arising out of the conviction and sentence of Hon. H. Nyagah – CM delivered on 23<sup>rd</sup> August 2016 in Makadara CM. CR. Case No.5671 of 2014)*

**PETER OTIENO ODIYO.....**

**APPELLANT**

**VERSUS**

**REPUBLIC.....**

**.....RESPONDENT**

**JUDGMENT**

The appellant, Peter Otieno Odiyo, was charged with **defilement** contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act**. The particulars of the offence are that on diverse dates between 22<sup>nd</sup> October 2014 and 30<sup>th</sup> November 2014 at [particulars withheld] estate in Nairobi within Nairobi County, the Appellant, intentionally and unlawfully caused his penis to penetrate the vagina of C A O, a child aged 12 years. In the alternative, he was charged with **committing an indecent act with a child**, contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars of the offence are that on the same diverse dates and in the same place, the Appellant intentionally and unlawfully touched the vagina of C A O, a child aged 12 years with his penis.

When the Appellant was arraigned before the trial magistrates’ court, he pleaded not guilty to the charge. After full trial, he was convicted of the main charge of **defilement** and was sentenced to serve 20 years imprisonment. The Appellant was aggrieved by his conviction and sentence and has filed for an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction. He submitted that the failure of the trial court to address the violation of his constitutional rights, specifically under **Articles 49** and **50** of the **Constitution** was fatal to the proceedings and urged the court to allow his appeal. He faulted the trial court for convicting him on the single evidence of PW1, which in his opinion was coerced, without recording its reasons for doing so in the proceedings. He submitted that his mode of arrest was unjustified in the circumstances. The failure by the prosecution to arraign him in court within 24hours of such arrest was a gross violation of his constitutional rights and therefore fatal to the subsequent proceedings. As such he urged the court to allow the appeal.

In conclusion, he submitted that the burden of proof was not discharged and that the trial court did not consider his defence. In the premises therefore, he urged the court to allow his appeal, quash his

conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, the Appellant was unrepresented. He presented his written submissions to the court for consideration.

Ms. Kimiri, learned counsel for the State opposed the appeal she submitted that that the prosecution was able to prove that the Appellant had indeed defiled the complainant, a child aged 12 years. She submitted that the three ingredients to the offence of defilement, that is: penetration, age of the complainant and the identity of the perpetrator had sufficiently been proved. In summary, she submitted that the prosecution had sufficiently established all the ingredients of the offence of defilement including the identity of the perpetrator.

In conclusion, she submitted that the Appellant had been properly brought before the court and that the sentence imposed on him was legal. In the premises therefore, she urged the court to dismiss the appeal and uphold his conviction and sentence.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced by the prosecution witnesses and by the defense before the trial court, so as to arrive at its independent determination of whether or not to uphold the conviction of the appellant. In so doing, the court is mindful of the fact that it neither saw nor heard the witnesses as they testified and therefore cannot give an opinion as regarding the demeanor of the said witnesses (**see Okeno -vs- Republic [1972] EA 32**). In the present appeal, the issue for determination by the court is whether the prosecution established a case for this court to convict the Appellant on the charge of **defilement** to the required standard of proof beyond any reasonable doubt.

The facts of the case are as discerned by the court are as follows. The complainant, Ms. C A O, was at the time a child aged 12 years. Her age was confirmed by her uncle, PW2 C O O, who produced a baptism card indicating that the complainant was born on 14<sup>th</sup> February 2002. The baptism card was produced as **Prosecution's Exhibit No.1**. At the material time, the complainant was a Standard 6 pupil at [particulars withheld] Academy, Ngomongo. According to her testimony, she stated that she knew the accused well prior to the incident. They had met the previous year. The Appellant frequented a bar near where she used to fetch water. She testified that the accused had approached her, befriended her and asked her to be his girlfriend. She told him that she was in class 6. All this happened in full view of the complainant's younger cousins who then went home and informed PW2 of what had happened between the appellant and the complainant. PW2 confronted the complainant regarding the same that very day.

The complainant testified that on the following day while going to school, she met some children carrying an envelope and when they opened it, they found a note that stated that the Appellant was spoiling her. When PW2 got wind of the matter, he warned the complainant. He wanted to beat her. That was when the complainant ran to the Appellant and told him of what had transpired. The appellant then asked the complainant to go back home as he did not want to be arrested. Shortly afterwards, the Appellant took the complainant to his cousins house in Dandora, where they both spent the night and had sexual intercourse. The complainant testified that she was in that house in Dandora for 4 more days and that she and the Appellant had sex the entire period. The Appellant promised her that he would take her to his rural home.

At some point the complainant was taken to a different house within Dandora, where she lived with the appellant for another week. She stated that she and the appellant had sexual intercourse through the entire period of her stay there and that she had stopped going to school the moment she moved in with the appellant. The complainant told the court that one morning the appellant told her that he was going to Narok. He left the house. Shortly afterwards, the appellant's brother came and took her to the police station where she found the appellant in police custody. She was then taken to Medecins Sans Frontiers Clinic where she was medically examined, treated and discharged. A report prepared to that effect. At the Police station, PC Benard Achola, PW5, was assigned to investigate the case. After concluding his investigations, he formed the view that indeed a case had been established for the Appellant to be charged with the offences herein.

When the Appellant was put on his defence, he denied committing the offence. He told the court that on 29<sup>th</sup> November 2014, he met C at 8.00pm and she told him that she had run away from home and needed a place to stay. He told the court that he asked C to go home but she refused. He then took her to the house where he lived in with a fellow crane operator. He told the court he helped the complainant as a Good Samaritan. He denied defiling the complainant and told the court that the complainant had been threatened with incarceration and coerced to incriminate him.

Upon re-evaluating the facts of this case, it is clear to the court that for the prosecution to prove its case on the charge of **defilement** of a minor, it was required to establish that there was penetration, the complainant was a minor and the Appellant was indeed the perpetrator of the offence.

In the present appeal, the Appellant took issue with the manner in which he was arrested and the period of time he spent in custody before he was arraigned to answer to the charges preferred against him. He was aggrieved with the fact that he had been detained for a period of about five days before being arraigned in court. He urged the court to allow the appeal.

What falls for determination before this court is whether the detention of the appellant for a period of five days before arraignment entitled him not to be tried for the offence for which he was arrested, or, if tried, whether he was entitled to a discharge or an acquittal.

Noteworthy is the fact that there is no law which expressly bars the prosecution of an accused person brought to court after the expiry of the 24 hours as provided under **Article 49(f)(i)** of the **Constitution**. The right to be arraigned in court within 24 hours of arrest was not designed to avoid trials on the merits, but rather, to deter the unconstitutional extra judicial detention of suspects by the police. It is a right to be taken to court as soon as it is reasonably practicable. (See **Julius Kamau Mbugua v Republic [2010] eKLR**).

Guided by this reasoning, it is the view of this Court that to allow this appeal on the grounds of arraignment after 24 hours will be disproportionate and inappropriate. The delay in the arraignment of the Appellant in this case was not so long and extended as to lead to an outright negation of his rights to a fair trial as provided under **Article 50** of the **Constitution**. The Appellant further failed to adduce any evidence to support his claims of being denied a fair trial in accordance with **Article 50** of the **Constitution**. From the record of the trial court, the appellant was fully aware of the proceedings. The appropriate remedy for the appellant in this case is as prescribed by the **Constitution** under **Article 23(3)**. The Appellant would be entitled to a declaration and an award of damages in the form of monetary compensation from the person or authority in breach of this right.

The Appellant was further aggrieved that the trial court had based his conviction on the sole evidence of the complainant. According to him, essential witnesses were not called to establish the facts of this case. It is important to note that courts are no longer hamstrung by the requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is telling the truth. (See **Mohammed vs Republic [2006] 2 KLR 138**).

In the present appeal, the trial court was satisfied that the complainant possessed sufficient intelligence to understand the nature of the proceedings and was convinced that the complainant told the truth.

The complainant identified the appellant as her boyfriend. She expressly told the court that they had lived together in a house in Dandora for a few weeks and that the Appellant had had sex with her throughout the entire period. This was buttressed by the evidence of PW3 and PW4, both medical officers, who testified that the complainant had indeed been defiled. They both stated that the complainant's hymen had old tears and both formed the opinion that the child had been involved in sexual activity. Further to the foregoing, the complainant's evidence, as appeared from the record of the trial court was cogent, vivid and consistent in the description of what the appellant had done to her. In essence, the trial court found the complainant trustworthy and her evidence reliable and credible. The Appellant's contention that the complainant was coerced to incriminate him is therefore unfounded as he did not adduce any evidence to support his assertions. I therefore find that the trial court was alive to its duty under the provisions of

**Section 124** of the **Evidence Act** in convicting the appellant on the evidence of the complainant.

The appellant contends that he was denied a fair trial and that the trial court failed to put his defence into consideration in making the decision to convict him on the charge of defilement. The Appellant told the court that he took the complainant in as a Good Samaritan and that he never defiled her. He alleged that the complainant had been coerced into incriminating him and had been threatened with incarceration in order to fix him. From the record before the court, there were no disagreements between himself and the complainant or any of the complainant's family members. The Appellant failed to adduce any evidence to support these claims. Further, the complainant expressly stated that the Appellant was her boyfriend. This led the court to arrive at the conclusion that there existed no bad blood between the two parties to warrant the complainant or her family to frame the charges against the appellant. It was established to the satisfaction of the court that the appellant was a child within the meaning ascribed to the terms **Section 2** of the **Children Act**. Notwithstanding her assertion that the Appellant was her boyfriend, she had no legal capacity to consent to sexual intercourse with the Appellant.

The evidence on record clearly shows that the trial court considered the Appellant's defence before reaching its decision.

This court is of the view that the defence put forward by the Appellant does not dent the otherwise strong evidence adduced by the prosecution connecting him with the offence. His culpability was established to the required standard of proof, beyond reasonable doubt. His appeal on conviction lacks merit and is hereby dismissed.

As regards sentence, **Section 8(3)** of the **Sexual Offences Act** provides for imprisonment for a term of 20 years for any person convicted of defilement of a child between the age of 12 and 15 years. The complainant was 12 years old at the time the offence was committed. The trial court sentenced the Appellant to serve 20 years imprisonment. That sentence is legal. The appeal on sentence is similarly dismissed. It is so ordered.

**DATED AT NAIROBI THIS 25<sup>TH</sup> DAY OF MAY 2017**

**L. KIMARU**

**JUDGE**