



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

**CRIMINAL APPEAL NO. 87 OF 2016**

**(DEFILEMENT)**

**(J.A. MAKAU – J.)**

**BRIAN OCHIENG.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal against both the conviction and the sentence dated 12.8.2016 in Criminal Case No. 589 of 2015 in Ukwala Law Court before Hon. C.N. WANYAMA - RM)*

**JUDGEMENT**

1. The Appellant **BRIAN OCHIENG**' faced a charge of **defilement contrary to Section 8 (1) (4) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence are that between 20<sup>th</sup> day and 30<sup>th</sup> day of October 2015 in Ugenya Sub-County within Siaya County, Intentionally caused his penis to penetrate the vagina of SA a child aged 16 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 and time, same place the Appellant intentionally touched the vagina of SA, a child aged 16 years.

2. Aggrieved by both the conviction and sentence the Appellant filed the appeal through a Petition of Appeal dated 17.8.2016, setting out three (3) major grounds of appeal being as follows:-

*(a) That the learned trial Magistrate convicted the Appellant despite the fact that the Appellant was under the age of eighteen years by the time of the committal of the alleged offence.*

*(b) That the Appellant was not accorded fair hearing as enshrined in Article 50(2)(j) of the constitution of Kenya.*

*(c) That the learned trial Magistrate erred in law and in fact by convicting the Appellant despite the fact that the appellant was not accorded an opportunity to engage an advocate.*

3. I am the first appellate court and as such I have subjected the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I had no opportunity to see and hear the witnesses and so I cannot comment on their demeanour. I have drawn my conclusions after due allowance. I am guided by the **Court of Appeal case Okeno V. R. (1972) E.A. 32** where the Court set out the duties of a first appellate court thus:-

***“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vs. Republic (1957) E.A. (336) and the appellate court's own decision on the evidence. 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 V. Sunday Post, (1958) E.A. 434”***

4. The record of Appeal contains the facts of the Prosecution's case and the defence, and I need not reproduce the same, save to summarize the Prosecution's case and the defence.

5. The Prosecution case is as follows:- that SA met the Appellant who asked her, her name and left, that after one week SA went to Appellant's house and both of them undressed. That the Appellant placed his genitalia (penis) into SA's genitalia (vagina), that on 11.11.2015, at 4.00 p.m. SA met the Appellant at the market, who greeted her and left, that in the evening SA went to collect her clothes from the Appellant's house after which she went home, that SA parents heard that SA was with the Appellant. She and her parents went to Aboke, then Ukwala Police Station, from where she was taken to the Hospital the Appellant was subsequently arrested and charged with this offence.

6. The Appellant denied the charge and gave sworn defence. The Appellant denied having known the complainant or having associated with her.

7. At the hearing of the appeal, the Appellant appeared in person whereas M/s. Odumba, learned State Counsel, appeared for the State. The Appellant relied on his written submission whereas the State Opposed the appeal orally.

8. Whether at the time of conviction, the Appellant was under the age of 18 years? The charge sheet preferred against the Accused does not indicate the apparent age of the Appellant. When he gave his sworn defence he did not indicate his age, the P.3 form exhibit 2, indicate the Appellant's age as 17 years. The age assessments of the Accused dated 16.2.2016 showed the Appellant's age to be at least 20 years, whereas that of 9<sup>th</sup> August 2016, showed, the Appellant is above 18 years and lastly that of 29<sup>th</sup> March 2017 showed he is above 18 years old. The Doctors Report on the age of the Appellant, were carried out by different Doctors and all are in agreement that the Appellant as of the time of the commission of the offence was above 18 years. I therefore from the evidence on record find that the Appellant, at the time of the offence was an adult and no error was made by the trial Court on his sentence.

9. Whether the trial Court was in error in the handling of the evidence adduced before it and whether the Appellant was accorded fair hearing as enshrined in **Article 50 (2) (j) of the Constitution of Kenya 2010**. The Appellant urges the trial Court ignored glaring contradictions and inconsistencies in the complainant's evidence, in that the Court deliberately ignored the complaint's evidence exonerating the Appellant from the offence. I have perused the proceedings before the trial Court. On 20.11.2015. the complainant while giving evidence on oath she is quoted to have stated as follows:-

***“..... I go to [particulars withheld] Primary School. I do not know the Accused. I have never seen him. My father told me to write the statement.”***

Yet again on 29.12.2015, the case was set down for hearing on 7.1.2015 and Mention on 30.12.2015. The trial Court turned the mention date to be a hearing date. There is no evidence on record whether the Appellant demanded the case to proceed to hearing on the mention date. There is no evidence the Accused had been supplied with witnesses statements **Article 50 (2) (b) and (c) of the Constitution of Kenya 2010**, provides:

***“Section 50 (2) (a) (b) (c) (d) (e) (f) and (i) of the Constitution of Kenya 2010 provides:-***

**(2) Every accused person has the right to a fair trial, which includes the right—**

**(b) to be informed of the charge, with sufficient detail to answer it;**

**(c) to have adequate time and facilities to prepare a defence;”**

I note that 30.12.2015 was a date for mention and not for hearing. The Accused having been brought to court before hearing commenced, he ought to have been supplied with witnesses statements and afforded sufficient time or adequate time and facilities to prepare his defence. I find that the Appellant was not supplied with witnesses statements, given adequate time to prepare his defence. This is given credence, by the fact that the Prosecution turned the mention day to be a hearing date. This uncalled for behaviour went to the root of failing to afford an Accused his Constitutional rights to a fair trial.

10. Another ignoring factor was even on part of the trial in analyzing the Prosecution’s evidence in ignoring the complainant’s evidence of 20.11.2015, when the complainant told, the Court on oath, that she did not know the Accused and had never seen him before and that it was her father who told her to write the statement. That evidence given on the first time and on oath, should not have been ignored in determining the credibility of the evidence of the victim. The trial Court did not make any comment on the demeanor of the victim in its judgment so as to apply the provisions **of Section 124 of the evidence Act.**

11. The victim in her further evidence, she was not forthright. No evidence was called from the person she claimed, she introduced her to the Accused. There is no reason why the person who introduced her to the Appellant was not called, and why her name was not given. There is further no evidence that the victim was kept at Appellant’s home or any evidence that she had left her clothes at the Appellant’s house. I therefore find no evidence, that the victim knew the Appellant. I find her first statement on oath, that she did not know nor met the Accused prior to 20.11.2015 as correct. I also find the trial Court erred in failing to analyze the entire evidence of the complainant including her initial evidence of 20.11.2015.

12. On penetration, PW1 stated on a day and month that she did not disclose, the Appellant had sex with her. PW3, the Clinical Officer, did not state the date, the victim was examined, by her, but gave history of where the victim was found. She stated the victim was found living with a man who had relationship with her since September 2015, this history was not supported by any of the Prosecution witnesses. I have perused the evidence of PW1 and PW2 who stated the victim left her home on 20.10.2015. PW1’s evidence is not corroborated by either PW2 or PW3. I therefore find the evidence of PW1, PW2 and PW3 inconsistent and not pointing to the dates appearing in the charge sheet.

13. In view of the above, I find the prosecution did not prove all the ingredients of the offence of defilement. The Prosecution failed to prove identification of the assailant in this case.

**14. The upshot is that I find the Appellant was not identified as the assailant, the victim’s evidence and the Prosecution witnesses was not consistent but contradictory and not credible. I therefore find the appeal is meritorious. The Appeal succeeds. The conviction is quashed, sentence set aside and Appellant set at liberty forthwith unless otherwise lawfully held.**

**DATED AND SIGNED AT SIAYA THIS 29<sup>TH</sup> DAY OF JUNE, 2017.**

**J. A. MAKAU**

**JUDGE**

**DELIVERED THIS 29<sup>TH</sup> DAY OF JUNE, 2017**

**IN THE PRESENCE OF:**

**APPELLANT IN PERSON PRESENT**

**M/S. M. ODUMBA FOR STATE**

**C.C.**

**1. LABAN ODHIAMBO**

**2. PATIENCE OCHIENG**

**3. SARAH OORO**

**LANGUAGE: ENGLISH/KISWAHILI**

**J. A. MAKAU**

**JUDGE**