REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 40 OF 2017

(DEFILEMENT)

(CORAM: J.A. MAKAU - J.)

G O O……APPELLANT

VS

REPUBLIC……..……...……RESPONDENT

(Being an Appeal against both the Conviction and Sentence dated 05.04.2017 in Criminal Case No. 717 of 2016 in Siaya Law Court before Hon. T.M. Olando - SRM)

J U D G M E N T

1. The Appellant **G O O** faced a charged of Defilement contrary to **Section 8(1)(2) of the Sexual Offences Act No. 3 of 2006**. The particulars of the charge is that on the 18th day of July 2016, at [particulars withheld]**Sub-location, Siaya Sub-County within Siaya County**, intentionally caused his penis to penetrate the vagina of **SA**, a child aged 8 years. The Appellant also faced alternative charge of committing an indecent act with a child contrary to **Section II(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 **SA**, a child aged 8 years with his penis.

2. After full trial, the Appellant was found guilty, convicted and sentenced to life imprisonment.

3. Aggrieved by the conviction and sentence, the Appellant preferred this appeal through the firm of M/S A.G. Opiyo & C.O. Advocates setting out 10 grounds of appeal as follows: -

> ***a) That, the Learned Magistrate erred in law and fact by relying on evidence which was contradictory and variant.***
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> ***b) That, the Learned Magistrate erred in law and fact by failing to make a firm finding that the standard proof of beyond reasonable doubt as enunciated in matters of criminal flavor was not met and no tangible effort was made thereto.***
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> ***c) That, the Learned Magistrate failed and/or deliberately failed to appreciate the good demeanor of the Appellant from the onset and throughout the hearing.***
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> ***d) That, the Learned Magistrate ignored the fact that no investigation or proper investigations were carried out in this case thereby leading to a grave injustice as there was nothing tangible to associate the Appellant with the commission of the offence under the charge.***

e) That, the Learned Magistrate failed, refused and/or deliberately neglected to caution himself as to the dangers of relying on uncorroborated evidence of a single witness to wit the complainant and as such the conviction was immoral and legally unsound.

f) That, the Learned Magistrate closed his eyes on lack of material evidence and/or deliberate destruction thereof so as to hide the truth as to misdirect himself deliberately and/or with knowledge leading to unfortunate conviction and harsh sentencing.

g) That, the Learned Magistrate erred in law and fact when he conducted a defective VOIRE DIRE wherein it was NOT ascertained whether the child understood what oath taking was for and moreover, the Learned Magistrate even after undertaking a defective VOIRE DIRE process proceeded to illegally allow the minor to give unsworn testimony and allowed cross-examination in the same breath. This was a fatal commission and/or omission and as such it is incurable.

h) That, the record as certified is incomplete thereby clearly avoiding part crucial testimonies by witnesses that would otherwise exonerate the Appellant. Unless there is typographical/error, then the Trial Court discriminately chose to record testimonies leaving out crucial sections at the detriment of the Appellant.

i) That, the Appellant was never subjected to a medical test and as such the Learned Magistrate never made a medical treatment order given that the Appellant is terminally ill.

j) That, the Prosecution in cohorts with the Investigating Officer shielded crucial witnesses from testifying and yet one of them would have been a prime suspect in particular Ann and Aruko Alias Okoth, the worker who allegedly vanished and refused to record a statement.

4. I am the First Appellate Court and as expected of me, I have subjected 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:-

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)"

5. The Prosecution case is contained in the record of appeal and I need not reproduce the same but only summarize the Prosecution case and Defence.

6. The Prosecution case is as follows: - PW1, SA, a class 2 pupil was at her parent's home with A A when on 18th July 2016, O told SA to go and collect pawpaw, which she did and he told her to get into the house, followed her, removed her cloth, put her on the bed and defiled her. That before then he had touched PW1's private part with his hand, then removed his short, inserted his penis ***(dudu yake)*** into

PW1's private part. PW1 felt pain, made noise but no one came. PW1 stated O lives next to PW1's home. PW1 stated O is her grandfather. PW1 left and she washed herself. That PW1's parents were then not at home. PW1 went to the neighbour's home, found no one then returned home and slept. The next day, PW1 told the Head teacher what had happened and she was taken to Siaya Hospital, treated and taken to Siaya Police Station. PW1 identified O as the person *(pointing at the accused person)* in the court. The Prosecution produced PW1's treatment note as exhibit 1, and P3 form as exhibit 2. The accused was subsequently arrested and charged with this offence.

7. The Appellant gave sworn evidence. He stated that on 18th July 2016 at about 5:00pm, he was grazing when SA came to where he was, and sent her to go and tell her young sister A to bring a stick to pick the pawpaw. That the two returned, he sent them to go and pick the pawpaw, requesting them to give him one. That they ate two and took 2 away. They then returned as he asked SA to assist milk the cow. He began to milk and offered them mixed beans to go and eat. They were in the house and the two went and returned. He told them to sit down so that they could take tea. SA said she did not want tea so the accused took tea with A. That at 6:30pm, he told them to go and open for the chicken and also check whether the worker had prepared food. They then went and did not return. That on 19th July 2016, he met SA and her sister at 7:00am going to school and asked them whether they had taken back the sufurias. That at lunch time, SA went to the accused's home as he was going to buy airtime. That at 4:30pm, he started looking for sufuria but could not trace it and as he had Kshs. 600/= in his coat, he went to check and found Kshs. 200/= missing. He called SA's mother who advised him to go to her school. That he went to the school at 4:30pm and with the help of other pupils, SA was traced, the accused called SA's mother over the phone, who asked him to let her talk to SA and she told her mother she picked Kshs. 50/=. The accused took SA to the teacher, raised his claim and the teacher told SA to go to his office as the accused was told to wait outside. The following day, the accused went back to the school and was told he had defiled the child. He then called the child's mother and told her about the claim. On 22nd July 2016, he went to the school with SA's mother, he was sent out of the office and on 26th, he was arrested.

8. At the hearing of the appeal, Mr. Obwatinyai, Learned Advocate appeared for the Appellant whereas Mr. Ombati, Learned State Counsel, appeared for the State. Mr. Obwatinyai, Learned Advocate urged the 10 grounds of appeal whereas Mr. Ombati opposed the appeal against both conviction and sentence.

9. Mr. Obwatinyai, Learned Advocate combined grounds No. 9 and 10 of the appeal urging that the Prosecution case was contradictory and could not as such sustain a conviction. He urged that PW1 and PW3 contradicted each other as to what had happened to the clothes; PW1, SA, was said to have been wearing at the time of the alleged incident of defilement. He urged PW1 stated that the clothes were washed by her mother PW3, whereas PW3 stated the clothes were rained on. He further urged that PW1 denied one Okoth was not present at the time of incident whereas PW3, mother to PW1 stated Okoth was at home.

10. I have very carefully perused the proceedings on the said contradiction made by PW1 and PW3 on whether the clothes which the complainant was wearing at the time of the incident were washed or rained on. PW1 indeed talked of the clothes having been washed by her mother PW3, whereas PW3 said the clothes were rained on. There is of course contradiction as to whether the clothes were washed or rained on from the evidence of PW1 and PW3. The clothes were produced in this case as exhibit. I have considered the said contradiction and my view from the aforesaid consideration is whether such contradiction materially dents the Prosecution case or goes to the root of this case. The Appellant faced a charged of defilement in which the ingredients of the offence are: - penetration; recognition or identification of the assailant and lastly the proof of the age of the victim. That whether the clothes were washed or rained on is not an ingredient of an offence of defilement and I find the Appellant failed to demonstrate how such contradiction affected the Prosecution case. I have examined the testimony of PW1 and PW3 and I am satisfied that there are no fundamental contradictions that dent the Prosecution case. The Appellant has not succinctly identified the alleged contradictions and how they dent the Prosecution case. PW1 in her evidence categorically stated she was at home with A A, her young sister and that Oruka, therefore was not at home at the time of incident. PW3 who was at the time at Mombasa stated that she had left her children with her worker Okoth who told her, he could not tell her of the

incident because he was not at home at the material time. DW1 did in his evidence say he saw Okoth was the time of the incident at home. I have considered the said contradiction and find none as PW1 was the one who was at home and clearly stated the mother was not at home and she even told her mother (PW3) at the time of the incident Okoth was not at home. I find the Appellant failed to establish the alleged contradiction in the Prosecution case and he did not at the time saw PW3's employee Okoth.

11. The Appellant contends the Learned Trial Magistrate erred in law and fact by failing to make a finding that the standard of proof of beyond reasonable doubt as enunciated in matters of criminal flavor was not met and that no tangible effort was made thereto. The Appellant's counsel urged there were glaring gaps which were not filled by the investigating officer. That the investigation was casual; that one witness did not record statements which he should have to state what he knew of the incident, that no eye witness was called and that failure affected the Prosecution case. That the accused was not taken for medical examination. The Appellant therefore urged the Prosecution did not act diligently and as such conducted a shoddy investigation.

12. In a defilement case, the Prosecution is supposed to prove beyond any reasonable doubt that there was penetration, identification or recognition of the assailant and the age of the victim. In the instant case, PW1testified the Appellant removed her panty, his trousers and inserted his penis ***(dudu yake)*** into her private part. PW1's evidence was corroborated by PW4 who examined her genitalia and noted mild laceration at the labia minora, vaginal opening inflamed and hymen absent. I have perused the P3 form exhibit 2 and it is confirmed that the complainant was penetrated. PW1 in her evidence stated she was defiled by O, who she identified as the Appellant. PW1 gave the name of her assailant to PW2 as the Appellant. PW1 knew the Appellant as her grandfather. DW1 did not deny being with the complainant at the time of the alleged offence. I therefore find that PW1 knew the Appellant before and that this is a case of recognition and not identification. On the age of the complainant PW1 stated that she is 8 years whereas PW3, PW1's mother stated PW1 was born on 20th January 2009 and identified PW1's Birth Certificate as PMF1 3. PW4 stated PW1 was aged 9 years. PW5, the Investigating Officer produced PW1's birth certificate as exhibit 3. I have perused PW1's birth certificate exhibit 3 which show that PW1, was born on 26th January 2009. She was therefore 7years 7months at the time of the incident. I have further perused the proceedings and have noted no gaps which were not filled by the Investigating Officer. PW5 received the complainant with her mother PW3, recorded her statement, issue P3 form which was filled at Siaya Hospital, which he received back duly completed. He visited the scene of the incident on 26th July 2016 and arrested the Appellant upon identification by the complainant. As regards failure by the employee of PW3 to record statement as submitted by the Appellant's Counsel; PW5 stated the house boy refused to record statement saying he was not at home when the incident took place. PW1 stated the house boy was not at home when she was defiled. I find such failure does not affect the Prosecution case nor prejudice the Appellant as such witnesses was not material witness in this case and his evidence would have been of no probative value. In this case, there were no eye witness as submitted by the Appellant's Counsel and as such I find the Prosecution did not fail to call the alleged eye witness as the incident took place in the Appellant's house where he was only with the victim PW1.

13. Mr. Ombati, Learned Prosecution Counsel submitted that in criminal cases, the Prosecution decides who to call as a witness. In this case, Prosecution found no need to call Okoth as he was not at the scene of the crime.

Section 143 of the Evidence Act provides: -

> ***"143. No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."***

I therefore find that failure to call a particular number of witnesses in a criminal case is not fatal to the prosecution case provided the evidence adduced in sufficient enough to sustain the prosecution case.

14. The Appellant further contends that he was not subjected to medical examination for the Prosecution to prove their case of defilement against him. In this case, the incident took place on 18th July 2016 but

the Appellant was arrested on 26th July 2016. There was a delay of close to 8 days from the time of the incident. However, the Appellant was not subjected to medical examination. I have considered the Prosecution evidence, and I find failure of the accused person to be taken by police to be medically examined in a sexual offence case is not prejudicial to the Appellant and more specifically where the Appellant is apprehended, a number of days after the commission of the offence and where the evidence against him has been interfered with due to delay in his examination nor does such failure affected the Prosecution case, though where such examination can be obtained in good time is the best evidence to place the accused at the scene of crime.

15. The Appellant's Counsel contends, that the Trial Magistrate erred in law and fact when he conducted a defective *voire dire* examination in which it was not ascertained whether the child understood what oath taking was for and moreover, the Learned Magistrate even after undertaking a defective *voire dire* examination, proceeded to illegally to allow the minor to give unsworn testimony and allowed cross-examination in the same breath. The Appellant's counsel urged that was a fatal commission and/or omission.

16. This court is faced with determining the purpose of *voire dire* examination. In doing so I have to address myself on, **"what is the purpose of *voire dire* examination?"** In my view the purpose of conducting *voire dire* examination is for the Trial Court to form an opinion, on whether the child understands the nature of an oath in which event his/her sworn evidence may be received **(see Peter Kariga Kiume V Republic, CRA No. 77 of 1982 (UR)**.

17. In **R vs Lal Khan(1981) 73 Cr. App. R190, Lord Justice Bridge** had this to say: -

> ***"The important consideration……when a judge has to decide whether a child should properly be sworn, is whether the child has sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth, which is involved in an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct".***
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> ***There were therefore two aspects when considering whether a child should be sworn:- first that the child had sufficient appreciation of the particular nature of the case and, secondly a realization that taking the oath did involve more than the ordinary duty of telling the truth in ordinary day to day life."***

18. In **DWM V Republic CRA.No.12 of 2014[2016]eKLR**, the Court of Appeal addressed itself that: -

> ***"In Nicholas Mutula Wambua and Another Versus Republic Mombasa Criminal Appeal No. 373 of 2006(UR), this Court when confronted with a similar issue construed Sections 208 and 302 of the Criminal Procedure Code governing trials in the subordinate court and the High Court respectively and arrived at the conclusion that cross-examination of a witness who has given evidence not on oath is permitted by law. The Court approved the view taken by the Supreme Court of Uganda in the Sula Case (Supra) that cross-examination of a child who gives evidence not on oath is meant to test the veracity of such child's evidence in the Nicholas Mutula case(Supra) the Court went over the responses given by the child witness both during the voire dire examination and in cross-examination of his/her unsworn testimony and then observed thus"***

19. The Appellant's counsel did not specifically state what was defective in the *voire dire* examination conducted by the trial magistrate. I have examined the *voire dire* examination conducted by the trial magistrate. It was in form of question and answer which is well recorded and which is one of the ways to conduct a *voire dire* examination of children of tender years. PW1 was aged 8 years hence a child of tender years. The Trial Court after conducting the *voire dire* examine ordered the child to give unsworn statement. The Trial Court allowed the Appellant to cross-examine the victim notwithstanding she was not sworn. The allowing of the Appellant to cross-examine the victim was in accordance with the provisions of **Article 50(2)(k)of the Constitution of Kenya 2010** which provides: -

"50(2) Every accused person has the right to a fair trial, which includes the right: -

(k) to adduce and challenge evidence;"

This was to give the Appellant an opportunity to enable court in making a finding as to the veracity of the child's evidence. I find the trial court acted properly in the conduct of *voire dire* examination and I find the Appellant has failed to identify the default in the *voire dire* examination as conducted by the Trial Court. I find no fatal commission or omission on the part of the Trial Court.

20. In the case of **DENNIS OSORO OBIRI V Republic CRA No. 279 of 2011 [2014] eKLR,** the Court of Appeal addressed itself thus: -

"The first issue in this appeal is whether the Trial Court and the First Appellate Court erred in relying on the evidence of PW1, the minor victim, as a basis of the Appellant's conviction. Section 124 of the Evidence Act as amended by Act No. 5 of 2003 and Act No. 3 of 2006 provides as follows: -

Notwithstanding the Provisions of Section 19 of the Oaths and Statutory Declarations Act, (Cap15), where the evidence of alleged victim is admitted in accordance with that Section on behalf of the 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:

Provided that where in a criminal case involving 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".

The effect of the provision of Section 124 is to create, in cases of sexual offences, an exception to the general rule that an accused person cannot be convicted on the uncorroborated evidence of a child of tender years. In JACOB ODHIAMBO V REPUBLIC, Cr. App. No. 80 of 2008 (Kisumu), this court made the same point as follows: -

"Though P's evidence was that of a child of tender years, the court can convict on it by virtue of the provision to Section 124 of the Evidence Act, Cap 80 Laws of Kenya, as amended by Act No. 5 of 2003."

In the instant case, the Trial Court believed the complainant, and found no reason to doubt her evidence. It gave reasons for so finding. I also find that in this case, **Section 124 of the Evidence Act** is applicable and the Appellant was properly convicted.

21. The Appellant's Counsel, contends the Appellant's good demeanor was not considered. That the Appellant reported of stealing of his Kshs. 200/= by the complainant. I have perused the Trial Court's judgment and I have noted the issues for determination were set out, decisions and reasons for decisions recorded are set out in the judgment. This court considered that the Appellant complained of his money having been stolen, however, found no reason for the victim having to frame the appellant. The court believed the complainant and found the Appellant's report of stolen money as a cover up for the offence of defilement. I find the Trial Court considered the credibility of the Appellant evidence to be lacking. I cannot as an Appellate Court interfere with the issue of credibility of the Appellant's evidence as I did not see him give evidence at the Trial Court and as such, I find no merits in this ground of appeal.

22. **The upshot is the appeal has no merits and is dismissed. The conviction is upheld and sentence confirmed.**

DATED AND SIGNED AT SIAYA THIS 13TH DAY OF OCTOBER 2017

J.A. MAKAU

JUDGE

DELIVERED IN OPEN COURT.

In the presence of:

Court Assistants:

1. Laban Odhiambo

2. Leonidah Atika

Mr. Obwatinyai: for Appellant

M/S Odumba: for State

J.A. MAKAU

JUDGE