



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

**AT NANYUKI**

**HCCRA. NO. 41 OF 2015**

**OBADIA ORINA.....APPELLANT**

**-VERSUS—**

**REPUBLIC ..... RESPONDENT**

**(Being an appeal from the original conviction and sentence by Hon. T W CHERERE CHIEF  
MAGISTRATE dated 5<sup>th</sup> June, 2014 in Nanyuki Chief Magistrate’s Court Criminal Case No. 146  
of 2014)**

**JUDGMENT**

1. **OBADIA ORINA** has appealed to this court against his conviction and sentence before the chief Magistrate’s court Nanyuki
2. Before that court appellant was charged with the offence of defilement **Contrary to Section 8(1) (2) of the Sexual offences Act Cap 62A** as the main count. In the **alternative count** he was charged with the offence of indecent act to a child **Contrary to Section 6 of the Sexual Offences Act Cap 62 A**. After trial he was convicted on the alternative count and was sentenced to 10 years imprisonment.
3. I wish at this stage to remind myself of the duty of the first appellant court as stated in the case **GEORGE MIRITI KALUNGE & ANOTHER – V- REPUBLIC [2013]eKLR** thus:

*“This being a first appellant court we are bound to follow the guidelines set by the court of appeal in Kinyanjui – v- REPUBLIC [2004] 2KLR 364, With respect to criminal appeals. It was said that the first appellant court must look at the evidence presented before the trial court afresh and re-evaluate and re-examine the same, and thereafter reach its own conclusions. The first appellant court must bear in mind that it did not have the opportunity to see the witnesses as they testified. The court should also look at the grounds of appeal put forward by the appellant. We also remind ourselves of the point made in Buru- v- Republic [200] 2KLR 533 and Republic – v- Oyier [1985] KLR 353, that a first appellant court will not normally interfere with the finding of a lower court on the credibility of witnesses unless it is shown that no reasonable tribunal could make such finding.”*

4. F W, a child of six years was on 14<sup>th</sup> February, 2014 walking home from school. She stated appellant, whom she met on the way, held her hand and led her into the bush. In the bush appellant

removed her pant and put saliva in her private parts. At that point appellant's mobile phone rang and as he answered it FW got an opportunity to run away.

5. She ran away and reported the matter to her mother. Later with the assistance of the police officer PC Manasseh Kirinya P W 5 the appellant was arrested.
6. Appellant filed supplementary grounds of appeal on 9<sup>th</sup> July 2015. In totality his grounds of appeal present the following issues for determination:

\*Whether the prosecution presented evidence that met the criminal standard of proof.

\* Whether the prosecution's case was defeated by failure of the complainant giving appellant's description before his arrest; and

\*Whether the trial court failed to consider appellant's defence.

### **WHETHER THE PROSECUTION MET THE CRIMINAL STANDARD OF PROOF**

7. Although appellant by his written submission stated that prosecution's failed to prove the offence of defilement, it is important to state that he was convicted on the alternative count of the offence of indecent act to a child. Bearing the evidence adduced by prosecution I indeed agree with the trial court that the only offence disclosed by that evidence was the offence of indecent act to a child.
8. Appellant further in his submissions before court submitted that FW's evidence was inconsistent because she said that the one who committed the offence put saliva to her vagina and later told her mother that the person put saliva and ballon.
9. Miss Kinyanyui prosecution counsel opposed the appeal. In her submissions she stated that FW confirmed that appellant assaulted her in an indecent manner.

### **COURT'S DETERMINATION OF THE FIRST ISSUE.**

10. The trial court which had the opportunity to observe FW stated that FW was confident of what she was saying in her testimony and that confidence prevailed even under intense cross-examination
11. In my view FW was clear in her evidence of how appellant whom she knew well since she said he (appellant) lived near their home, perpetrated an indecent act on her. At that time she was walking home from school alone although she ordinarily walked home in the company of a girl she identified as Nyawira. On the material date it does seem that, at sometime, as she walked home she was in the company of another girl she identified as Nyaguthie but by the time she met appellant and he led her to the bush she was on her own. In this regard she said:

*"I did not meet other people except you... I did not meet anyone on the way... I was alone when walking home from school. It is accused in the dock that took me to the bush."*

12. Although appellant in his submissions before court stated that the prosecution's evidence was inconsistent, with one witness, P W 3 mother of FW, where the appellant said that P W 3 stated in evidence that the person who committed the offence against FW "put ballon on her (FW's) vagina; I can confirm that the word "ballon" in the typed proceedings was an error committed by the typist. The hand written proceedings which I went through clearly shows that the word written by the trial Magistrate was "saliva" and not "ballon". There is therefore no inconsistency in the prosecution's evidence. Both the mother (P W 3) of FW, to whom FW made the first report and the father of FW (P W 4), stated that FW told them that appellant put saliva in FW's vagina. P W 4, the father, even went further to state:

*"The accused (appellant) had started to defile her (FW) but she escaped when*

*accused answered to a call.”*

13. Prosecution adduced evidence of the clinical officer who examined both FW and appellant. In respect to FW the clinical officer found:

*“Her hymen was broken and she was not bleeding and she had no discharge .... The hymen was not freshly broken. There was evidence of previous penetration.”*

14. Appellant submitted that the trial court failed to carry out *voire dire* examination of FW. On that submission appellant was mistaken. The trial court carried out *voire dire* examination and then concluded thus:

*“The child is intelligent. She will give unsworn evidence.”*

15. The reason the trial court found that FW would give unsworn evidence was because in its examination of FW the court found that she did not understand the significance of an oath. FW's evidence even though not given under oath was acceptable as provided under Section 19 of Oath and Statutory Declaration Act Cap 15. That Section Provides:

*“where in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing... shall be deemed to be deposition within the meaning of that Section.”*

16. The trial court satisfied itself FW understood the importance of telling the truth when FW stated:

*“We are taught those who lie go to hell. I want to go to heaven.”*

17. It follows that although FW gave unsworn evidence her evidence had the same force as that given under oath.

18. I, just like the trial court, do find that the evidence adduced by the prosecution met the standard of criminal proof and did indeed prove that appellant committed an indecent act against FW, a child of 6 years.

19. I also, just like the trial court reject the defence offered by appellant and do find that indeed it was an afterthought.

20. Appellant in his defence and for the very first time stated that the charge against him was ‘frame up’ because he and FW'S mother (PW3) were lovers but that he had broken up that relationship when he found out she was married.

21. Appellant did not question FW's mother or her father on the alleged love affair even though both of them testified.

22. Surprisingly appellant in his grounds of appeal filed on 4<sup>th</sup> July 2014, in particular ground No. 5, stated that the charge was preferred against him because he had a debt of FW's mother. The issue of that purported debt was not raised by appellant in his defence nor was it advanced in his submissions in support of his appeal.

23. This court's finding in regard to the first issue identified above is in the positive. Prosecution

surmounted the standard of proof.

24.Appellant submitted that his, was a case of mistaken identity.

25.FW told her mother, when she ran home away from the appellant, that the person who took her to the bush was the heard man of Mzee Ngare. P W 3, (FW's mother) stated that when, after reporting to the police, and in the company of that police officer FW identified the appellant before he was arrested.

26.FW in her testimony before court stated:

*“it is obad that removed my pants....”*

27.Again I wish to state that the typist of the hand written proceedings of the trial court erred on page 16 (handwritten in red) or page 15 (typed), second to last line by typing.

*“It is accused that removed my pants on the way from school.”*

28.The correct version of that sentence can be discerned by looking at the hand written proceedings of the trial court. In that sentence the trial court noted that FW's testimony was that it was Obad (short form of Obadia, appellant's name) and not accused, that removed her pant.

29.FW, undoubtedly knew appellant, who was working as a herder for the neighbour, FW cannot therefore be said to have made a mistake in identify appellant. The offence also occurred in day time, just after FW left school at 4p.m. The Learned trial Magistrate after warning herself about relying on a single identifying witness in relation to FW's testimony stated:

*“... I have no doubt in my mind that she (FW) is a truthful witness.”*

30.I can find no reason to depart from that conclusion of the testimony of FW. I therefore find that appellant was not mistaken for some one.

#### **WHETHER THE TRIAL COURT CONSIDERED APPELLANT'S DEFENCE**

31.The trial court did indeed consider, and infact devoted a paragraph in its judgment, considering the appellant's defence. The trial court rightly in my view rejected that defence.

#### **OTHER ISSUES**

32.Nothing turn on the fact that the trial court did not state whether the evidence of FW was received by the trial court in the presence of FW's parents. It is in my view of no consequence to the prosecution's case, contrary to the submissions of appellant.

33.The Learned trial Magistrate after convicting appellant on the alternative count of committing an indecent act to a child Contrary to Section 6 of Cap 62A sentenced appellant to 10 years. The trial court in so sentencing stated that, that was the mandatory sentence.

34.That statement by the trial court, in my view was in error. Section 6 of Cap 62A provides that on conviction under that section a person shall be sentenced to imprisonment of a term of not less than five years. The trial court did not given a reason why it sentenced appellant to ten years.

35. Bearing in mind the above I shall interfere with the sentence of appellant. Other than that i find no merit in the appeal against conviction. His conviction was well founded.

36.Accordingly appellants appeal against conviction is dismissed. The sentenced of the lower, however, is set aside and is substituted with a sentence of 5 years from the date of conviction and

sentence of appellant

37.It is so ordered.

*Dated and Delivered at Nanyuki this 25<sup>th</sup>February, 2016*

**MARY KASANGO**

**JUDGE**

**Coram**

Before Justice Mary Kasango

Court Assistant – Kiruja

For state .....

For Appellant .....

Appellant .....

**COURT**

Judgment delivered in open court

**MARY KASANGO**

**JUDGE**