



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

HIGH COURT CRIMINAL APPEAL NO. 25 OF 2015

(CORAM: J. A. MAKAU – J.)

STEPHEN OJWANG OLOO APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal against both the conviction and the sentence in Criminal Case No. 587 of 2013 in Siaya Law Court before Hon.M. S. Kimani – R.M.)

JUDGMENT

1. **Stephen Ojwang Oloo** was charged with the offence of defilement contrary to **Section 8(1) (4) of The Sexual Offences Act No. 3 of 2006**. The particulars of the Offence are that on 29th August 2013 at [particulars with held] sub-location, in Gem District within Siaya County, defiled one **E A O** aged 13 years. The Appellant faced an 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 time and place, the appellant intentionally, touched the vagina of **E A O** aged 13 years.
2. The complainant **O E A** testified that, she was a student at [*particulars withheld*] Secondary School, in form 1 and that she stays with her aunt **J A**. That her home is far from the school. That on 29.7.2013 at about 4.00 a.m., she left for school and on reaching at Barkalole Centre, she saw a girl dressed in uniform of her school, who she urged to go with her but she stated she had to run some errands first. On the way she met a man who greeted her and told her that he had just escorted his daughter and if **PW1** was to hurry, she could catch up with her. She proceeded on and as she was near the school, she heard someone coughing and thought the person coughing was the girl the man she met, was talking about, so she hurried the more, that on reaching at the spot she saw it was a man wearing black cloths. **PW1** went past him and he greeted her. That the man did about turn and followed **PW1**. **PW1** started running and screaming for help, no one came to **PW1**'s help and as there were no homesteads nearby, the man kept on following **PW1**, armed with with a panga, that **PW1** saw a grass thatched house and wanted to go there but in the process, she fell down and the man caught up with her. The man started assaulting **PW1** with the panga he had, using the flat side of the machete, to hit her on the thighs and back. He also strangled the complainant using her necktie and he pulled her to a bush area, the man told **PW1** to choose between two things, either to have sex with him or to be cut into pieces or take her to his company, who will all have sex with her and thereafter kill her. **PW1** was able to see the appearance of the man, with the aid of moonlight as he was wearing a black coat, black trouser and brown jumper. His face was scarred and had a sport of grey hair near his temple. **PW1**

refused to make any choice and the man continued to assault her. The man told PW1 he would have sex with her by force. PW1 tried to run but she fell and the man caught up with her, he tied her legs apart using paper bags he had around his waist as he was lying on PW1. He tore PW1 inner wear using the panga. He removed his clothes and inserted his penis into PW1's vagina and had sex with PW1. PW1 felt pain and cried. He heard a sound of a motorbike got up and run away after he had sex with PW1 for ½ an hour, that before he run away he cut the paper bags loose. PW1 found her pantie and shoes missing. She returned home as the man followed her from a distance, that on arrival at her aunt's home the man disappeared. PW1 told her aunt what had happened, this was about 6.00 a.m. PW1 was then taken to the hospital at Dolphill Maternity and Nursing Home. PW1 identified treatment notes and Laboratory request form as MFI P1 (a) and (b). PW1 after treatment reported the matter to the area chief and Yala Police Station. That on 30.7.2013 as PW1 was with her school mates, she saw the accused on a motorbike and identified him as her attacker to her schoolmates. PW1 also informed the school teacher who informed the chief of the description of the assailant. The accused was then apprehended. PW1 recorded her statement on 8.8.2013. PW1 identified her birth certificate MFI P 2 showing she was born on 1.7.1999 and P.3 form filled at Yala Level VI Hospital as MFI P.3. During cross-examination PW1 testified that the assault took place few minutes past 4.00 a.m. and she was able to see his appearance and colour of his clothes as there was moonlight, which was shining on their faces and PW1 saw the assailant. PW1 gave description of her assailant to her teacher and the chief. PW1 testified her defiler had no cap. PW1 testified she was able to appreciate fully the accused's appearance especially the spot of white/grey hair on the temple region but it is only that he is now clean shaven.

3. **PW2 R A J** testified that PW1 is her daughter aged 14 years as of the time of giving evidence. That she was born on 1.7.1999, that on 29.7.2013 at 6.00 a.m. she received a telephone call from J, who used to stay with PW1 informing her that PW1 had been raped as she was on her way to school. PW2 then told her to take PW1 to hospital. She proceeded and met them at Rabuor hospital where PW1 was treated. PW2 then reported the matter at Barkolale A.P. Post and later Yala Police Post. PW1 was issued with P.3. form which was filed at Yala sub-district Hospital and the police officers took over the matter.
4. **PW3 J O** testified that on 29.7.2013 she got up early as E (PW1) was to go to school early. PW1 left the house at 4.30 a.m. but at 5.00 a.m. she returned home and told PW3 that some **one** had raped her, PW3 called PW2 over the phone and she told PW3 to tell PW1 to take PW1 to the hospital. PW3 asked her husband to take PW1 to the hospital as she had an infant, PW3 later recorded her statement.
5. **PW4 Morris Otieno Odine** Assistant Chief of Uranga sub-location, testified that on 29.7.2013 at about 11.40 a.m. he received information from PW1 who was accompanied by her mother she had been raped on her way to the school from home. PW4 and A.Ps later proceeded to the home of the accused and arrested him and escorted him to A.P. Post at Barkolale and later Yala Police Station. PW4 identified the accused as the person he directed A.Ps to arrest. During cross-examination PW4 testified he was informed about the incident by PW1.
6. **PW5 No. 237333 A.P.C. Erick Mikenye Omweri** formerly attached to Barkalale A.P. Post testified that on 29.7.2013 the area Assistant Chief PW4 went to the station with arresting warrant from Yala Police Station authorised by O.C.S. The warrant was to have one Stephen Oloo Ojwang arrested for defiling a school girl by the name E A (PW1). PW5 in company of PW4, Cpl. Boaz proceeded to the accused's home at around 8.00 a.m. where they found him and arrested him. They took him to their Post, informed O.C.S. Yala Police Station who came and picked him. PW1 identified the accused and showed him in the dock.
7. **PW6 Evalyn Odhuno** a Clinical Officer based at Yala Sub-County Hospital testified that she examined PW1 and filled in her P.3. form. That she was by then 13 years. PW6 carried out genital examination in appreciation of the fact that she had been initially been seen and treated at Dolphill Maternity Hospital. PW6 testified on examination she noted inflamed vulva, some whitish discharge on both labia which were not foul smelling. Pregnancy test were negative and the same applied for H.I.V. Test. There was presence of RBCs on urine and on high vaginal swabs. There was revelation of spermatozoa. PW6 from the foregoing concluded PW1 had been penetrated sexually. PW6 also examined the appellant on 11.8.2013 on examination of his

- genitalia, PW6 noted a whitish creamish discharge on the gland penis. The same were not smelling. No bruises noted. Urinalysis no abnormalities noted. H.I.V. Test negative results and the test for other S.T.Ds. That the appellant was brought after 13 days, after alleged offence and as such no conclusive evidence could be gathered in relation to the offence in question. PW6 filled the P.3. form on 11.8.2013. She produced P.3. form for PW1 MFI P.3. as exhibit P3 and for the appellant as exhibit P.4. PW6 also produced laboratory result of the appellant as exhibit P.5. and the treatment notes as exhibit P.6.
8. **PW7 Dr. Philip Adhero** of Dolphin Maternity Nursing Hospital testified that on 29.7.2013 a patient by the name E A aged 13 years went to the hospital complaining of defilement and complaining of pain in the vagina, thighs and knees, claiming she was attacked by a man unknown to her who also defiled her. PW7 examined PW1 and noted that her vulva was inflamed with signs of forced penetration. Laboratory investigation comprised a high vaginal swabs which revealed presence of spermatozoa. That from the presence of spermatozoa and inflamed vulva PW7 concluded that PW1 had her genitalia penetrated. PW7 produced MFI P1 (a) and (b) as exhibits P1 (a) and (b).
 9. **PW8 No. 38149 Cpl. David Kamau** based at Yala Police Station the investigation Officer in this matter testified that on 8.8.2013 a prisoner from Barkolale A.P. Post was taken to Yala Police Station on allegation of defilement. He booked the suspect and issued a P.3. form to the complainant and the accused. He recorded witnesses statements and proceeded to charge the appellant with this offence. That the P.3. form and treatment documents obtained from the first point of treatment established PW1 had been defiled. PW8 proceeded to ascertain the age of the complainant and obtained a copy of her Birth Certificate showing she was born on 1.7.1999 hence aged 13 years. He produced birth certificate as exhibit P.2.
 10. The appellant when put on his defence opted to give sworn statement and call witnesses.
 11. The appellant testified that he is a jua kali artisan and also a farmer. He testified he could not recall anything that could be said to be unique about 29.8.2013, only that he could recall 8.8.2013 when he was arrested at 8.30 p.m. while inside his mother's house, that as it was dark and the people who came to arrest him refused to identify themselves, the appellant armed himself with a machete screaming for help. The appellant then heard PW4 the Assistant Chief Morris Odine speak as he knows his voice they then arrested the appellant and escorted him to Barkolale Chief's Camp. He was informed he was detained for defiling a school going child. He was later transferred to Yala Police Station and on 12.8.2013 arraigned before the Court. During cross-examination the appellant admitted it is true he has a scar on his left cheek which he got from an accident. He stated he does not know whether he has a spot of grey hair as prosecution was suggesting and stated he does not know whether the complainant lied when she testified. The appellant then opted to close his case without calling his witness as his witness had not shown up.
 12. The trial Magistrate evaluated the prosecution's evidence, and the defence and convicted the appellant for the offence of defilement and sentenced him to imprisonment for 40 years. In convicting the appellant the court expressed itself as follows:-

“Turning to the other aspect of the prosecution's case which I have also said not be in doubt insofar as its prove is concerned, it is my view that the complainant's testimony thereto absolutely left no doubt whatsoever that she had suffered such ordeal as was narrated to this court. It will be recalled that she told this court how her assailant tied her legs each apart from the other with plastic bags(tied to one another as to form a rope), then ripped her inner wear using a machete he was armed with, removed his clothes and inserted his penis into her vagina essentially having sex with her and which – according to her --- was a painful experience. This testimony was not only lucid and/or vivid but also found corroboration in the medical evidence that was brought forth by the prosecution”

13. Aggrieved by conviction and sentence the appellants was provoked to prefer this appeal setting out the following grounds of appeal:-

(a) That during trial he pleaded not guilty and still stood on the same ground.

(b) The trial court erred in both facts and law by not considering the grave defect and disputes on age of the complainant during trial.

(c) The trial court failed in both Law and facts by violating his fundamental rights and defence towards the allegation and time of the incident.

(d) The trial court failed in both law and facts to observe the forensic results obtained from two(2) different experts on medical analysis which was inconsistency.

(e) The trial court erred in both law and facts to consider the delay of medical attendance by the complainants stipulated by the laws of Sexual Offences Act within the required time.

(f) The examination results between two P3 forms were not verified to prove him as the accused person.

(g) The trial court failed in both law and facts to produce any markable exhibit to ascertain the truth on the said offence during trial.

(h) The appellant wished to be present during the hearing of the appeal and also prayed to be furnished with the true certified copies of the trial court's proceedings to enable him erect more grounds.

14. At the hearing of the appeal, the appellant appeared in person while Mr. Ombati learned State Counsel appeared for the State.

15. The appellant relied on the written-submissions and had nothing else to add to his written submissions. He contended that his constitutional rights were violated by the Police in that he was not taken to court within 24 hours from the date of his apprehension, but he was detained for five (5) days in Police cells without any reasons, that he was not properly identified as the offence took place at night and the complainant had not known her assailant before and that the prosecution had inconsistencies and contradictions especially evidence of PW6 and PW1.

16. The State in opposing the appeal submitted that if the appellant was held for five(5) days at Police, there is nowhere in the proceedings where he raised such issue urging further even if he was held which he would say was unconstitutional his remedy lies elsewhere. On issue of identity he submitted, PW1 identified her assailant and informed others on seeing her assailant on a motorbike. She also informed her teacher. She also saw features of her assailant. On contradictions of PW1's evidence and PW6 the State Counsel submitted there was no contradictions as PW1 stated she was assaulted. On complainant's age the learned State Counsel urged that the complainant's age was proved through Birth Certificate, exhibit P 2, showing her date of birth as 1.7.1999, he submitted that she was aged 14 years. He prayed that the appeal be dismissed.

17. As the first appellate court, I have subjected the entire evidence adduced before the trial Court to a fresh evaluation and analysis and will draw my own conclusions. I am alive to the fact that I neither saw nor heard any of the witnesses and so cannot comment on their demeanor. I am guided on the duties of the first appellate court by the Court of Appeal decision of **Kiilu and Another V. R. (2005) 1 KLR 174** where the Court of Appeal held thus:-

“an appellant in a 1st appeal is entitled to expect the whole evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision in the evidence. The 1st appellate court must itself weigh conflicting evidence and draw its own conclusions.”

18. The appellant contended that his constitutional rights were violated as he was held at Police Station for five (5) days without being arraigned in court. He did not raise the issue with the trial court. The lower court record especially the charge sheet show that the appellant was arrested on 8.8.2013 and arraigned before Court on 20.8.2013. In his defence he stated he was detained at Yala Police Station from 9.8.2013 upto 12.8.2013, hence his claim of being detained for 5 days. The court record is irreconcilable with the appellant's evidence but be as it may, **Article 49(1) (f) (i), (ii)** of the Constitution provides that

an arrested person has the right to be brought before Court as soon as reasonably possible but not later than twenty four hours after being arrested or if the twenty four hours ends outside ordinary court hours, on a day that is not an ordinary court day, the end of the next day.

From the submission, by the appellant and court's record it is clear that **Article 49 (1) (f) (i), (ii) of the Constitution of Kenya** was not complied with and no justification was given when the appellant was brought to the court for plea on the first day. The detention of the appellant beyond 24 hour period which is clearly spelt by the Constitution was in complete violation of the Constitutional Rights of the appellant. The appellant was held unconstitutionally for a period, beyond the period allowed by the law, I so find, however proceedings to hearing of the appellant's case by the trial court was constitutional. The trial court was not a Constitutional Court when it was trying him, nor is this appellate court which is vested with criminal jurisdiction in this appeal only. The appellant's remedy lies within Constitutional Court, where he is supposed to commence the proceedings under **Article 22 (1) the Constitution of Kenya 2010** which provides:-

“Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened”

He is further by virtue of **Article 23 (3) of the Constitution of Kenya 2010** supposed to seek the appropriate redress at the Constitutional court by filing a petition. The said **Article 23 (3) of the constitution** provides:-

“In any proceedings brought under Article 22, a court may grant appropriate relief, including:-

- (a) a declaration of rights;***
- (b) an injunction;***
- (c) a conservatory order;***
- (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;”***

19. That though I have found that the appellant's constitutional rights as enshrined in the Constitution were violated, and the trial court as well as this court being not a Constitutional Court in this matter I find and hold the lower court proceedings properly proceeded before the trial court. The violation of the appellant's constitutional rights have therefore no effect on the proceedings and subsequent judgments by the trial Court.

20. The major issue for consideration is whether PW1 identified the appellant at the time she was defiled? In the case of **Charles O. Matanyi V R (1986) KLR 198**, the Court of Appeal held thus:-

“Although it is trite law that a fact may be proved by a testimony of a single witness, this does not lessen the need for testing with greatest care the evidence of a single witness respecting identification.”

21. The trial court in its judgment noted the evidence of identification of the assailant was that of the complainant and the offence was committed at 4.00 a.m. The trial court warned itself of special need to be cautious and relied on the case of **Abdalla Bin Wendo V R (1953) E.A. 166** for the case of **Abdullah Bin Wendo V Rex 20 EACA 166** the judges of Appeal emphasized the need for careful scrutiny of the evidence of identification especially by a single witness, before basing any conviction on it. The court held as follows:

“Subject to certain well known exceptions it is trite law that a fact may be proved by a testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the

conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt from which a judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as free from the possibility of error.”

22. In the instant case the offence was committed at 4.00 a.m. The only witness was the complainant. The complainant gave detailed account of how she encountered the appellant, who was stranger to her. She testified she heard someone coughing ahead of her and on nearing the person she saw it was a man wearing black cloths. After passing him, he followed her and she started running, but she fell down and he caught up with her. He was armed with a panga and started assaulting her, using the panga, hitting her on the thighs and back. He also strangled her using her necktie. He pulled her into the bush. He talked to her threatening her as he demanded sex. PW1 testified she was able to see and appreciate her attacker through the aid of moonlight. She described the clothes the attacker was wearing as black coat, black trouser and brown shirt. She noted his face was scarred and had a spot of grey hair near his temple. That this ordeal took a while and at one time PW1 got time to ran away but she fell down and the assailant caught up with her. The assailant tied PW1's legs apart using paper bags, he had around his waist while lying on PW1, tore her inner wear apart on both sides using a panga. He removed his clothes and inserted his penis into PW1's vagina. He had sex with PW1 for ½ hour. That as the assailant was assaulting PW1 she was able to see his appearance and colour of his clothes through the moonlight which was shining on their faces. That PW1 was able to immediately and at the earliest opportunity give the description of the assailant to her teacher, school mates and area chief.

23. In the instant case, I am satisfied that even though the conditions at the time might not have been favourable for positive identification, PW1 was able to positively identify her assailant. The ordeal took long time approximately more than 30 minutes as PW1 stated, the assailant had sex with her for 30 minutes and before then the complainant explained there was a long struggle while resisting the assailant's advances, in having to tie her with paper bags on her legs apart. She had before then undergone humiliating assault. There was moonlight and all that time the appellant was under observation of the complainant. Their faces came close to each other as PW1 struggled with the appellant and as he was tying her with paper bags, lying on top of her and when he had sex with her for close to 30 minutes. PW1 testified there was moonlight which was shining on their faces. She gave descriptions of the appellant's face as having been scarred and he had a spot of grey hair near temple. That during cross-examination the appellant admitted his face was scarred from an old accident. The complainant saw the appellant the following day and immediately informed her teacher and classmates who passed information to the chief an appellant was subsequently arrested. The trial Magistrate who saw the complainant testify before him noted that she was forthright on her testimony about the appearance of the accused at time of the offence was perpetuated and she was unshakable. The court as noted did see the witnesses testify and I cannot interfere with the trial court's findings on demeanor of the witness. I agree with the trial court's finding that PW1 had ample time and opportunity to seeing the appearance of the attacker as there was bright moonlight from zero distance between the complainant and the assailant during the time of commission of the act of defilement and the duration of the ordeal of about 1 hour. I find that the appellant was not mistakenly identified by the complainant. The appellant contended that PW6 contradicted PW1's evidence by stating that there were no injuries from “Head to toe” while PW1 talked of having been assaulted. PW6 in her evidence stated:–

“He had no physical injuries from head to toes” she was referring to her examination of the appellant Stephen Ojwang Oloo and not PW1.”

PW1 in her evidence narrated of how she was assaulted by her assailant, in view of that, I find that there were no contradictions between the evidence of PW1 and PW6. The P3 form exhibit P3 supported the charge of defilement and the same do not contradict the charge as alleged by the appellant.

26. On the appellant's age the prosecution produced PW1's birth Certificate as exhibit P2 which showed that she was born on 1.7.1999. I therefore find that the trial court in noting there was a contradiction of the age of the complainant as stated in the charge sheet, thus 13 years instead of 14 years. That did not in any way affect the section under which the appellant was charged, thus **section**

8(1) (3) of the Sexual Offences Act No. 3 of 2006. I find that a slight variation of the exact age is not fatal to the present case. That in my view, not every conflict between the particulars of the offence, (*more so where under the charging section the age is given between across ages*), and the evidence will vitiate a conviction, especially where the conflicts are minor or of such a nature that no discernible prejudice will be occasioned to the accused person by the variation.

27. This appellant was sentenced to serve 40 years imprisonment. He did not challenge the sentence in his appeal nor in his submissions, in imposing the sentence of 40 years the court noted the prevalence of such offences in Siaya and noted what the appellant did to the complainant a child aged 14 years was beastly. The court took into account that the appellant was not remorseful in his mitigation. I have noted the appellant has not challenged the sentence and in view of the ordeal under which the complainant underwent and the threats, as well as the beastly acts of the appellant, I feel the sentence was deserved, I won't interfere with the same. The appellant will serve the forty(40) years meted by the trial court..

28. The upshot is that I find the evidence was overwhelming and sufficient to find a conviction. Consequently, I hold and find that conviction entered against the appellant was safe and I uphold it. On sentence, the appellant was given lawful sentence as Section 8 (1) (3) of The Sexual Offences Act No. 3 of 2006, provides for minimum sentence and not maximum sentence. The trial court acted within the law and based his sentence on facts of the case before it. The trial court in imposing the sentence acted within its discretion and acted judiciously. The sentence was therefore lawful and I find no basis for interfering with the same. I accordingly dismiss the appeal.

DATED AT SIAYA THIS 17TH DAY OF MARCH, 2016.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT THIS 17TH DAY OF MARCH, 2016.

In the presence of:

Appellant: Present

Mr. Ombati for State

Court Clerk – Kevin Odhiambo

Court Clerk – Mohammed Akideh

J. A. MAKAU

JUDGE