



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

**HCCRA CASE NO. 29 OF 2015**

**(CORAM: J. A. MAKAU – J.)**

**BONACE ONYANGO OGUK ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against both the conviction and the sentence delivered on 8.5.2015 in Criminal Case No. 897 of 2013 in Siaya Law Court before Hon. Hazel Wandere – P.M.)*

**JUDGMENT**

1. The appellant, **BONIFACE ONHANGO OGUK** was charged with an offence of defilement contrary to **section 8(1) (3) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence are that on the 29th day of November 2013 in Gem District within Siaya County intentionally caused his penis to penetrate the vagina of **B A** a child age 9 years.

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 setting out several grounds of appeal which are:-

*a) He pleaded not guilty and maintains the same.*

*b) That the sentence was not relevant with the charge sheet likewise the O.B. Diary indicates two file numbers and also two P.3. forms signal and different rubber stamped with different evidence.*

*c) The charge sheet indicates an organ (penis) as a weapon but the object on 9964/13 did not identify any weapon used on general medical history. Part II of medical details.*

*d) The medical evidences and results cannot stand due to the overlap of time in records “6 days ago” in the P3 form medical officers Ref. No. 1007413.*

*e) The investigation carried out were not sufficient and efficient prior to expertise rank(constable) as exhibits were brought by witness no. 7 after chief hearing and bad in law.*

*f) The witnesses were not consistent and reliable and trustworthy in their testimonies and evidence during trial.*

***g) That a minor of 9 years could not make any movement and the delay of 6 days with act that causes penetration under the stringent sexual offences act.***

Can be summarized thus:-

***a) That proper sentence was not meted.***

***b) That the prosecution did not prove the charge to the required standard, thus beyond reasonable doubt.***

***c) That the prosecution witnesses were inconsistent and contradicted the charge sheet.***

1. That at the hearing the appellant appeared in person and State was represented by prosecution Counsel Mr. Elphas Ombati, Learned State Counsel.

2. The Appellant contends that the prosecutor was inconsistent and contradictory, urging the age of the complainant was 40 years and not 9 years, that there is an error on the date of investigation diary which is different from the date of first report and date of defilement being 29th November 2013, that this contradiction for the period complainant was admitted for her evidence of 7 days to that of 4 were by PW4, whereas P3 forms states Pw1 was taken to the hospital on 3.12.2013, that the appellant had not been supplied with witnesses statements, and investigation diaries missing, that the P3 form was not stamped, that exhibits were not produced, that the court failed to carry out age assessment of the appellant, that the charge was defective as it was brought under the wrong section and ----- report was not availed.

3. Mr. E. Ombati learned prosecution counsel opposed the appeal on three major issues;- on the age of the complainant as raised by the appellant he submitted the complainant was 9 years as per documents submitted and evidence on record, and not 40 years, that the appellant was recognized by Pw2 who knew him, that penetration was proved through evidence of PW2 and PW3 as well as by production of the P3 form and treatment note, on contradictions of the prosecution evidence on age he submitted there was none, or did any commission of the offence the appellant mentioned it was 26.11.2013 but charge sheet indicated 29.1.2013, the evidence of PW2, and PW5 mentioned date of the offence as 29.11.2013, treatment notes 29.11.2013, he therefore submitted there was no contradiction on the date of admission of the complainant appellant asserted that was admitted for 4 weeks but from evidence of PW1 she was admitted for 7 days whereas PW4 stated PW1 was admitted for 4 weeks the learned Counsel concedes that is a contradiction on a number of days the complainant was admitted at the hospital but submitted that is not a material contradiction to the prosecution case. On issue of sentence the learned Counsel submitted under **Section 8(3) of the Sexual Offences Act** it is provided for a mandatory sentence, however he conceded owing to the appellants age at the time of commission of the offence being a minor the trial court ought to have sentenced the appellant within the provision of **Children Act**.

4. I have carefully considered the Appellant's appeal, the appellant's submission and the submissions by the prosecution counsel.

5. I am a first appellate court and as such I have subjected the entire evidence adduced before the trial court to a first evaluation and analysis while bearing in mind that I had no opportunity to see and hear the witnesses and so cannot comment on their demeanour. I have drawn my conclusions after giving due allowance. I am in this regard guided by the court of Appeal decision in the case of **Okeno Vrs Republic [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)***

6. I have perused the trial Court's proceedings which are on record and I need not reproduce the same, however I shall briefly capture the relevant facts of this case.

7. The facts of the prosecution case are that Pw1 uncle to PW2 B.A, the victim, was on 29.11.2013 at 1.00 p.m. at her home which PW2, B.A went to PW1's home crying and bleeding from her private parts. PW1 asked PW2 why she was crying but she kept quiet. She took Pw2 to centre where her aunt C was, and from where PW2 told the two how she was defiled by someone in a maize plantation near her home. PW2 was then rushed to the hospital where she was admitted for 7 days. That after discharge from hospital PW2 reported to Yala Police Station and gave the name of the accused as her defiler and appellant was subsequently arrested and charged with the offence.

8. The appellant denied the offence and gave sworn statement. He stated that on 4.12.2013 at 8.00 a.m. he was sleeping at his rental house at Nyangweso Trading Centre when two men came enquiring about him, they then arrested him and escorted him to A.P. Camp then Yala Police Cells, that on 5.12.2013 he was examined at Yala District Hospital and thereafter arraigned in Court.

9. Regarding recognition of the appellant I am guided by the case of **Paul Etole and Another V. Republic CA 24 of 2000 (UR) Pg. 223** thus:-

***“The prosecution case against the second appellant was presented as one of recognition or visual identification. The appeal of the second appellant raises problems relating to evidence and visual identification. Such evidence can bring about miscarriages of justice. But such miscarriages of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused, the court should warn itself of the special need for caution, before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific weaknesses which had appeared in the identification evidence. It is true that recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made.”***

10. I have perused the trial the trial court's proceedings and examined the evidence of recognition adduced by PW2 who testified the victim B.A. Mentioned the appellant later and that appellant is a neighbour at home and is known by PW1 as Boniface Onyango. PW2 testified she knew the appellant and that she saw appellant at her home on 29.11.2013 at 1.00 p.m., they had conversation and he even gave the appellant water to drink. The Appellant gave her sweet and told her to follow him to the maize plantation. He told PW2 to her door and on refusal he forced her and removed her clothes, then defiled her. The incident took place during day time, the encounter with the appellant took a reasonable time, he a neighbour to the complainant B.A. Who knew him very well. PW2, B.A. At the earliest opportunity from the police gave the name of her defiler as Onyango the appellant. PW2 also told PW3 she was defiled by Onyango the appellant.

11. The evidence of PW1, PW2 and PW3 bring to front the issue of the first report and the importance of that report when it comes to considering the ability of the complainant to recognize the person who defiled her or committed the offence. In the court of Appeal for Eastern Africa in the case of **Republic V. Shabani Bin Donaldi Criminal Appeal No. 76 of 1940 VII EACA Page 60** it was held:

***“That it is desirable in almost every case in which an immediate report has been made to the police by someone who is subsequently called as a witness that being hearsay or the like should always be given at the trial.”***

12. PW3 was one of the people who received the first report from the complainant in this case. He said when he went to see PW2 at the hospital she told him that Onyango (appellant) had defiled her. He stated he knew Onyango as his neighbour. PW2 in her evidence testified that she later went to Yala Police Station to report and gave the name of the appellant' who she knew well.

13. In view of the evidence of PW1, PW2 and PW3 and PW8 who received report on the person who defiled Pw2 from PW3 I am satisfied that PW2 recognized her defiler as the appellant. The condition for favourable recognition were credible and reliable and I do not find any case of mistaken identity of the defiler. I therefore find that PW2 recognized the appellant and her defiler.

14. The appellant urged that all witnesses called by the prosecution save PW2 did not witness the attacker, and thus complainant being the only eye witness the prosecution did not prove their case to the required standard.

15. **Section 143 of the Evidence Act** Provides:

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

16. **Section 124 of the Evidence Act** on the other hand states:

***“Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that Section on behalf of the prosecution in 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 him.***

***Provided that where in a criminal case involving a 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.”***

17. The complaint as the time of defilement was alone however there is sufficient corroboration of her evidence from PW1, PW3, PW4, PW8 and PW9. PW1 said PW2 immediately after the incident bleeding from her private parts, she later told him he had defiled her PW3 went to the hospital and confirmed PW2 was defiled. She gave him the name of the appellant and the defiler. PW4 who received PW2 at the hospital examined PW2 and confirmed she was defiled. He produced patient record both as exhibit 3, P3 from exhibit 2. I therefore find from the aforesaid evidence there was no error on part of the trial court proceedings to convict or evidence and for reasons that there was sufficient evidence to convict the appellant with the commission of the offence.

18. On contradiction on the age of the complainant B.A., the appellant urged the complainant's age was not clear whether she was 40 years or 9 years. The charge sheet alludes to the fact that the complainant was 9 years. PW5, and Pw9 testified the complainant was 9 years old. Exhibit 2, P3 form showed the complainants age to be 9 years, the child Health card indicted the complainants date of birth as 23.4.2004. PW1 stated that she was 10 years old. From the view of the document of evidence produced the complainant's age can be ascertained, it is not unclear as submitted by the appellant. The appellant at the time of commission of the offence was 9 years old and not 40 years as alluded by the appellant.

19. On contradiction on the date of commission of the offence, the appellant alleged some witnesses said the offence was committed on 26.11.2013 but her charge sheet indicated it was on 29.11.2013. PW1, PW2, PW3, PW4, PW8 and PW9 testified that the offence was committed on 29.11.2013. The treatment notes exhibit 3 and P3 form exhibit 2 under Paragraph 2 indicate the date of commission of offence as 29.11.2013. I therefore find no material contradiction from the witness evidence or documents that on materially affect the charge sheet as drawn.

20. On the submission of the complainant to the hospital, the appellant urged there is contradiction as some witness stated she was admitted for 7 days whereas another talked of 4 weeks. The typed record reveal that PW1, PW2 and PW3 testified that the complainant was admitted for 7 days whereas PW4 talked of 4 weeks (*1 perused the handwritten record to confirm the period it appears that his trial court recorded "for a week" but not 4 weeks as typed*). Be as it may, in view of the typed proceedings there is a contradiction as pointed out by the appellant on the number of dates of admission of the complainant. The number, dates of admission do not in my view change the fact that an offence was committed but it sows the gravity of the offence. The contradictions are not material contradiction, as the fact remains that the complainant was defiled and sustained a serious injuries. That contradiction do not go to the ----- of the charge and the commission of the offence, contradictions do not affect the trial Court's findings at all and I find them non material contradiction.

21. Whether prosecution proved penetration? PW4 in his evidence described the injuries sustained by the complainant as bleeding form her private parts. He stated that complainant had laceration on her urethra with a cut wound. That she also had vaginal laceration on both labia, laceration on her anus and was bleeding. P3 form exhibit 2 confirmed the complainant was defiled **Section 8(1) of the Sexual Offences Act** Provides:

***"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."***

**"Penetration"** defined as follows:-

***"Penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person."***

I am therefore satisfied from the above that the prosecution proved that there was complete insertion of the genital organs of the appellant herein into the genital organs of the complainant **"B A."**

22. The Appellant urged the P3 form was not stamped hence not genuine. I have perused the P.3. form and I find it duly stamped the ground is without merits.

23. The appellant urged that the charge was defective in that the particulars did not support the charge. The charge preferred against the appellant was brought under **Section 8(1) (3) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that on the 29th day of November 2013 at Nyandiwa sub-location in Gem District within Siaya County intentionally caused his penis to penetrate the vagina of **B A** a child age 9 years. That the victim was aged 9 years it was wrong from the accused to have been charged under **Section 8 (1) (3) of the Sexual Offences Act**. He should have been charged under **Section 8(1) (2) of the Sexual Offences Act No. 3 of 2006**. The trial court heard the case and convicted the appellant under **Section 8 (1) (2) of the Sexual Offences Act** without the prosecution --- the charge. The issue is whether the charge was defective and whether the appellant was prejudiced. **Section 382 of the Criminal Procedure Code** provides:-

***"Subject to the provisions hereinbefore contained, no finding sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice;***

***Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised as an earlier stage in the proceedings"***

24. In view of provision of Section 382 of CPC through the charge had an error in that a wrong Section was quoted in their charge sheet the evidence before trial court supported the Section under which the

appellant was convicted with, he was not prejudiced at all as he was tried by a court of competent jurisdiction. This error is --- by provisions of Section 382 of CPC. I therefore find and hold the charge was not defective by virtue of going to another proper Section as the particulars in support of the complainant were correct and the Section did not affect the evidence given. I also found the appellant was not prejudiced as the evidence supported particulars set out in the particulars of the offence.

25. The charge sheet preferred against the appellant show that he was taken to court on 6.12.2013 in which it was indicted that he was an adult aged 19 years. The trial court proceeded to hear, convicted and sentence the appellant on the basis of the charge sheet thus he was an adult. It is of great importance for the trial magistrate to be in control of the court process and have a keen eye for detecting minors at the time of plea taking and hearing so that the minors, who are charge are not remanded with the adults or be imprisoned with the adults the court should where it is in doubt of the age of the accused and who appears to be a minor find out first him or her, his or her age assessment at the earliest opportunity so as not to fault the provisions protecting the rights of minors.

26. The trial court, convicted the appellant to life imprisonment. "That on the hearing of the appeal the appellant challenged sentence on the ground that he has herd life sentence notwithstanding that at the time of commission of the offence he was underage. This court ordered that the appellants age be determined as of the time of the commission of the offence by Siaya Referral Hospital the report was subsequently filed on 29.3.2016 which states:-

***"AGE ASSESSMENT***

***RE: BONFACE ONYANGO OGUK***

***The above named was brought to the hospital for age assessment accompanied by Prison Officers. Upon examination he is approximately 19 years. Going by that it means he was about 16 years as at 29.11.2013***

***Kindly assist."***

27. It therefore appears from the medical superintendent Siaya County Referral Hospital that as of the time of commission of the offence the appellant was aged 16 years and therefore a minor, hence at the time he was convicted by the trial court he should have been sentenced as per provisions of **Section 8(7) of the Sexual Offences Act** which provides:-

***"Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act and the Children's Act."***

not as per **Section 8(1) (2) of The Sexual Offences** that which provides:

***"(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***

***(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."***

**28. Section 191 (1) (a) – (c) by the Children Act.**

In view of the above I agree with the learned prosecution counsel for conceding that the trial court was in error in sentencing the appellant to life imprisonment instead of sentencing him as provided by **Section 191 (1) (a) – (l) by the Children Act.**

**29. I have come to thee conclusion that the evidence adduced by the prosecution was sufficient and safe to found a conviction against the appellant. I therefore uphold the conviction, but as of the time**

**of commission of the offence the appellant was a minor, aged 16 years, I will set aside the sentence of life imprisonment and order the appellant has served 1 year imprisonment. I place him under community service order under the supervision and direction of the Probation Officer Siaya County.**

**DATED AT SIAYA THIS 19TH DAY OF MAY 2016.**

**J. A. MAKAU**

**JUDGE**

**DELIVERED IN OPEN COURT IN THE PRESENCE OF:**

**Appellant in person – present.**

**M/s Ombati for State.**

**Court Clerk: 1 K. Odhiambo**

**2. M. Akideh**

**J. A. MAKAU**

**JUDGE**