



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**HCCRA NO. 15 OF 2016**

**(CORAM: J. A. MAKAU – J.)**

**NOAH LOKOL IBRAHIM .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an appeal against both the conviction and the sentence dated 12th October, 2014, in Criminal Case No. 768 of 2013 in BONDO Law Court before Hon. C.A..KUTWA – P.M.)***

**JUDGMENT**

1. The Appellant **NOAH LOKOL IBRAHIM**, was charged with an offence of **defilement contrary to section 8 (1) (2) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence are that on 3rd day of September 2013 at around 9.00 p.m. at [Particulars Withheld] Sub-Location, in Rarieda District within Siaya County the appellant intentionally caused his penis to penetrate the vagina of H I E a child aged 10 years. He faced an alternative charge of Committing an indecent Act with a Child Contrary to Section 11(1) of the Sexual Offences Act Number 3 of 2006. The particulars of the alternative charge are that on the same day, same time, same place, the appellant intentionally touched the vagina of H I E a child aged 10 years with his penis. After full trial the trial court found the appellant guilty of the alternative charge and sentenced the appellant to serve ten (10) years imprisonment.

2. After full trial the trial court found the appellant guilty of the alternative charge and sentenced the appellant to serve ten (10) years imprisonment.

3. Aggrieved by the conviction and sentence the appellant preferred this appeal setting out the grounds of appeal as follows:-

***(i) That the trial magistrate erred in law and in fact by allowing the evidence of the complainant PW1 that was not credible and consistent.***

***(ii) That the trial court erred in law and facts by allowing the evidence of the medical practitioner who did not examine the complainant and without giving any reasons as to the whereabouts of the doctor who did the examination.***

***(iii) That the trial court erred in law by failing to observe article 50 (2) (j) of the Kenyan Constitution which resulted to unfair trial thus made the appellant got confused in my defence.***

***(iv) That the trial court erred in law and fact by convicting and sentencing in the same case which was not investigated and more so the investigating officer was deliberately not called to witness in the same case herewith.***

4. At the hearing the Appellant appeared in person and the State was represented by Mr. E. Ombati Learned State Counsel.

5. That before the hearing of the appeal the Court warned the appellant that if he proceeds with the appeal and the court finds that the main charge had been proved he would face a stiffer sentence to which the appellant insisted on going on with the appeal.

6. The appellant in support of the appeal relied on his written submissions which he produced to the court. He urged that the ingredients of an offence of defilement namely penetration was not proved, that he was not identified, that there was no corroboration, that the alternative charge of indecent act with a child was not proved, nor the age of the alleged victim proved and lastly that the complainant was not a truthful witness as she had been coerced to frame the appellant with this offence.

7. The prosecution opposed the appeal through Mr. E. Ombati learned State Counsel. Mr. E. Ombati submitted that the age of the complainant was proved through production of Baptism card exhibit P2, that the appellant was identified by PW1, PW2 and PW4. That penetration was established and urged that all the ingredients of an offence of defilement were proved and that the appellant should have been convicted of the main charge and not the alternative charge, and urged the court to find the trial court erred in convicting the appellant on the alternative charge and urged the court to set aside the sentence of 10 years and substitute it with the appropriate sentence.

8. The Appellant in a quick rejoinder informed the court that if it finds him guilty on the main charge it may vary sentence. He urged that he wished to proceed with his appeal as there was no sufficient evidence to convict him especially from the evidence of the alleged victim urging he was away on duty and he did not commit the offence.

9. I am the first appellate court and as expected of me have to subject 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)'***

10. The facts of the prosecution's case form part of the record of appeal, and I need not reproduce the same, I shall however summarize the prosecution's case and the defence.

11. PW1 H I E on 3.9.2013 at 9.00 p.m. left her home for H A's home where she used to sleep but on the

way she was called by Noel Lokolo, her neighbor, the Appellant herein, who is a watchmen at Chianda High School, requesting PW1 to enter his house, on entering, the appellant told PW1 to sit on his bed, she sat and he ordered her to remove her clothes, PW1 refused but the appellant removed her skirt and pant, he covered PW1's mouth, using his hand, telling her not to scream, but PW1 started screaming drawing her mother's attention, she bit the appellant's hand, giving her opportunity to scream, the appellant removed his trouser and removed his penis and inserted it into PW1's vagina. PW1 felt pain and she screamed as the appellant defiled PW1 severally. He then left PW1 on the bed went to the door giving PW1 an opportunity to put on her clothes, sneaked from the house and found her mother outside the house. PW1 immediately told her mother Noah had defiled her. That as PW1's screams attracted many people, the school cateress's house and PW1's father came to the scene and all proceeded to the school cateress, where PW2 narrated to them what had happened. The matter was subsequently reported to Aram Police Station. PW1 was taken to hospital examined and treated. The Appellant was arrested and charged with this offence.

12. The Appellant on being put on his defence, he opted to keep silent.

13. The appellant in his appeal contends that the offence of defilement was not proved to the required standard and that the court erred in convicting him on the alternative charge of **committing an indecent act with a child**. The offence of defilement is defined under **Section 8(1) of the Sexual Offences Act** as follows:-

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

14. Penetration is defined under **Section 2 of the Sexual Offences Act** as follows:-

***“Penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person; ”***

15. The three essential ingredients of the offence of defilement are as follows:-

***(a) Penetration.***

***(b) Identification.***

***(c) Age of the victim.***

16. In the instant case, PW1 testified that the appellant called her to his house, removed her skirt and pant, he removed his trouser and his penis inserting it into her vagina, she felt pain and screamed. That the appellant defiled her severally. PW1 after sneaking outside of the appellant's house found her mother (PW2) outside the house of the appellant and told her the appellant had defiled her, she also told the school cateress (PW4). PW2 A A E, mother to the complainant (PW1) after hearing screams of a child coming from Noah's house, the appellant, she proceeded to the house and using torch light peeped through the window and saw the appellant defiling a child. PW2 screamed and many people came to the scene. The child came out and PW2 found it was her daughter H I E. Nicholas Onsondo, a Clinical Officer who examined PW1 on 4.9.2013 concluded that the child had been defiled with no forceful penetration. He produced P3 form, indicating there was alleged defilement with no evidence of forceful penetration. It is not clear what the Clinical Officer meant by no forceful penetration. I have very carefully examined the P3 form under Section “C” in which the Clinical Officer indicated normal *labia minora*, normal vagina and cervix. He gave evidence that he did not detect any discharge nor tear. In view of the evidence of PW1, the Clinical Officer and in absence of any other evidence to show that there was any injury to complainant's vagina or tear, as he found and indicated, I am inclined to agree with the trial court's finding that there was no evidence either of partial or complete penetration to the genital organs of the complainant by the genital organs of the appellant. There was however from the evidence of PW1, the complainant and PW2 her mother evidence of contact of the appellant's penis with the vagina of the complainant which leads me to find and hold that the appellant committed an indecent act

with child but did not defile her. **Section 2 of the Sexual Offence Act** defines “**indecent Act**” as follows:

**“indecent act” means an unlawful intentional act which causes:-**

**(a) Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.**

**(b) Exposure or display of any phonographic material to an person against his or her will.”**

PW1’s evidence, and that of PW2 clearly demonstrates there was contact of the genital organs of the appellant’s with that of the complainant as he tried to defile her. It is clear that the appellant unlawfully and intentionally caused his genital organs to have contact with the complainant’s genital organs but failed to penetrate into her genital organs.

17. On identification of the appellant, PW1, the complainant knew the appellant as a neighbor and by his name. He talked to her and took her to his house, that though there is no evidence on lighting, the complainant could identify the appellant by his voice, she also identified the appellant by his place of work and job, thus a watchman at Chianda High School. PW2 mother to the complainant, with aid of torch which she used to illuminate inside the house of the appellant, from where the child was screaming, she was able to recognize the appellant defiling a child. The child came out and it turned out to be her daughter, the complainant. PW2 knew the appellant by his name Noah and a former workmate of her husband. PW1 immediately gave the name of the appellant as her assailant to PW2, and PW4. PW4 testified that PW1 the complainant gave the name of the appellant as the assailant. The evidence of PW1, PW2 and PW4 placed the appellant at the scene of crime. I therefore find that the appellant was recognized as the assailant at the material time.

18. I now turn to the age of the complainant. PW1, the complainant under *voire dire* examination gave her age as 10 years. The Clinical Officer who examined PW1 the complainant, testified that she was 10 years, though he did not do age assessment on her. PW2 mother to the complainant testified that the complainant is 10 years and produced child Health Card (immunization card) exhibit P2 which shows the date of birth was 21.5.2002 which means the complainant at the time of the commission of the offence was ten (10) years. The appellant was therefore charged under the proper **Section, thus 8 (2) of the Sexual Offences Act**. I am satisfied that in proving the age of a victim, different documents can be used to prove the victim’s age. It is not only Birth Certificate that can be used only to determine the age of a victim but even other documents such as Baptism card, Child Health Card or immunization card or school leaving certificate and even age assessment report can do. I am satisfied that the immunization can be relied upon by the prosecution, to proves the age of the victim, and such document is acceptable document and the age of the victim herein was properly proved by use of such document.

19. The Appellant faulted the trial Court, for accepting the evidence of the complainant urging the same was not credible. The trial court in its judgment apart from the evidence of PW1, the complainant, considered the medical evidence and found that, there was no proof of defilement and convicted the appellant on the alternative charge. The evidence on the alternative charge was sufficient from the evidence of the Clinical Officer, PW1 the complainant, and her mother PW2. The evidence was corroborated by evidence of PW4, which placed the appellant at the scene of incident. The appellant in his submissions did not specifically state why PW1’s evidence was not credible. I therefore find no merits in this ground of appeal.

20. The appellant faulted the trial court for allowing evidence of the medical practitioner, urging he did not examine the complainant and he did give reasons as to the whereabouts of the doctor, who examined the complainant. PW1 Nicholas Onsando, Clinical Officer at Madiany District Hospital examined the patient, made treatment notes and filed the P3 form. The appellant did not demonstrate that the Clinical Officer was not the one who examined the patient. There is no evidence to suggest that the Clinical Officer was giving evidence on behalf of the maker of the document he produced. I therefore find no basis on this ground of appeal.

21. The Appellant contends **Article 50 (2) of the Constitution of Kenya 2010** was not complied with **Section 50 (2) (J) of the Constitution of Kenya 2010** provides:-

*Section 50 (2) (i) of the Constitution of Kenya 2010 provides:-*

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

*(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence”*

22. The Appellant in his written submission, has not raised any issue related to having not been informed in advance of the evidence the prosecution intended to rely on, nor has he alleged that he was denied access to that evidence. It would be wrong for the court to start speculating on what the appellant intended to state in support of this ground of appeal. I have perused the trial court’s proceedings and have noted that as early as 5.9.2013 immediately after taking plea, the court ordered copies of the relevant documents to be used in the trial by the prosecution, to be supplied to the accused at his own copying charges before the hearing on 18.9.2013. That on 2.10.2013 both the prosecution and the appellant were ready for hearing. The appellant never raised the issue of non-compliance with court’s order of 5.9.2013, when the case subsequently proceeded to hearing, the appellant was able to proceed with cross-examination, without any complainants, that lacked witnesses statements, he cross-examined witnesses at length showing that he knew the prosecution evidence. I find he was not prejudiced in any way and as such I find no merits in this ground of appeal.

23. The Appellant contends that he was convicted on the Prosecution’s case which was not investigated and in absence of the investigating officer having not given evidence. In this case PW3 No.74947 Cpl. Norman Tongu from Aram Police Station, the Investigating Officer gave evidence. He testified that he received the report of defilement, recorded witnesses statements, issued P3 form to the complainant and escorted her to the hospital for examination, that after investigation, he arrested and charged the appellant, he also produced immunization card P exhibit P 2. I therefore find that the investigation was carried out in this case before the appellant was arrested and that the investigating officer gave evidence. I find no merits in this ground of appeal.

**24. The Upshot is that I find no merits in his appeal. The conviction is upheld and sentence confirmed.**

**DATED AND SIGNED AT SIAYA THIS 13<sup>TH</sup> DAY OF OCTOBER, 2016.**

**J. A. MAKAU**

**JUDGE**

**DELIVERED THIS 13<sup>TH</sup> DAY OF OCTOBER, 2016**

**IN THE PRESENCE OF**

**APPELLANT IN PERSON PRESENT**

**MR. E. O. OMBATI FOR STATE**

**C.C.**

**K. ODHIAMBO**

**L. ATIKA**

**J. A. MAKAU**

**JUDGE**