REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

HIGH COURT CRIMINAL APPEAL NO. 21 OF 2015

(CORAM: J. A. MAKAU – J.)

JOSEPH OMBURE ORUWO ……..... APPELLANT

VERSUS

REPUBLIC …..... RESPONDENT

***(Being an appeal against both the conviction and the sentence of Life imprisonment in Criminal Case No. 61 of 2014 in Siaya Law Court before Hon. Ms. Kimani – R.M.*)**

JUDGMENT

1. **JOSEPH OMBURE ORUWO** was charged with an offence of defilement Contrary to **Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence are that on 19th January, 2014 at [particulars withheld] Trading Center in Siaya District of Siaya County he caused his penis to penetrate the vagina of **M A** a child aged 7 years. He faced on alternative charge of **Committing an indecent Act with a child Contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006**. The particulars are that on the same day, same place he unlawfully and intentionally touched the breasts, buttocks and vagina of **M A** a child aged 7 years.

2. The complainant **M A** PW1 testified that on 19th February, 2014 in the evening she was playing with her sibling and Rosiel in the open outside when Ombure called her and told her to go to his house which was nearby. The Appellant held her by hand lead her to his house. At the house Ombure completely undressed PW1 and he also undressed completely. He pushed PW1 down onto the mattress. She lay on her back and the appellant laid on top of her and did bad things to her and after he was through he told her to go away. PW1 put on her clothes and went back home, where she found her grandmother N. E's mother came later and PW1 told her what had happened to her. PW1 was then taken to Rwambwa Health Center and treated, that they thereafter proceeded to Police Station and made a report. PW1 stated the person she was referring to as Ombure is the man sitting in the dock and stated she had not known him prior to this material date. During cross-examination PW1 testified that was not the first time for Ombure to do bad manners to her stating on the first time she did not report. She also stated Ombure used to live in her mother's house and that was not the first time she was meeting the appellant and that she knew him from the past.

3. **PW2 E A O** testified that she lives with PW1 being her niece and was aged 8 years as of 6.5.2014 as she born in 2006. PW2 identified PW1's birth certificate dated 5.11.2011 as MFI-P1. She testified that on 19.1.2014 at 6.30 p.m. PW1 was at home and left to pick PW2's baby who was playing with neighbour's Children, but PW1 did not return immediately. That a child who goes by the name

"baby" on being asked by PW2 whether she had seen PW1 she said she had not. PW2 proceeded to her neighbours compound, found her children but did not find PW1. PW2 then proceeded to homestead of W O who is uncle to PW1 and found the house of, Wilson locked from inside. PW2 kicked the door and W's child by the name E O opened the door for PW2, he told her, he had not seen PW1. At 8.00 p.m. PW2 met O who told her PW1 had returned and was at her grandmother's. PW2 proceeded there and found PW1 and her grandmother. PW2 inquired from PW2 where she was and she told her Ombure had fetched her from the neighbour's residence and taken her to his house. PW2 identified Ombure as man sitting in the dock. PW2 testified she knew him as at one time he had rented a house at her mother-in-law's residence. PW1 told PW2 Ombure had defiled her. PW2 contacted one chief Felix Odongo, who came and picked PW1 and all headed to Ombure's house. That on 20.1.2014 the chief called PW2 and asked her to go to Police Station at Rwambwa Health Center. PW3 was issued with P.3. Form at Rwambwa Health Center and PW1 was examined. PW2 identified treatment notes and MFI. P2, P3 forms as MFI P3. PW2 testified appellant was arrested the same day, thus 20th January, 2014. During cross-examination PW2 testified PW1 stated the appellant had sex with her. That PW2 found the inner wear of PW1 wet. PW2 testified from her house to that of the appellant was 800 metres.

4. **PW3 Felix Don Odongo** testified that he is an assistant chief of [particulars withheld] "B" Sub/Location. That on 19.1.2014 at 10.00 p.m. he received a phone call from at least three people one of whom was Shaniel Ondulo who informed him they had arrested somebody who had defiled a minor. PW3 with a member of Community Policing one **George Ojwang Ojwang** proceeded to the homestead of Ombura and found the complainant had escaped and proceeded to his home where they found him and re-arrested him. They escorted the appellant to Nyadorera Police Station Base. PW3 recorded his statement on 21.1.2014. He also found PW1 who assisted them in searching for the culprit. PW3 testified the person they arrested was the appellant who was well known to him and that he has no grudge with the appellant. During cross-examination PW3 testified he was told the defilement took place at the appellant's house.

5. **PW4 Lameck Sagwe**, a Clinical Officer at Siaya District Hospital testified that he had a P.3 form for PW1, M A O who was 7 years at the time of examination. He testified the P.3 form was filled by Lameck Onyomba on 21.1.2014 who he had worked with before his transfer to Rwambwa Health Centre. He testified that he was conversant with his hand writing and signature. That according to P.3 form PW1 had history of having been defiled by a person known to her. That on examination her underwear was wet and stained. Clothes not torn. The date of the alleged defilement was 10.1.2014. On examination of her genitalia it was noted the labia was inflamed, that the hymen was not intact. There was a whitish creamy discharge. The conclusion was that there was physical signs of vaginal penetration because the hymen was not intact. PW4 produced P3 form as exhibit P3. PW4 testified that he had treatment notes of PW1 taken to Rwambwa Health Centre which revealed that PW1's hymen was not intact and that there was presence of whitish creamy discharge. PW4 produced treatment notes of PW1 as exhibit P.2.

6. **PW5 No. 95635 P.C. Yusuf Abdalla Mohammed** testified that on 20.1.2014, he was in the Nyadorera Police Patrol Base at 16 hours when they received a complaint concerning defilement involving PW1 who was accompanied by her relatives. That they took down witnesses statements and issued a P.3. Form. P3 was filled and returned to Police Base. The following day by the area assistant chief. The Appellant was taken to Police Patrol Base the following day by the area Assistant Chief. The Appellant was then transferred to Siaya Police Station. PW5 testified that PW1 was born on 6.5.2006 as per birth certificate given to PW5 by her step mother. Births Certificate was produced as exhibit P1. During cross-examination PW5 testified PW1 stated she was defiled by a person known to her.

7. The appellant when put on his defence opted to give sworn statement and call no witness.

8. In his defence DW1 Joseph Ombure Oruwo in his sworn testimony stated that he lives in Nyadorera in Usuno village that he is a watchman. That on 20.1.2014 at about 9.30 p.m he was on his way home from [particulars withheld] Trading Centre when he met two men who were in black clothes. They stopped him and asked him his name. On asking them who they were they grabbed him by the

collar and demanded him to produce everything that was in his pockets. They searched his pockets and made away with Kshs.600/= and a phone Nokia 110. They removed the Sim card and broke the phone into two and threw it away. He was arrested and taken to homestead whose occupants he did not know as it was dark. His hands were tied and beaten without being told the reason. They told him he would be told the reason at a Police Station that as he was bleeding from the nose and mouth they left him. That as he neared Police Station. That saw the duo following him in motorcycles. He saw 3 motorcycles, that upon reaching him one identified him an Assistant Chief. He was then mounted on the motorcycle and taken back to where he had come from. He was forced to strip and give his blood stained T-Shirt. He was forcefully dressed in another T-Shirt and taken to the Police Station at about 11.00 p.m. He was booked and stayed at Police Station the whole of 21.1.2014. He was also photographed alongside a small girl child who was there. He was then transferred to Siaya Police Station on 22.1.2014 and thereafter arraigned before Court. He concluded by stating he is a stranger to the offence with which he was charged with. During cross- examination he stated he did not know PW1. He testified he had not met all the witnesses who testified before the Court but for the first time. He testified he knows nothing of 19.1.2015.

9.The trial Magistrate evaluated the prosecution's evidence and convicted the appellant for the offence of defilement and sentenced him to serve imprisonment for life.

10. Aggrieved by both conviction and sentence, the appellant has lodged this appeal raising the following grounds in his supplementary petition of appeal:-

"(a) That, the Learned Magistrate erred in law and facts to convict him by failing to find that he was not accorded a fair trial due to failure to be provided with witnesses statements and any other relevant documents the prosecution intended to use hence Article 50 (2) (j) of the constitution was not compiled with as required in law.

(b) That the Learned Magistrate erroneously convicted me by failing to find that some of the essential witnesses were not availed in Court to clear shadows of doubt hence Section 150 of the CPC was not adhered to as required by the law.

(c) That the trial Court erroneously convicted me without considering that there was need for further investigation such as a D.N.A. Test to disclose the culprit hence Section 36(1) of the Sexual Offences Act No. 3 of 2006 was not complied with as required by the law.

(d) That the learned magistrate erroneously shifted the burden of proof on me whereas the same lies with the prosecution throughout the trial and never shifts hence Section 107 of the Evidence Act (cap 38) Laws of Kenya was not complied with as per the law.

(e) That the trial Magistrate erroneously rejected my sworn illustrative without giving cogent reasons whereas the same was not rebutted by the prosecution hence Section 169 (1) of the C.P.C. Was not adhered to as required in law.

11. At the hearing of the appeal the appellant appeared in person while the State was represented by M/s. Odumba Learned State Counsel.

12. The Appellant relied on his written submissions which were just supplementary petition of Appeal.

13. The State Counsel in opposing the appeal submitted that the State relied on evidence of PW1 a minor who at the time of the commission of the offence was aged 7 years. She repeated what PW1 had stated in her evidence adding on cross- examination PW1 stated it was not the first time for the appellant to defile her and she knew the appellant as at one time he was living at her grandmother's house. She added that PW1's evidence was corroborated by PW2 her mother who gave appellant's name as the person who had defiled PW1. She stated that PW4's evidence and medical report corroborated PW1's evidence on penetration in that her hymen was not intact, proving there was penetration. On witness statements the Learned State Counsel submitted on 14.4.2014 the accused State to as follows:-

"Accused I am not ready as I have not served copies of witness statements. I am in custody."

Case was on 20.5.2014 the case was adjourned as the appellant had not been supplied with the witness statements and Court directed he be supplied with that same "that on 3.6.2014 the State Counsel submitted the appellant had been supplied with witness statements and he was ready with the hearing."

14. The Learned State Counsel submitted that the ingredients of defilement were satisfied this penetration as per evidence of PW1 and PW4, identification/recognition was the evidence of PW1 who stated she knew the appellant before the incident as it was not the first time for the appellant to defile her PW2 also identified the appellant by his name and on issue confirm the Learned State Counsel submitted PW1 was in class 2 and she did not know her age. However PW2 gave her age and stated PW1 was born on 5.6.2006 and produced Birth Certificate. The Counsel submitted. The prosecutions demonstrated the complainant was a minor of 8 years and she lacked capacity to consent to have sex.

15. On calling essential witness the Learned State Counsel submitted the calling of witness is a prerogative of the prosecution and the prosecution called witness they deemed fit and indeed called all relevant witness. She prayed the appeal be dismissed.

16. I have now carefully considered the submissions by the appellant and the State as I note this is first appeal and as first appellate Court and as expected of me, I have subjected the entire evidence adduced before the Lower Court to a fresh evaluation and analyses being in mind that I neither saw nor heard any of the witnesses and have given due allowance. I have drawn my own conclusions and was guided by the **Court of Appeal in the case of Isaac Nga'ng'a Kahiga alias Peter Ng'ang'a Kahiga V. Republic Criminal Case No. 2012 of 2005.**

17. The appellant contend that the Learned Magistrate erred in law and facts to convict him by failing to find that he was not accorded a fair trial due to failure to be provided with witness statements and any other relevant documents the prosecution intended to use hence **50 (2) (j) of the constitution** was not complied with as required in law. **Article 50 (2) (j) of the Constitution of Kenya 2010** provides:

"50" (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;"

18. **Article 50 of the constitution of Kenya** States every person has the right to have a dispute that can be restored by the application of law decided in a fair and public hearing before a Court or if appropriate another independent and impartial tribunal or body and lists some of the rights for one to have fair trial. The rights includes right to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence. The appellant before commencement of his trial bound that he be supplied with witness statements. That was on 14.4.2014 and 20.5.2014. On 20.5.2014 the Learned trial Court ordered as follows:-

"Accused person to be supplied with prosecution witness statements. The copies to be made at the Court's registry. E.O. To facilitate. Hearing is adjourned to afford accused time to prepare the new date for 1st trial 3.6.2014."

19. On 3.6.2014 when the matter came up for hearing the appellant stated:-

"I am equally ready to proceed." the appellant it should be noted on 14.4.2014 and 20.5.2014, was not ready as he needed witnesses statements on 20.5.2014 trial Court ordered the appellant be supplied with witness statements and E.O. was to ensure that was done. On 3.6.2014 the appellant informed Court he was ready to proceed. He did not raise the issue having not been supplied with witness statements.

That throughout the hearing of the matter the appellant over raised the issue after each witness had given evidence. This I believe is because Court's order of 20.5.2014 had been complied with. In view of the above I am satisfied, I find no basis of the appellant's claim that **article 50 (2) (j)** of the constitution had been violated and as such he was denied his constitutional rights to a fair trial. I find no merits in this ground of appeal and I dismiss the same.

20. The appellant in his 2nd ground of appeal contest that the trial Court in convicting him failed to consider that some of the essential witnesses were not availed in Court to clear shadows of doubt hence **Section 150 of the Criminal Procedure Code** was not observed to as required by law.

Section 150 of the Criminal Procedure Code Provides:-

> ***"Section 150, A Court may, at any stage of a trial or other proceedings, under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-re-examine a person already examined, and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case.***
>
> ***Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the Court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion either party may be prejudiced by the calling of that person as a witness."***

21. **Section 150 of Criminal Procedure Code** deals with Court's power to furnish witnesses or examine person present, only if his evidence appears to it essential to the just decision of the case. The Court is not supposed to take the role of a prosecution in a Criminal matter and its role remains that of a judge and not a prosecution on when applying the provision of **Section 150 Criminal Procedure Code**. The prosecution is the one entrusted with a role of calling witnesses who they feel are relevant and would assist Court reach just decision. The appellant has not discussed the names of the witnesses who were essential in this case and the prosecution failed to call them. In absence of the names of the witnesses who the prosecution failed to call and in absence of ulterior motive for not calling the undisclosed witness the Court cannot draw an inference that such undisclosed witness was not called because they would not give favourable evidence for the prosecution. I therefore find no merits on this ground and the same is dismissed accordingly.

The appellant faulted this trial Court for convicting him without considering that there was need for further investigation such as D.N.A. Test to disclose the culprit hence **Section 36 (1) of the Sexual Offences Act No. 3 of 2006** was not considered with as required by the law. **Section 36(1) of the Sexual Offences Act** Provides:

> ***"(36(1) Notwithstanding the provisions of section 26 of this Act or any other law, where a persons with committing an offence under this Act, the Court may direct that an appropriate sample offence under this Act, the Court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as Court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence."***

Section 36 in my view cannot be dealt with in isolation of S**ection 26 of the Sexual Offences Act.** The said Sections are primarily intended to give a trial Court trying a suspect charged with committing an offence not S**exual Offences Ac**t powers to give sample or have sample taken from him for the purpose of forensic or other scientific testing, including a D.N.A. Test, in order together evidence and can ascertain whether or not the accused person committed an offence. This should not be taken as the only way on offence under **Sexual Offence Act** be proved but is one of the way that must be used especially where there are no direct evidence. In the instant case there was direct evidence for PW1, PW2 and PW3. There was also evidence of the doctor PW4 which corroborate evidence of PW1. The trial Court

did not require the appellant to be subjected to D.N.A. To find him guilty as charged. PW1 had not as per PW4's medical report did show that PW1 had been infected with H.I.V. or any life threatening Sexually transmitted disease intentionally or knowingly and willfully to provoke application of **S. 36 (1) of the Sexual Offences Act.** I therefore found the trial Court was justified in not applying **Section 36 (1) of the Sexual Offences Act** and which Section is not mandatory when trial Court's are dealing with an offence not **Sexual Offences Act**. I find no merits in this grand of appeal and dismiss the ground.

The appellant contended that the learned trial Magistrate erroneously shifted the burden of proof to the defence whereas the same lied with the prosecution throughout the trial and never shifts hence **Section 107 of the Evidence Act (Cap 38) Laws of Kenya** was not coupled with as per law to believe the appellant meant **Section 107 of Evidence Act (Cap 80 and not 38) Laws of Kenya. Section 107 of Evidence Act** Provides:-

> ***"Section 107 (1) Whoever desire any Court to give judgment as to any legal rights or liability dependant on the existence of facts which he asserts must prove that those facts exist.***
>
> ***2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."***

The Appellant was charged with an offence of defilement under **Section 8(1)** as read with **Section 8 (2) of the Sexual Offences Act.** The prosecution has the burden to prove the three ingredients of the offence, this identification penetration and consent. PW1 in her evidence testified that the appellant Ombure who she had known from the past called her and told her to go to his house. The time was around 6.30 p.m. it was not dark and PW1 saw the appellant clearly PW1 after PW2 found her at her grandmother's house saw PW2. The name of Ombure as the person who had defiled her PW3 was also given the name of the appellant and proceeded to arrest the appellant. From the evidence of PW1, PW2 and PW3 the appellant was identified by PW1 who gave his name PW2 and PW3. He stayed with the minor for 2 hours and she had known him before this is a case of recognitions of the appellant to find from the appellant spoke to her when he met her at her neighbours home and when he took her to her house. She recognized him by voice as well. The trial Court saw the complainant testifying before it and visited that PW1 gave her evidence with a lot of lucidity and further noted there was nothing in her dimension to get that what she saw was untrue the trial Court further to be a credible witness and there is nothing that was raised by appellant to make this Court find the trial Court came to no wrong conclusion.
I therefore find and hold this condition prevailing here conducive to favourable identification to hold the appellant was properly identified by PW1 who gave the name of her assailant to PW2 who communicated the same to PW3 leading to the arrest of the appellant. On issue of penetration PW1 testified that the appellant at his house completely undressed PW1. He also undressed PW1. He also undressed, put her on the mattress and made her lie on her back and he laid on top of her and did bad manners to her. That after he was through he told her to go away. She stated that was not his first time for appellant to do bad manners to her. PW2 testified she checked on PW1 private parts and found her inner wear wet PW4 testified on the examination of PW1 her underwear was wet and stained. Her genitalia reveal that labia were inflamed and hymen was not intact that there was whitish creamy discharge which according to PW4 was evident of physical signs of vaginal penetration because the hymen was not intact. The name of PW1 was corroborated by P.3. form, exhibit P.3. and Treatment notes exhibit P.2. to therefore have doubts from the evidence of PW1 and PW4 that the prosecution proved penetration the evidence by PW2 is that PW1 was born on 6.5.2006 as per exhibit P.1. That at the time of commission of the offence PW1 was aged 7 years. PW1 being a minor could not consent to sex. I therefore find that the prosecution proved that the complainant lacked capacity to consent. Consequently the three ingredients of an offence defilement have proved to the required prescribed standard by the provision. The burden of proof was now shifted to the appellant to proof his innocence and the burden of proof lied with the prosecution through the trial and they did prove their case beyond any reasonable doubt. I do not find any error in the learned trial Magistrate's judgment. The appellant's 4th ground of appeal is without merits is accordingly dismissed.

The appellant's in his 5th ground of appeal contend that the trial magistrate erroneously rejected his sworn illustrative defence without giving reasons whereas the same was not rebutted by the prosecution hence

Section 169 (1) of the C.P.C. was not adhered to as required.

Section 169 (1) C.P.C. Deals with contents of judgment which requires any judgment to be written by or under direction of presiding officer of the Court in the language of Court, contrary points for determination, the decision though and reasons for the decision and be dated and signed by the presiding officer in open Court at the time of pronouncing it. The trial Court's judgment reveals that it was written by the presiding officer of the Court **Mr. M.S. Kimani (R.M.)** in English language, by language of Court, the issue for determination are well set out in the judgment and the stated reasons for the decision are set out in the judgment. It is dated and signed by the presiding officer and that it was done in open Court at the time of pronouncing it. The appellant did not point out in what area he claims **Section 169 (1) of C.P.C**. Was not complied with.

The trial Magistrate considered the appellant's sworn defence and stated as follows:-

> ***"And whilst the accused gave a sworn statement in his defence, I just do not see how for absolutely no reasons at all PW3 would have caused the accused to be arrested and charged before this Court with serious offences of the like we are dealing with here today. In fact, the accused never alluded to the existence of any grudge, ill will or malice on the part of PW3. In circumstances, I reject the accused person's defence."***

The appellant in his sworn defence did not address the Court on the events of the date of the offence this on 19th January, 2014, but on his arrest, his defence did not challenge the prosecutions case on the material date the offfence was alleged to have been committed inspite of PW1, PW2 and PW3 evidence having placed him on his defence of crime. His evidence was evasive, an afterthought and a mere denial. It was analyzed and properly rejected. I find the defence untenable, an afterthought and a mere denial. I therefore find no merits in appellant's ground of appeal number 5 and the same is dismissed.

The upshot is that the appeal is dismissed. The convictions is sound and I find no reason to interfere. The conviction is therefore upheld. As for the sentence, the appellant was sentenced to serve life imprison under **Section 8 (2) of the Sexual Offences Act No. 3 of 2006**, the only sentence provided for is life imprisonment. The appellant was given the mandatory sentence and the same is confirmed.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 26TH DAY OF NOVEMBER, 2015.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT

In the presence of**:**

M/s. Odumba State Counsel – present

Appellant – Present

Court Clerk – Mohammed Akidae

Court Clerk – David Tunya

J. A. MAKAU

JUDGE