



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT SIAYA**

**HIGH COURT CRIMINAL APPEAL NO. 82 OF 2015**

**(CORAM: J. A. MAKAU – J.)**

**VINCENT NELSON OKUMU..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal against both the conviction and the sentence in Criminal Case No. 983 of 2013 in Bondo Law Court before Hon. C.A. Kutwa – P.M.)***

**JUDGMENT**

1. The Appellant **VINCENT NELSON OKUMU** was charged with an 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 diverse dates between 2nd to 9th November, 2013, at night hours, Kambare Sub-location in Siaya County, unlawfully and intentionally caused his penis to penetrate the vagina of **E A O**, a child aged 16 years. The appellant faced alternative count of **Committing an Indecent Act with a Child Contrary to Section II(I) of the Sexual Offences Act No. 3 of 2006**, The particulars of alternative count are that on the diverse dates between 2nd to 9th November 2013, at night hours, Kambare sub-location in Siaya County, the appellant unlawfully and intentionally touched the vagina of **E A O** with his penis a child aged 16 years.

2. The complainant PW1 **E A O** testified that she was born on 10.1.1996 as per her birth certificate MFI P1 and that she was in Form IV at [particulars withheld] Secondary School. That on 4.11.2013 at 5.00 p.m. she left home and went to Nelson's home, her boyfriend having started the relationship 2013. PW1 did not find the appellant but he came later and PW1 decided to spend the night at the appellant's house. They had sex and it was not time to have sex with him. That the sex was by her consent because the appellant was her boy-friend. The following day PW1 went home. She stated during the time of sex she did not feel any pain. At home she told her mother where she was and she was told to go back to the appellant's home which PW1 did that she used to go to school and back to the accused's home. That on a Monday Police went to Appellant's home but did not find him but took the complainant to A.P. Camp (Siala). The Police later arrested the Appellant and took the complainant's clothes and shoes. PW1 identified school uniform as MFI – P2, assorted clothes MFI P3, pouch of MFI P4 and pair of shoes MFI P5, PW1 testified she was later taken to Bondo District Hospital, where a P.3 form was filled which was marked MFI P.6. She was released and the accused in dock was later arraigned in Court.

3. **PW2 J O O** testified that on 2.11.2013 at 6.00 a.m. the complainant left home and spent the night outside and came the following day. 2 PW2 asked PW1 whether she had come back with her clothes, pouch and shoes but she did not reply leading to PW2 to tell her to go and bring the clothes. That she left and came back on 4.11.2013 and left again. PW2 went to check with the school but did not find her there. She investigated and discovered where PW1 was. She reported to Siala and later received report from the Police that PW1 was taken from the appellant's home but the appellant wasn't there. The appellant was later arrested and PW2 found her daughter and the appellant at Siala A.P. Camp. PW2 testified that she knew the appellant and did not know that he was a friend of her daughter. PW2 testified that she did not know that the appellant was her daughter's boyfriend and she had never seen him at her home.

4. **PW3 No.2009014894 APC Bernard Moi**, testified that on 9.11.2013 at 1.00 a.m. PW2, reported a case of a person who was cohabiting with her daughter who was a student. That PW3 proceeded to the home of the person at 11.00 a.m. and found the girl, one E A and the person one Vincent ran away. That at 4.30 a.m. PW3 went to the house of Vincent as arrested him. They received clothes belonging to E. PW3 identification Vincent as the accused in the dock.

During cross-examination PW3 testified that when they arrested the Appellant the girl was not there.

5. **PW4 No. 45477 Cpl. Boniface Wanjala** testified that on 4.4.2014 at 8.00 a.m. he received the appellant with a P.3 and Birth Certificate of the complainant from O.C.S. and complainant's shoes, clutch, uniform, skirts and a scarf and Appellant's P.3 form. He testified the exhibit were recovered from the appellant's house who he was informed was accused of defilement. He produced Birth Certificate as P. Exhibit 1, uniform P exhibit 2, clothes P exhibit 3, clutch P exhibit 4 and shoes P. exhibit 5. He testified he never saw the accused and he did not recover the exhibits. He stated the investigating officer was at a training.

6. **PW5 Dr. Bobby Awino** from Bondo District Hospital testified that he examined PW1 on 10.11.2013. That her clothes had no stains or tears nor did she have any physical injuries. He noted the external genitalia was normal, no discharge noticed and that she was not pregnant. No spermatozoa were seen. He testified it was as of defilement with consent. He produced P.3. as P exhibit 6 and results as P. exhibit 8. On the appellant he testified they examined him and found his genitalia was normal urinalyses normal and produced P.3 as exhibits 7 and results P. exhibit 9.

7. The appellant on being put on his defence he opted to give unsworn statement and call no witness.

8. The trial Magistrate evaluated the prosecution's evidence and the appellant's unsworn defence and convicted the appellant for the offence of defilement and sentenced him to serve imprisonment for 15 years.

9. Aggrieved by the conviction and sentence of the trial Court the appellant lodged this appeal raising the following grounds:-

***“1. That the learned trial Magistrate erred in law and facts by failing to observe that the birth certificate of the complainant and/or age assessment was not adduced before the Court.***

***2. That the learned trial Magistrate erred in analyzing and/or evaluating the respondent's evidence separately forming a considered opinion or impression thereof.***

***3. That the medical evidence was not well corroborated as the law requires.***

***4. That the prosecution Court exhibits e.g. school books availed had nothing to do and connect with the allegations.***

***5. That the complainant clearly stated in her sworn evidence that she was an adult of eighteen years old in age.***

**6. That since he could not recall all that had transpired in the Court during the trial, he begged to be supplied with the certified trial proceedings to add more grounds and be present during the hearing of appeal.**

**REASONS WHEREFORE:- Appeal be allowed, conviction quashed and sentence set aside.”**

10. Being first appellate Court, I shall subject the entire evidence adduced before the trial Court to a fresh evaluation and analysis and draw my own conclusions. I am alive to the fact that I neither saw or heard any of the witnesses and cannot comment on their demeanor. I am guided on the duty of a first appellate Court by Court of Appeal decision **Kiilu and Another V. R. [2005] 1 KLR 174.**

11. At the hearing of the appeal the appellant appeared in person and relied on his written submissions which he gave to the Court.

12. The State in opposing the appeal submitted that at the time of commission of the offence the complainant was a minor as per birth certificate P. exhibit 1, that the trial Court analyzed and evaluated the prosecution's evidence and the evidence was found sufficient to sustain conviction, that though the defence was not evaluated the appellant was not prejudiced, that P.3 form was filled by a person with skill and experience and it corroborated the complainant's complaint, that the victim was 17 years and 10 months at time of commission of the offence and therefore a minor, that PW1 confirmed she had sex with the appellant though P.3. Form do not confirm penetration PW1 did and trial Court was satisfied PW1 was truthful and needed no corroboration. On the sentence State Counsel stated that the sentence of 15 years was the minimum mandatory sentence and was proper.

13. The appellant's first ground of appeal is that the Learned trial Magistrate erred in law and fact by failing to observe that the birth certificate of the complainant and/or age assessment was not adduced before Court. PW1 testified she was born on 10.1.1996 and had birth which was certificate which was marked as MFI P 1, PW4 produced complainant's Birth Certificate as P. Exhibit 1. P. exhibit 1 show the complainant was born on 10th January, 1996 showing at the time of commission of the offence between 2nd to 9th November, 2013. She was 17 years and 11 months. In view of the evidence produced before the trial Court, I am satisfied birth Certificate of the complainant was produced and her age given to Court. I find though the complainant's age was at the time of commission of the offence at border line the appellant's defence to the charge was not that the complainant had deceived him into believing that she was over the age of 18 years at the time of the alleged commission of the offence and that from that the appellant reasonably believed that the child was over the age of 18 years. **Section 8 (5) (a) and (b) of the Sexual offences Act** provides:-

“8 (5) It is a defence to a charge under this section if -

**“(a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and**

**b. the accused reasonably believed that the child was over the age of eighteen years.”**

I therefore find no merits on this ground of appeal.

14. The appellant faulted the trial Court for analyzing and/or evaluating the respondent's evidence separately and as such formed wrong impression. The trial magistrate in analyzing the prosecution's evidence party stated as follows:

**“The essential element in the offence of defilement is “penetration” penetration is established by evidence from the victim and is corroborated by medical evidence.” -----.**

Further down the Court stated:-

**“The complainant was very confident and concise in her evidence. She was defiled yes but she**

*consented to the Act. I was satisfied that her evidence was truthful and need no corroboration. Be that as it may be, I found that her evidence was corroborated by her mother. The medical officers and medical report.”*

15. I find confusion in the trial magistrate's analysis and evaluation of the prosecution the prosecution evidence. Is the trial Court saying that there was corroboration or that there was none but he believed the complainant was telling the truth? One cannot have both at the same time.

16. PW1 stated that she went to appellant's home on 4.11.2013 and spent the night with the appellant. That they had sex. That on the following day she went back home and was told to go back to where she was and returned to the appellant's home. PW2 recalled that the complainant never spend at home on 2.11.2013 but returned on 3.11.2013 and that she left again on 4.11.2013. PW3 testified that on 9.11.2013 they collected the complainant from the appellant's home when he paid a visit there. PW2 and PW3 never found the complainant with the appellant between 2nd to 9th November, 2013. None of them found the complainant and appellant together at the appellant's home. The items belonging to the complainant allegedly collected from the appellant's home were collected by PW3 in absence of the complainant then who did show PW3 the place where the clothes were? Who identified the items to PW3 and the appellant's home? PW4 produced exhibits which had been received by investigating officer who did not give evidence. He did not know where the exhibits had been recovered from on his own part. The investigating officer's failure to attend and give evidence was not sufficiently explained. The failure to explain why the investigating officer could not attend Court before PW4 gave evidence and produced the exhibits in my view raises serious suspicion as to where the exhibits had been recovered from. The investigating officer in a criminal case is a vital witness who should always be called to give evidence and his failure to be called and failure to explain his unavailability can be taken to mean his evidence do not support the prosecution's case. Further more the evidence purportedly recovered from appellant's home by PW3 or differently from the one produced by PW4.

17. The medical report P. exhibit 6 and evidence of PW5 is that the complainant on examination on 10.11.2013, a day after she was purportedly collected from the appellant's home, the clothes had no stains or tear nor did she have any physical injuries. That the external genitalia was normal and no discharge was noted. The doctor did not find any evidence of penetration and if he did he did not tell the Court of any. So where is the corroboration that the trial Court talked of? None at all. The trial Court stated that there was corroboration from PW2 and PW3. PW2 had not known the appellant was a boyfriend of her daughter before nor had the appellant visited her home. PW2 did not state the name of the person who her daughter was with nor did she, when she made report to the police state she knew him but was only told by PW3. Her evidence do not therefore corroborate the evidence of PW1. PW3 testified they went to the home of the person who was cohabiting with the complainant one Vincent. PW3 testified that Vincent ran away. This evidence is not corroborated by PW1 who testified when she was collected by Police she was at Nelson's home and Police did not find Nelson. The name Vincent given by PW3 was not confirmed to be that of Nelson by any other witness and that the name Vincent PW3 was talking of was of the same person PW1 was talking of as the name Vincent is a common Christian name that is commonly used in this country and Vincent could be anyone of them and not necessary the appellant.

18. I therefore find the trial Court erred in failing to analyze and evaluate the entire evidence before reaching its conclusion that the complainant's evidence was corroborated. On the other hand the complainant talked of having had sex with the appellant between 2nd and 9th November, 2013, yet PW5 could not find any evidence of penetration or evidence of defilement when it examined the complainant a day after the alleged day of arrest the trial Court did analyze the appellant's defence who denied the offence. The absence of evidence of sexual assault or defilement of the complainant would tend to support the appellant's defence. Had the trial Court taken serious consideration of the evidence of the complainant; that of PW5 and the accused it would not have come to the conclusion that the evidence of complainant was truthful and did not need corroboration. The trial Court in an attempt to comply with **Section 124 of the Evidence Act** relied on the evidence of the complainant but in doing so failed to record reasons in the proceedings that it was satisfied the alleged victim was telling the truth. I find such a finding to have been contrary to **Section 124 of the Evidence Act** as there were other evidence to consider which the trial Court failed to consider and as such came to wrong conclusion.

19. I have on evaluation and analysis dealt with ground 2 which dealt to great extent with all other grounds raised by the appellant in his appeal and having come to conclusion that I have, I feel this ground disposes, off, this appeal and I need not deal with the other grounds as doing so would be a repetition of what I have already stated.

20. The upshot is that the appellant's appeal is merited. I hold that the conviction and sentence is unsafe and unsatisfactory. I hereby set aside the convictions and

sentence meted upon the appellant. I order that the appellant be and is hereby set at liberty forthwith unless otherwise lawfully held.

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

**J. A. MAKAU**

**JUDGE**

**DELIVERED IN OPEN COURT THIS 26TH DAY OF NOVEMBER, 2015.**

In the presence of:

M/s. Odumba State Counsel – present Appellant – Present

Court Clerk – Kevin Odhiambo Court Clerk – Mohammed Akidae

**J. A. MAKAU**

**JUDGE**