REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL APPEAL NO. 11 OF 2013

DANIEL OGWAKO DOLA……..……..…….APPELLANT

VERSUS

REPUBLIC……..…….…..…RESPONDENT

JUDGMENT

(Appeal from the judgment, conviction and sentence of George M.A. Ong'ondo, A.g. Chief Magistrate made on the 29th May, 2013, in Oyugis , SPM SOA No. 10 of 2012)

1. The appellant, DANIEL OGWAKO DOLA was charged at the Senior Principal Magistrate's Court at Oyugis with the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act, No. 3 of 2006. He also faced an alternative charge of indecent act with a child contrary to section 11(1) of the Sexual Offences Act, No. 3 of 2006. The particulars of the principal charge were that, on the 7th day of June, 2012 at around 22 hours at [particulars withheld] North Karachwonyo District within Homa Bay County, he intentionally caused his penis to penetrate the vagina of PA , a child aged 9 years. The particulars of the alternative charge were that, on the same date and time at the same location, he unlawfully committed indecent act with P A , a child aged 9 years by rubbing his penis against her vagina. The appellant was tried, convicted and sentenced to serve life imprisonment in a judgment that was delivered by the trial court on 29th May, 2013. The appellant was dissatisfied with the said judgment and has preferred this appeal against his conviction and sentence.The appellant has put forward the following grounds of appeal against the decision of the trial court:-

i. **The learned trial magistrate erred infact and in law by holding that the appellant was guilty of the offence charged in respect of count (1) when the prosecution had not established guilt beyond the required standard of proof.**
ii. **The learned trial magistrate erred in law by analyzing the respondent's evidence separately, forming a considered opinion thereof and then laying the burden of disproving the pre-meditated impression upon the appellant contrary to the principle in criminal law which casts the burden of proof upon the Respondent.**
iii. **The learned trial magistrate erred in law in finding that the appellant witnesses were untruthful, without assigning any credible reason for such finding, consequently the trial learned magistrate failed to approach the judgment of the appellant with an impartial judicial mind and hence the failure to take cognizance of the material discrepancies apparent in the evidence tendered by the respondents witness.**
iv. **The learned trial magistrate erred in law in failing to consider the appellants submissions and thus arrived at a conclusion contrary to law and weight of the evidence on record.**
v. **The learned trial magistrate found the accused guilty of defilement contrary to section 8(1)**

as read with section 8(2) of the Sexual offences Act No. 3 of 2006 without the prosecution establishing the age of the accused.

2. To prove its case at the trial court, the prosecution called a total of six witnesses. The prosecution's first witness was the complainant, P A (herein after referred to as "**the complainant"** or "**PW1**"). Before taking the evidence of PW1, the court conducted a *voire dire* to ascertain whether PW1 understood the meaning of taking an oath and if she was not, whether she was possessed of sufficient intelligence and understood the importance of telling the truth. PW1 in her sworn testimonytold the trial court that on the 7th June, 2012 at about 10p.m. she was in the house of the appellantbecause the appellant's wife was unwell and as such she was asked to go and sleep in the appellant's house. The appellant and his wife slept on a bed while PW1 and the appellant's children slept in the sitting room. PW1 slept with her clothes on. While PW1was sleeping, the appellant came, tied her mouth and lay on top of her after removing her knickers. PW1saw the appellant through the light that was being emitted froma lamp. The appellant had a short trouser which he removed halfway before penetratingPW1's genital organ using his penis. PW1 who felt pain in the process screamed but the appellant covered her mouth using his hand.
3. PW1 told court that after the ordeal, she sat on a chair until morning. She felt pain on her vagina and blood was oozing therefrom. PW1 went to their home and took a shower. She did not report the ordeal to any one because the appellant had threatened to beat her up in the event that she talked of the incident. She told the court that a neighbor who noticed that she had a problem took her to the area chief. She was thereafter taken to Wagwe Health Centre for treatment and appropriate report made at Kendu Bay Police Station. The appellant was then arrested and placed in police cells. PW1 identified P3 Form dated 14th June, 2012 in her names and her treatment notes from Wagwe Health Centre. PW1 told the court that she was staying with her grandmother as her parents were deceased and that the appellant's son RAILA witnessed the appellant defiling her.
4. The prosecution second witness, PW2, George Odhiambo Ondieki, the area assistant chief testified that; on 13th June, 2012 at about mid-day he received information that a girl from [particulars withheld] Primary School had been defiled. He rushed to the said school and interrogated the girl. The girl was PW1 and she was in class 4. PW1 told him that she had been defiled by a person known to her namely, the appellant herein who was her guardian.PW2 took PW1 to Wagwe Health Centre where she was examined and treated on 13th June, 2012. PW1 thereafter refused to go back to her guardian. She was taken in by a nurse from the said health centre. On 14th June, 2012, PW2 arrested the appellant and took him to Kendu Bay Police Station.
5. The prosecution's third witness was, Newborn Okari (PW3). PW3 was a clinical officer based at Kendu Bay Sub-District Hospital. He examined PW1 and filled the P3 Form. He told the court that at the time of the examination of PW1, she had changed her clothes. He therefore relied on PW1's medical history. PW1claimedto have been sexually assaulted by a person known to her. PW1 was sober at the time of the examination. He noted no abnormalities from PW1's head to toe. She had been prescribed antibiotics and pain killers. On examination,PW1'sexternal genitalia was found to have been bruised and her hymen broken. A creamish discharge was also noted between her labia majora and minora. PW3 carried no lab tests on PW1 since she was presented to hospital a week after the incident. He testified further that since the bruises in PW1's genitalia were about a week old,his conclusion was that penetration had taken place. He produced P3 Form and PW1's treatment notes as exhibits. He put the age of PW1 at 9 years.PW3 also examined the appellant on the same day. Like PW1, the appellant had also changed clothes. He found the appellant who was 28 years sober and his physical body normal. His external genitalia werealso normal. He carried no lab tests on the appellant. On cross examination by appellant he said that there was nothing to show that PW 1 was 9 years old. His age assessment of PW1 was based purely on his examination PW1.
6. J O S (PW4) was the head teacher at [particulars withheld]primary school where PW1 was a pupil. He told the court that he received a phone call on 7th June, 2012 from a member of the public that PW1 was found on the road crying and that she appeared to have been severely molested.PW1 was not at school on that day.When PW1 came to school the next day he interrogated her and she told him that her guardian had defiled her. PW4 then left PW1 with the

school deputy head teacher who was to investigate the matter further. PW1 gave the deputy head teacher the same information. PW4 then decided to report the matter tothe area assistant chief. He confirmed that PW1 was taken to Kendu bay sub district hospital and that he recorded a statement at Kendu Bay Police Station.

7. M O O (PW5), was the deputy head teacher at [particulars withheld] primary school. She confirmed having been called by PW4 and asked to talk to PW1. She told the court that PW1 revealed to her that her guardian used to defile her.
8. CPL. ELIZABETH CHEBII NO. 79450(PW6)was a police officer attached to Kendu Bay police station. She told the court that on 14th June, 2012 at about 1.15p.m. PW1, PW2, PW4 and the appellant came to Kendu Bay Police Station and it was alleged that the appellant had defiled PW1 on the night of 7th June, 2012. PW6 took PW1 and the appellant to hospital for examination and had P3 Forms for both of them filled. She then took their statements. PW6 told the court that her investigations had revealed that the appellant had penetrated PW1's sexual organ and that PW1 was disturbed. She therefore charged the appellant. That marked the close of the prosecution's case.
9. The trial court considered the prosecution's evidence and found that there was a prima facie case made out against the appellant. The appellant was accordingly put on his defence. The appellant chose to give a sworn testimony and to call two (2) witnesses. In his defence, the appellant (DW1), told the trial court that he knew PW1 who is a sister to his wife. According to him, PW1 was 13 years old and was a pupil at [particulars withheld] primary school. He told the court that, on the material night, he was with his wife L A (DW2) in his house where they slept in their bedroom. PW1 slept in their kitchen house with the appellant's son, B O, G a.k.a R (DW3). He did not go to where PW1 was sleeping. The next morning, the appellant who was a fisherman went on duty as usual. On the 13th June, 2012 at about 2p.m. he was informed by his wife that PW1 had not come back from school. He went to PW1's school to look for her but failed to get her. He was told by PW4 that PW1 was with the area assistant chief who in turn referred him to the area chief. The area chief told him that he was suspected of having had carnal knowledge of PW1. He was thereafter arrested and charged. He denied defiling PW1. On cross examination he told the court that he had stayed with PW1 for about five years as his relative and that there was no grudge between them except that he had differed with PW1 when he asked her about the strange clothes that his wife had found among PW1's clothes.
10. The appellant's first witness, L A O(DW2), is the wife to the appellant and a sister to PW1. She told the court that the charges against the appellant were false. She told court that on the material night she slept with the appellant in the same house and that the appellant did not wake up. She told the court that PW1 and their son, B O O alias "R" (DW3) slept in the kitchen house belonging to her mother in-law. On the following day, PW1 told her (DW2) that she was unwell and she gave her some medication for two days. On the 3rd day, PW1 went to school but failed to return home at lunch hour. Later on, she learnt that PW1was taken to the area chief on allegation that the appellant had defiled her. She did not check the PW1's private parts. On cross examination, she reiterated her evidence in chief but added that they had stayed with PW1 for three years.
11. The appellant's second witness was BO O a.k.a R (DW3). He was first taken through *voire dire* by the court. After the court satisfied itself that he understood the meaning of taking oath, he was allowed to testify on oath. He told the court that on the material night,he was with PW1 in a house that belonged to his grandmother. PW1 went out to study in the house of his other grandmother and left him alone sleeping and she did not come back until 6.00 a.m. the following day. He told the court that no person came to the house where he slept that night and that when PW1 returned to the house in the morning, she had a cloth belonging to a lady and when asked about it, she ran away.
12. The trial court after analyzing the evidence on record found the accused guilty of defilement and convicted him accordingly to life imprisonment. When this appeal came up for hearing before me on 14th October, 2013, Mr. Ochoki, advocate appeared for the appellant while Mr. Oluoch, Assistant Deputy Director of Public Prosecutions appeared for the state. Mr. Ochoki argued only grounds 1 and 5 of the appellant's grounds of appeal which grounds he argued together. He abandoned the other grounds of appeal. In his submissions on the said groundsof appeal, Mr. Ochoki submitted that there were material contradictions in the prosecution's case that should have been resolved in favour of the appellant. Counsel highlighted what he termed as

contradictions in the evidence of PW1, PW2, PW3, PW4 and PW5 as to when the offence was committed and when it was reported. He contended that in view of these contradictions, it was not clear as to when the alleged defilement actually took place. Counsel submitted that a contradiction as to the reporting date of the incident was material having regard to the fact that the appellant was examined by a clinical officer more than one week after the alleged defilement. Counsel submitted further that the age of the complainant was not properly established before the trial court as no evidence in the form of a birth certificate was produced to prove the complainant's age. In support of this submission, counsel cited the case of, **JonCardon Wagnervs. Republic,NairobiCriminal Appeal No. 404 of 2009(unreported),** where, Warsame J. stated that, the most important element in a charge of defilement is the age of the minor. Counsel submitted further that the trial court did not adopt proper procedure in admitting the evidence of the complainant who was a minor. In support of this submission, he relied on the case of, **Kemoni vs. Republic [1991] KLR 489** where Patel J. set aside a conviction on the ground that a proper procedure was not followed in receiving the evidence of a minor. Counsel also cited the case of **Katana Kesi vs. Republic [2008] eKLR,** in which the court held that it was not enough for a child just to state that she knows what swearing means. Lastly, Counsel submitted that the complainant's evidence was not corroborated and that in the absence of corroboration the conviction of the appellant was unsafe. He urged the court to allow the appeal and quash the appellant's conviction and sentence.

13. In opposing the appeal, Mr. Oluoch submitted that the contradictions as to when the offence occurred or when it was reported are immaterial and that the same are curable under section 382 of the Criminal Procedure Code, Cap. 75 Laws of Kenya as no prejudice was caused to the accused as a result thereof. He submitted further that there was a *voire dire* conducted by the trial courtand that the manner of conducting *voire dire* is a matter of style which may vary from one judicial officer to the other. On the issue of corroboration, Mr. Oluoch referred to the provisions of section 124 of the Evidence Act, Cap. 80, Laws of Kenya and submitted that, in Sexual offences where the evidence is only that of the complainant, the court can rely on that evidence without corroboration.In support of this submission, he cited the case of, **Jacob Odhiambo Omumbo vs. Republic, Court of Appeal at Kisumu, Criminal Appeal No. 80 of 2008(unreported).**On the cases cited by the appellant's advocate in support of his submission on the issue of corroboration, counsel submitted that the same were decided prior to the change in the law as concerns sexual offences. Counsel submitted that in any event, the complainant's evidence was corroborated by the evidence of PW3 and PW4. Mr. Oluoch submitted further that in sexual offences, the distressing condition of the complainant is a sufficient corroboration. In support of this submission, he relied on the case of, **Moses Kamau Waweru vs. Republic, Criminal Appeal No. 53 of 1988 (unreported).** He urged the court to dismiss the appeal.

14. Since this is a first appeal, the court has a duty to re-evaluate the evidence and arrive at its own conclusion. The court should however bear in mind that it did not hear or see the witnesses. The court of appeal held in the case of **Kiilu & Another vs. Republic [2005] I KLR 174**as follows:-

i. **An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.**
ii. **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 courts findings and 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 witnesses.**

15. I have considered the appellant's grounds of appeal and the submissions by the appellant's advocate. I have also considered the submissions in reply by the state. Equally, I have evaluated the evidence on record. The appellant's fist ground of appeal contained several sub-grounds on which the appellant's conviction and sentence was challenged. The first of such sub-grounds was the alleged contradiction in the evidence of the complainant, PW2, PW3, PW4 and PW5 as to when the offence was committed and when it was reported to the relevant authorities. According to the charge sheet, the offence was committed on 7th June, 2012 at 10p.m. PW1 testified that she

was defiled at 10p.m. The report made to the police was that PW1 was defiled on 7th June, 2010. See, the evidence of PW6 and Prosecution Exhibit 1. There is no other evidence to the contrary concerning the date when the offence is alleged to have been committed. The evidence of PW4 on which the appellant has put reliance concerns when the witness received a report concerning the defilement of PW1. PW4 is recorded to have stated that he received the report on 7th June, 2012 at about 10.00am. This could not have been correct because if the offence had been committed on 7th June, 2012 at 10 p.m, it was not possible for it to have been reported on the same day at 10 a.m. I however see no contradiction in the evidence of PW1 and PW4 as to when the offence occurred. As I have said, PW4 did not tell the court that the offence was committed on 7th June, 2012 at 10 a.m. His evidence concerned when he received the report on which as I have stated above he may have been wrong as to the actual date. The only witnesses who gave evidence as to when the offence occurred were PW1 and PW6 and I have not found any contradiction in their evidence. I did not quite get the appellant's argument as concerns contradictions on the date when the incident was reported. His submission was not clear as to where the report was made and in what respect the evidence of witnesses who had made such reports had conflicted. PW1 clearly stated that she did not report the incident to anyone because of fear of the appellant. The incident was reported to PW4 by a member of the public. It was PW4 who informed PW2 and PW5 of the same. PW6 was informed when PW2 and PW4 took the appellant to the police station. I have not appreciated at all the appellant's argument on this point. The appellant's ground of appeal based on the alleged contradictions in the prosecution evidence has no merit. The other sub-ground of appeal that was argued by the appellant under, ground one of appeal concerned the manner in which the evidence of PW1 was taken. The appellant argued that that no proper *voire dire* was conducted. The appellant argued that the trial court had failed to establish whether PW1 who was a child of tender years understood the meaning of an oath before taking her sworn testimony. There is no dispute that the trial court conducted a *voire dire*. The appellant's complaint is that, PW1's response to questions that were put to her by the trial court was not sufficient to enable the trial court to determine PW1's appreciation of an oath. On examination by the trial court during the *voire dire*, PW1 told the court her name, her age, the school which she attended and her class. She knew her Location and County. She told the court of her knowledge of the bible and the fact that she attended church and understood the meaning of an oath. I am unable from the foregoing to agree with the appellant that the trial court did not establish that PW1 understood what taking an oath involved. The only mistake the trial court made was that it failed to conduct *voire dire* in a question and answer format. What the trial court did was only to take down the answers given by PW1 to the questions that were put to her by the court. This failure on the part of the trial court to record the proceedings of voire dire in a question and answer format looked at from the totality of the evidence on record did not in my view occasion any failure of justice. The case of, **Katana Kesi vs. Republic (supra)** which the appellant cited did not state that it is mandatory to take *voire dire* evidence of aminor in a question and answer format. In the court of appeal case that was cited in that case, the court stated that "**it is important to set out questions and answers when deciding whether a child of tender years understands an oath**". This sub-ground of appeal must therefore fail.

16. The other sub-ground of appeal that was urged by the appellant under, ground one of appeal concerned corroboration of the evidence of PW1. The appellant submitted that in view of the circumstances under which the offence herein is alleged to have been committed, it was unsafe for the trial court to convict the appellant solely on the evidence of PW1 without corroboration. As was submitted correctly by Mr. Oluoch, in sexual offences, it is not necessary for the evidence of the victim or complainant to be corroborated before the accused can be convicted. Section 124 of the Evidence Act, Cap. 80 Laws of Kenya empowers the court to convict an accused on the sole evidence of the victim if the court is satisfied that the victim is telling the truth. In his judgment, the trial court held that PW1 was a truthful witness. In the trial court's assessment, PW1 was *"clear, consistent, firm and cogent"*. This is what was required of the trial court before accepting the evidence of PW1 assuming that her evidence was not corroborated, namely, to satisfy itself that the witness was truthful and to record its reasons for such belief. In any event, I agree with Mr. Oluoch that the evidence of PW1 was corroborated by the evidence of other witnesses. For the foregoing reasons, I find no merit in this ground of appeal.
17. On ground five of appeal, the appellant argued that the trial court erred in convicting him with the

offence charged without establishing the age of the complainant. The appellant submitted that the complainant's birth certificate was not produced in court in proof of her age. PW3 assessed the complainant's age as nine (9). See, Prosecution exhibit 1. This is the age that was set out in the charge sheet. In the case of, **John Cardon Wargner vs. Republic (supra)** that was cited by the appellant in support of his submission on this point, although Warsame J. (as he then was) highlighted the importance of proof of the age of victims in defilement charges, the judge equally observed that "**proof of age of the complainant cannot be established through age assessment by a medical doctor or production of a birth certificate only"**. The trial court on the basis of the evidence tendered found that the complainant was about 9 years old. This finding was based on the evidence of PW3 who was the clinical officer who examined PW1. I see no basis for the appellant's claim that the complainant was 13 years old. This ground of appeal also fails.

18. Due to the foregoing, it is my finding that the conviction and sentence imposed upon the appellant was proper and there is no reason to disturb the same. I find no merit in this appeal. Thesame is hereby dismissed.

Signed and Dated at Kisii this 19th day of November, 2013

S. OKONG'O

JUDGE

Delivered at Homabay this 20th day of November 2013

E. MAINA

JUDGE

In the presence of:-

……for the appellant

……..……for the state

…….Court Clerk.

E. MAINA

JUDGE