No. 170

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO.167 OF 2011

JAMES OLE SAULI…. ….….……………………APPELLANT

VERSUS

REPUBLIC ……………………………...……..RESPONDENT

(Being an appeal from the conviction and sentence of the SeniorResident Magistrate's Court at Kilgoris, Hon. B. Ochiengin Criminal Case No. 610 of 2010 dated 23rd August, 2011)

JUDGMENT

1. The appellant herein **James Ole Sauli**was charged, tried and convicted of the offence of defilement of a girl contrary to **section 8 (1)** as read with **section 8(2) of the Sexual Offences act No. 3 of 2006**. He was thereafter sentenced to serve life imprisonment as by law provided. Particulars of the offence were that, on the 27th day of July 2010 at [particulars withheld] in Trans Mara District of the Rift valley province he did cause his penis to penetrate the vagina of S O child aged 10 years.
2. The appellant 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**. Particulars of the alternative offence were that on the 27th day of July 2010 at Nyasita village in Transmara District within Rift Valley Province he did intentionally and unlawfully cause his penis to come into contact with the vagina of S O girl aged 10 years. The appellant pleaded not guilty to both the main count and the alternative charge. During the trial the prosecution called 5 witnesses. PW1, who was the complainant, was taken through *voire dire*by the trial court. The trial court was satisfied that she understood the meaning of taking an oath to tell the truth and the consequences of lying. She was therefore allowed to give a sworn statement. She told the court that on 27th day of July 2010 at 12.00pm she was coming from school together with her brother **J C** (PW2) who is 7 years old. As they were running going home the appellant came and held her and took her to a thicket where he removed her school clothes and her inner pants then he removed his pants and under wear. He (appellant) then went ahead and pricked her by touching her vagina area using "his thing". That he lay on her stomach. Her brother wanted to scream but the appellant promised him kshs.5/- and he was told to sit down but later he went away. She added that the appellant went away after he had defiled her. She further told the trial court that her brother (PW2) went and informed her mother (PW3) who came and found her lying at the scene. Her mother took her to Kilgoris

District Hospital where she said she was examined and given medicine. She was then taken to the police station where the incident was reported.

3. She told the court that she felt pain and saw blood coming out of her vagina. She could not walk but was carried by her mother. She could not scream or make any noise during the incidence as the appellant held her throat. On cross examination by the appellant, she maintained that the appellant defiled her and she was able to identify him in court. The prosecution's second witness was **James Ojwang**, PW2. The trial court after interviewing him made a finding that he was quite young and does not understand the meaning of taking an oath. The court ordered that he gives an unsworn statement.PW2 told the trial court he recalled the 27th July 2010 at 12.00pm when they were coming from school in [particulars withheld] with her sister (PW1) going for lunch when they met the appellant who held her sister and pulled her towards the forest.
4. He testified that the appellant did "bad things" to her sister PW1. He saw the appellant laying her sister down and holding her mouth so that she does not raise any alarm. He told the court that he saw the accused remove PW1's clothes together with her inner pant and he slept on her after removing his long trouser upto the knee. He then ran and alerted her mother who came and found PW1laying down and she carried her and together they went to the police. He identified the appellant in court
5. PW1's mother**, J N**, PW3 told the court that his son, PW2 told her that the appellant had defiled her daughter (PW1) and abandoned her in the forest. She ran to the said forest and found the girl laying down facing up. She carried her and took her to Kilgoris Dispensary where she was treated. Thereafter, she went and reported the matter to the police. She told the court that she was given P3 form by the police which she had filled and returned together with the treatment records.
6. She told the court that she looked at PW1's sexual organ and found her without her panties. She said that one section on the backside was "wetish" and the sexual organ were bruised and had blood. That the girl later told her at the hospital that the appellant had defiled her.
7. PW4 **PC Elizabeth OndusoNo. 92684** who works at Kilgoris Police Station investigated the case. She told the court that she got the information from S O (PW1) on 27th July 2010 at 11.00pm that she had been defiled by a person known to her at about 12.50pm. She then took the complainant to hospital where she was examined and it was found that she had been defiled. At 7.00am next morning, she sent other police officers to make arrest and the girl, PW1 pointed at the accused who was then arrested. The complainant identified the appellant by name and she knew where he stayed.
8. PW5,**Dr. Patricia Onguti**, a doctor at Kilgoris District Hospital examined the complainant (PW1) and prepared a medical report. She told the court that the child (PW1) was brought a day after the alleged offence and after examining her she found that she (PW1) had changed her clothes but was in good general condition. There was laceration on the labia, hymen was intact, HIV test was negative, syphilis test was negative and there were many epithelial cells an evidence of penetration. The urine showed signs of infection. She concluded that there was recent penetration within 24 hours and that the act was done on 27th July 2010 and she examined the child (PW1) on 28th day of July 2010. She produced the P3 form as exhibit P1 and the treatment book as exhibit P2. She approximated the age of the child as 11 years and produced the age assessment report as exhibit – P3. She told the court that according to the record the appellant was examined and found to have urinary tract infection and the type of bacteria was established.
9. At the close of the prosecution case, the trial court found that the appellant had a case to answer and he was put on his defence. Section 211 was explained to the appellant and he chose to give a sworn statement and to call two witnesses. The appellant (DW1) told the court that on the particular day, namely, 27th July 2010, he was at his farm planting maize with other people from 8.00am to 2.00pm when they took a break had lunch and continued planting until 5.00pm when they left. That his farm is 1 ½ acres. He testified that he never defiled PW1 and that the whole saga is a frame up because of the differences they had with the mother of the complainant (PW3) which he explained to the trial court.
10. DW2, **Jackson Wapari**, told the court that on 27th July, 2010 together with five others they were preparing the farm until evening when they left for their homes. DW3, **Julius KoechRotich** told the court that the appellant, DW1 had been framed. He told the court thaton the material day, they planted DW1's shamba (farm)upto 5.00pm and that they were together throughout on that day

with DW1. He said that he didn't know the reason as to why the accused was arrested.

11. On cross examination, he told the court that he did not know if the accused defiled the girl. After analyzing the evidence that was before him, the learned trial magistrate concluded that the prosecution had proved its case against the appellant beyond reasonable doubt. The trial court accordingly found the appellant guilty as charged and convicted him of the offence of defilement contrary to **section 8(1) asread with section 8(2) of the Sexual Offences Act No. 3 of 2006**. The appellant was aggrieved by the entire judgment of the learned trial magistrate and has come to this court on appeal. Through his advocates M/s Oguttu-Mboya& Co. Advocates the appellant has laid the following 11 grounds of appeal.

a. *The learned trial magistrate erred in law in proceeding with, entertaining and convicting the appellant of the offence charged when the appellant's constitutional right had been violated contrary to the provisions of Article 49(1) (f) of the Constitution 2010.*
b. *The trial, conviction and sentence of the appellant was unconstitutional and thereby null and void.*
c. *The learned trial magistrate erred in law in finding and holding that the offence of defilement as defined in section 8(1) and (2) of the Sexual Offences act No. 3 of 2008 had been proved as against the appellant as by law required.*
d. *The learned trial magistrate failed to consider and/or take into account the provisions of section 8(5) (a) of the Sexual Offences act No. 3 of 2006 and thereby denied the appellant a statutory defence which was availed in favour of the appellant.*
e. *The learned trial magistrate failed to appreciate or consider the essential ingredients necessary in proving the offence charged including proof of the age of the complainant which was material before determining whether the acts complained of constituted to the offence charged.*
f. *The learned trial magistrate failed to address his judicial mind to the totality of the circumstances obtaining the commission of the offence complained of consequently arriving at a conclusion which was contrary to the evidence on record.*
g. *The learned trial magistrate failed to appreciate the material contradictions apparent in the prosecution's case and more particularly on the age of the complainant and consequently the conviction rendered by the trial court was erroneous.*
h. *The learned trial magistrate misconceived, misapprehended and misapplied the evidence of the appellant and thereby failed to discern the salient and pertinent features of the appellants defence.*
i. *The learned trial magistrate erred in law in disregarding ignoring and/or failing to appropriately consider the appellant's defence thus occasioning a miscarriage of justice.*
j. *The learned trial magistrate erred in fact and in law in failing to properly evaluate the evidence on record and the applicable law. Consequently, the learned trial magistrate arrived at an erroneous decision contrary to the weight of evidence on record.*
k. *The judgment of the trial magistrate is wrought and/or fraught with illegalities.*

12. The appellant sought orders that his appeal be allowed,his conviction and sentence quashed, varied and/or set aside and he be set at liberty forthwith.This being a first appeal the court is under a duty to re-consider and re-evaluate the evidence herein afresh with a view to reaching its own conclusions. The court is also required to carefully read and appreciate the proceedings and the judgment of the lower court. See, the case of, **Pandya –vs- Republic (1957) E. A 32,** on this duty of a first appellate court.The court must however remember while rehearing the appellants case that the court has no opportunity of seeing and hearing the witnesses who testified before the trial court. It is only a trial court which has the singular opportunity of seeing and hearing witnesses and therefore the privilege of being in a position to assess the demeanor and credibility of such witnesses.
13. When the appeal came up for hearing on 17th October, 2013, Mr. Oguttu, advocate appeared for the Appellant while **Mr. Shabola**, state counselappeared on behalf of the State. Mr. Oguttu abandoned ground 5. He then argued grounds 1 and 2 together, grounds 3, 4 and 7 together, grounds 6, 8, 9 and 10 together and ground 11 alone.
14. On grounds 1 and 2, Mr. Oguttu submitted that upon the arrest of the appellant on 13th August, 2010 he was held in custody upto 16th August, 2010 which period was in excess of the 24 hours provided for in the section 72 (3) of the repealed Constitution of Kenya. He argued that it was the duty of the prosecution to ensure that the appellant was brought to court within the constitutional

timeline and in the event that the timeline was not met, the prosecution had the obligation to offer a reasonable explanation for that omission to the court. He submitted that the court as the custodian of justice was obligated to make inquiry on the compliance more so because the appellant was acting in person.

15. Mr.Oguttu submitted that in the absence of such explanation, the plea, trial, conviction and sentence that was passed against the appellant were all nullities and beyond cure. He urged the court to uphold the appellant's constitutional right as set out in the said section 72(3) of the repealedConstitution of Kenya and article 22 of the new constitution. In support of this submission, Mr.Oguttu cited the case of,**Gerald Macharia Githuku –vs- Republic, CA CRA No. 119 of 2004 (unreported)**.He submitted that in this case, a similar situation arose and afavourable decision was made in favour of the accused.
16. On ground 3, 4 and 7 Mr. Oguttu submitted that under **section 8 of theSexual Offences Act,** the age of the victim is paramount because, it is the age that determines the relevant provision to base the charge and the sentence to be meted out. He submitted that the age of the victim can only be proved through a certificate of birth and in the alternative by an age assessment report. In the case of the latter, he argued that the report must be officially requisitioned for by the investigating officer and must be rendered by aqualified personnel which personnel must attend court to explain the report.
17. Counsel for the appellant submitted that in this particular case, no certificate of birth for the complainant was produced in evidence and that the P3 form at page 26 shows that the complainant was 10 years which age the complainant (PW1) confirmed as much in her testimony. He submitted that a purported age assessment report that was produced in evidence indicated that the complainant was aged approximately 11 years. He submitted that this age assessment report contradicted what is indicated as the age of the complainant in the P3 form and the complainant's own testimony regarding her age. He submitted further that this age assessment report was disowned by PW5 who had issued and produced it in court. Counsel submitted that, in cross-examination, PW5 testified that she only filled the P3 form and that she never examined the complainant. Counsel argued that this evidence negated the said age assessment report that was prepared by this witness and eroded completely the basis of the charge and conviction of the appellant.
18. On grounds 6, 8, 9, 10 and 11 Mr. Oguttu submitted that the court did not interrogate the evidence on record appropriately before arriving at the conviction. He submitted further that the court had also misapprehended the evidence before it that PW1 and PW2 had given sworn testimony which was not the case. He submitted that, the complainant (PW1) is said to have been putting on a dress and that her inner wear was not recovered. Counsel submitted that given the intensity of the act and the time said to have been taken in it,it would have been only natural that the complainant should have bled. He submitted that the complainant's dress was never produced and no evidence of bleeding was given by the mother of the complainant (PW3) or by PW5 who was an expert and who was the first to examine the complainant. He added that the examination was carried out on the same day when the incident was said to have occurred.
19. Mr.Oguttu submitted further that the court failed to interrogate the claim by the appellant that he was framed by the complainant's mother(PW3). He submitted that there was doubt raisedarising from this claim which could have been resolved in favour of the appellant. He submitted further that the appellant gave sworn testimony and called two witnesses who told the court that they worked on the farm of the appellant together with the appellant from 8.0am to 5.00pm. Counsel submitted that since, the incident herein is said to have occurred between 12.00noon and 3.00pm, the appellant could not have been involved in the same as he was away in his farm. Counsel submitted that the defendant had raised a defence of alibi which the trial court ought to have interrogated. In support of this submission, counsel cited the case of,**Peter KiokoKasilu –vs- Republic C.A CRA No. 264 of 2006 (unreported)**more particularly, the *ratio decidendi* at pages5, 6 and 7 of the said decision and argued that the standard set out in the said case was not applied when considering the appellant's defenceof*alibi.*
20. **Mr. Shabola** counsel for the state opposed the appeal. He submitted that PW2, J O gave an unsworn testimony as can be seen at page 4 of the record of the proceedings. However, at page 6 of the proceedings, there was another "PW2"J N gave a sworn testimony. This second PW2 was actually supposed to be PW3. The witnesses were not properly identified by the trial court and this

is what caused the confusion as to which witness gave asworn testimony.

21. On ground 1 of appeal,**Mr. Shabola** referred the court to the charge sheet and pointed out that the appellant was arrested on 13th August, 2010 which was on a Friday and he was arraigned in court on Monday, 16th August, 2010. Counsel argued that the appellant could not have been taken to court over the weekend and as such none of his rights were infringed when he was presented to court on the first working day after his arrest. On grounds 2 to 11 of appeal,**Mr. Shabola** submitted that PW1 who was the complainant gave a sworn testimony of how the appellant defiled her on 27th July, 2010. She was on her way from school in the company of her brother and was defiled and promised kshs. 5/=. She said that her mother found her at the scene and she was able to identify the appellant at the dock and called him by his name. PW1's testimony was corroborated by the evidence of PW2,**J O**, the complainant's brother who gave unsworn testimony. He told the court that they had come from school when they met the appellant who pulled the complainant to the forest. He narrated what he saw the appellant doing to complainant. He is the one who ran home and alerted their mother, (PW3). **Mr. Shabola**submitted further that PW3,**J N** the mother to the complainant testified of how she got the news of the complainant's defilement and proceeded to the scene where she found the complainant without her pants and on examining her vagina she noted that she had bruises and blood. PW5, Dr. PATRICIA ONGUTI confirmed that there was evidence of penetration and that the hymen was obliterated. She produced the P3 form and concluded that there was a recent penetration within 24 hours. **Mr.Shabola**submitted that, the evidence of PW1, PW2 and PW3 were consistent and there was no contradiction of any nature.
22. On the age of the complainant, he submitted that this was ascertained to be approximately 11 years by PW5. He submitted that the **Sexual Offences Act, No. 3 of 2006** provides for life imprisonment for an offence of defiling a child aged11 years or less. He submitted that the sentence that was imposed on the appellant was lawful. On the appellant's contention that his defence was not given due weight, **Mr. Shabola** submitted that the trial court considered the appellant's evidence but found the same not convincing. **Mr.Shabola** submitted that the prosecution's case was proved beyond any reasonable doubt and as such this appeal has no merit and should be dismissed.
23. I have considered the appellants appeal and the submissions made by both sides. In my view, the following are the issues that arise for determination:-

i. **Whether the appellant's constitutional right was violated contrary to provisions the provisions of article 49 (1) of the new constitution and section 72(3) of the Old constitution.**
ii. **Whether the offence of defilement as defined in section 8(1) and 2) of the Sexual Offences Act No. 3 of 2006 was proved against the appellant as required by law.**
iii. **Whether the learned trial magistrate disregarded the appellant's defence.**
iv. **Whether the age of the complainant was properly ascertained.**

24. I have carefully read through the record of appeal and re-evaluated the evidence on record afresh. It is not disputed that the appellant was arrested on Friday, 13th August, 2010. It is also not in dispute that 14th and 15th August, 2010 fell on a weekend. The record of the proceedings shows that the appellant was arraigned in court on Monday, 16th August, 2010. I am persuaded by the state counsel's argument that the appellant was arraigned in court on the first court working day after his arrest and as such there was no violation of the appellant's constitutional rights as contended by the appellant's counsel. Due to the foregoing, the appellant's 1st ground of appeal must fail.
25. From the testimony of PW1, PW2 and PW3, it is clear that PW1 was defiled on the 27th July, 2010. The incident occurred during the day at 12.00noon when school children were going back home for lunch. I have found the evidence of PW1, PW2 and PW3 on what happened on 27th July, 2010,to be cogent, unwavering and consistent. The same is far from a story created from PW3's imagination as the appellant had contended before the trial court and before this court. If this was a set up by PW3 to settle a score with the appellant, I do not think that PW2 who was 7 years old and PW1 who was 10 years old would have given a consistent version as to what transpired on 27th July, 2010 in their evidence in chief and in cross-examination. PW1 and PW2 knew the

appellant before the incident as they were residing in the same area. PW1 and PW2 had no doubt in their testimony that it was the appellant who had defiled PW1. There was no suggestion at all that someone else could have defiled PW1. Since, PW1 and PW2 knew the appellant and the incident occurred during the day, there was sufficient light for the two to be able to recognize the appellant. PW1 was taken to hospital on the same day that she was defiled. From her treatment notes that were produced in evidence as Pexhibit. 2, the medical officer who attended to her observed that; there was an obvious laceration on the labia minora, semen was visualized, hymen was not intact, it was perforated and there was no active bleeding. PW5, a medical doctorwho examined PW1 on the following day concluded that PW1 was defiled. PW3 who had the first contact with PW1 after the incident had also examined her and in her evidence, she stated that she had seen blood and bruises in her vagina. I am convinced that the prosecution proved their case that there was actual defilement of PW1 by the appellant herein beyond reasonable doubt.

26. From the record, I am unable to accept the appellant's submission that the trial court failed to consider the appellant's defence. At page 22 of the record of appeal, it is clear that the trial court considered the evidence of the appellant and his two witnesses. At page 24 of the record of appeal,the trial court weighed that evidence of the appellant and his witnesses and found the same not convincing. I have reconsidered the appellant's alibi defence. I am unable to reach any other conclusion other than that was reached by the trial court. I have found the evidence given by PW1 and PW2 to the effect that the appellant was at the scene and committed the act overwhelming. Just like the trial court, I have found, the appellant's "cow tail" story not convincing. From the chronology given by the appellant and DW2, the appellant's cow's tail was cut by PW3 on 28th July, 2010. It is on the same day that the appellant beat up PW3 and this is what is said to have made PW3 to frame him up with the present charge. I do not find this believable. The defilement took place on 27th July, 2010 at 12.00noon. The complainant, PW1 was taken to the hospital and examined on the same day and found to have bruises on her vagina and an obliterated hymen. . I don't see how PW 3 could have started scheming against the appellant on 27th July, 2010 before she was beaten by the appellant. I also found the evidence of the appellant's witnesses not convincing. DW2's evidence was very shallow. He did not even mention in his evidence in chief that he was with the appellant on the material day. On the other hand, DW3 struck me as a person who was out to defend the appellant at all cost. The opening statement in his evidence in chief after introduction was "**he has been framed**". His version as to why PW3 allegedly cut the tail of the appellant's cow is also different from that of the appellant.The trial court found the defenceof the appellant neither convincing nor satisfactory. On my own analysis, I have come to the same conclusion.

27. The next issue is whether the prosecution proved the age of the complainant. Counsel for the appellant submitted that the age of a victim of sexual offence can be proved through a birth certificate or by age assessment report. I have noted from the record that in this case the age of the complainant was proved by way of an assessment report by PW5 who was a medical officer. The appellant had challenged the said report on the ground that PW5 never examined the complainant and that the age given in the report contradicted the age that was given by the complainant in her testimony and in the P3 form. I have found no merit at all in the appellant's argument. PW5 produced the age assessment report of the complainant as Pexh. 3. In his testimony, he said that he is the one who ascertained the age of the complainant, PW1. In cross-examination, he testified that he never examined the complainant. He told the court that the complainant was examined by her colleague who also ran laboratory tests concerning her case. He testified that he filled the PW 3 form on the basis of the records that had been prepared by her colleague. I don't think that the fact that DW5 never examined the complainant renders his age assessment of the complainant worthless. DW5 had with him the complainant's medical records and results of laboratory tests that were carried out by his colleague. Being a medical doctor, I don't see why could not have been in a position to make as assessment of the complainant's age as he did. In any event, DW5 was not asked in cross-examination on what basis he assessed the age of the complainant. I would wish to add that, there was enough evidence that the complainant was in the age bracket of 11 years and below. She told the court in her testimony that she was 10 years. In her medical treatment notes that were produced as P.exhibit. 2, her age was given as 10 years, In the P3 form(Pexb.1), the police gave her age as 10 years and in the age assessment report that was produced by DW5, (P.Exhibit.3), her age was put at approximately 11 years. Furthermore, the

complainant testified that at the material time she was in class 2. There is no contradiction between the age of the complainant as set out in the P3 form and the age assessment report. The age of the appellant in the P3 form was given by the police based on the report that was made to them. It was not given by a medical doctor. It should be noted that paragraph 1 of section C of the P3 form where the medical doctor normally indicates the estimated age of the complainant was left blank. The doctor who issued the P3 form however did a separate age assessment that she submitted to court. I see no contradiction at all between the age of 10 years that was given by the complainant in her testimony and the approximate age of 11 years that was given by DW5. I believe that without an official birth record, age can only be approximated. Defilement of a child falling between the ages of 10 and 11 years is an offencefalling under**sections 8 (1) and 8 (2) of the SexualOffences Act, No. 3 of 2006** which is the offence with which the appellant was charged. I cannot see any prejudice or miscarriage of justice that was occasioned to the appellant by the age of the complainant having been given as between 10 and 11 years. I am convinced that the age of the complainant (PW1) was properly ascertained and therefore the argument to the contrary must fail.

28. For the above reasons, it is my finding that the appeal herein lacks merit. The appellant's conviction and sentence was proper and I hereby uphold the same. The appellant's appeal fails in its entirety and the same is dismissed accordingly.

Delivered, dated and signed at KISII this 6th day of December 2013.

S. OKONG'O

JUDGE

In the presence of:

Mr. Ombachi h/b for Oguttu for the Appellant

Mr. Shabola for the Respondent

Mobisa Court clerk

S. OKONG'O

JUDGE