



**No. 168**

**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO.66 OF 2011**

**JOSEPH HAWKINS OBALA AGUTU..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**(Being an appeal from the conviction and sentence of the Senior Resident Magistrate's Court at Oyugis, Hon. C. L Yalwala in Criminal Case No. 194 of 2007 dated 17<sup>th</sup> September 2010)**

**JUDGMENT**

1. The appellant herein **Joseph Hawkins Obala Agutu** was charged, tried and convicted of the offence of defilement of a girl contrary to **section 8(2) of the Sexual Offences Act, No. 3 of 2006**. He was thereafter sentenced to serve imprisonment for twenty (20) years. Particulars of the offence were that, on the 18<sup>th</sup> day of February 2007 at [particulars withheld] in Rachuonyo district within Nyanza Province unlawfully had carnal knowledge of R A A a girl aged 15years.
2. The appellant also faced an alternative charge of indecent assault **contrary to section 6 (a) of the Sexual Offences Act, No. 3 of 2006**. The particulars of the alternative charge were that on the same date and at the same place, he intentionally and willfully indecently induced and compelled R A A a 15 year old girl by removing her pants and touching her private parts. He pleaded not guilty to both the main count and the alternative charge.
3. During the trial, the prosecution called 5 witnesses. The complainant PW1, told the court that she was aged 15 years and attended school at [particulars withheld] Primary School in class 8. That on 18<sup>th</sup> February, 2007 she left home at 7.00am and headed to Othoro to get her admission letter that had come from [particulars withheld] School as she had sat for KCPE in the year 2006. She was to get the letter from [particulars withheld] Othoro having been sent there to the see the director of that institution whose name she did not know. She told the court that she arrived there at 9.00am and got the said director who told her to wait. She waited until 6.00pm when she went to the director and told him that she was going back home and she needed a reply. The director told her to wait so that they could fill in the forms and at about 8.00pm the director called her and they started filling the forms for sponsorship which they finished at around 11.00pm
4. She testified further that the director told her that he had sponsored other students who are doing well and who he visits in their schools and caters for their needs. He then told her that she had gone late and that he could not write to the sponsors then to avail monies for her schooling but he could take her to school with his own personal monies on condition that she (PW1) becomes his wife.
5. She (PW1) told him that the issue of becoming his wife could be discussed later but if he could sponsor her then he should just do so and take her to school. The director told her that she should

- commit herself by having sex with him which she refused. He then stood up and got hold of her (PW1) and took her to bed as his office was in a dormitory with beds inside. She started to cry and he told her to stop crying which she refused. He went ahead and started removing her skirt. As they struggled she says that her skirt buttons got cut and since her skirt did not come out he tore her pants and put her right leg and right hand between the bed and the wall. He removed his clothing and then had carnal knowledge of her.
6. She testified further that she went out with her clothes and put them on and proceeded to where other children were sleeping and spent the night there upto 6.00am. She reported the incident to the step mother one **M AG** (PW3) as her mother had gone to a funeral. When her mother came back from the funeral, PW3 told her what had happened and she in turn told her father who then directed her to go to the chief. The chief gave them a letter to go to Othoro police station where they were given a P3 form which she produced as "**MFI PI**". She concluded her testimony by stating that she went to hospital at Othoro and was treated, the P3 form was filled and she wrote her statement at the police station. In court she identified the appellant as the director who she had gone to see and who had carnal knowledge of her. During cross examination, PW1 told the court that when they were filling the forms there was a lady in the appellant's office who later left. She added that she shouted for help since the other dormitory was only 10 metres away from where the appellant's office was. She maintained that the complaint she made against the appellant was true and she was not on a revenge mission.
  7. PW2, **W AO** told the court that on 18<sup>th</sup> February, 2008 while at home, he received a report from the wife of his son called A that she had been told by her daughter R A (PW1) that where she sent her she had been defiled. He testified of how he had sent her daughter (PW1) to Othoro [particulars withheld] to be assisted to pursue her learning as the said institution assists orphans. He was told by his daughter in law that when his daughter was there she was defiled by the appellant but the daughter feared to tell him. He then went to the area chief and reported the matter. He was given a letter to take to Othoro police station from where he was directed to take her daughter to the hospital where she was treated. He testified that her daughter (PW1) opened up and told him that she had been defiled by the appellant herein, the principal of the said [particulars withheld]. He explains that he sent her daughter there to be assisted as he did not have the finances to pay for her secondary school fees as he had been to the institution before and saw the appellant who told him that he could assist him but the daughter was finally not assisted.
  8. PW3, **Samuel Koech** a clinical officer at Othoro Health Centre produced the P3 form prepared by his colleague Frasier Odhiambo. He told the court that he was conversant with the handwriting and signature of his colleague and that on examination as per the P3 form, PW1's labia minora and majora were bruised and tender with no discharge and the approximate age of injury was two (2) weeks.
  9. He told the court that PW1 was treated with analgesics and pain killers and the P3 form was signed by Dr. Frasier Odhiambo. The P3 form was marked as exhibit P1. In cross examination, he told the court that the conclusion on the form was that the complainant had been defiled and that such conclusion can be made even after two weeks based on the injuries taken together with the patient's history.
  10. PW4, **MA** told the court that PW1 left for Othoro on the morning of 18<sup>th</sup> February, 2007 for assistance at a certain institution that caters for the needs of orphans. PW1 did not return that day but returned the next day in the morning and when she was asked what was wrong with her as she looked tired and pale, she vowed never go back to Othoro. On being asked why by PW4, she said that she was raped by the director of that institution. She told the court that at the time she was with her father in law and that she feared telling him. She waited until her mother in law had come and then she reported the matter to her. Her mother in law then reported the matter to her father in law PW2, who then reported the matter to the area chief and then to Othoro police patrol base where she recorded her statement. She recognized the appellant on the dock as the person who runs the orphanage.
  11. PW5, **PC Benson Otieno No. 65500** told the court that on 2<sup>nd</sup> March, 2007 at about 1.00pm while in the company of his colleagues, the complainant PW1 in the company of her mother reported that she had been defiled by the accused herein **Hawkins Obala Agutu**. He booked the report and referred the complainant to Othoro Health Centre where she was examined and the P3 form issued to her filled. He began the investigation and went to the appellant's orphanage known as

- [particulars withheld] on several occasions without finding the appellant. It was on 11<sup>th</sup> March, 2007 at about 6.00pm that together with PC Rono and PC Micha while manning a road block near Othoro Centre that they came across the appellant while he was driving his motor vehicle and arrested him and then preferred the charge herein against him. He identified the appellant on the dock.
12. The trial court considered the evidence adduced by the prosecution and concluded that there was a prima facie case established against the appellant to warrant him being put on his defence. The appellant chose to give a sworn statement. The appellant indicated to the trial court that he intended to call one witness, one, Barrack Owaga.
  13. In his statement, the appellant (DW1) told the court that he was the director of [particulars withheld] Kenya which was an orphanage home and that he was the Bishop of Faith Commission Ministry. The [particulars withheld] was situated in Rachuonyo District opposite [particulars withheld] School on the Kisii-Kisumu Highway. He told the court that he knew PW1 on the 5<sup>th</sup> February, 2007 when he (the appellant) came from Kisumu at about 10.00am and was informed by the manager a Mr. Barack that a girl by the name R A had gone to the orphanage seeking for sponsorship as the orphanage caters for the needy, abandoned and orphaned. As she (PW1) did not find him she left. On 8<sup>th</sup> February, 2007 the father of PW1, PW2 came and introduced himself to the appellant (DW1) and reiterated the plea for sponsorship. He told PW2 that the manager had already turned PW1 away as there were no funds.
  14. The appellant testified further that PW2 requested him to pray for PW1 because PW1 had some mental problems but he declined to do so as he had not seen the girl. He told PW2 to go and get PW1. On 18<sup>th</sup> February, 2007 PW1 came again to see him at the home. She was alone and he (DW1) told her that he could not talk to her alone and left for a meeting. When he came back from the meeting he was attending the whole day he found PW1 sitting on a stone crying. It was late in the evening about 6.00pm and she told him that she was crying because she felt her father did not like her and that it was also late.
  15. The appellant as a father inquired from PW1 if she felt safe to go home that late but she answered in the negative. This prompted DW1 to call the matron one, Beatrice Barak Owaga. Together, they discussed PW1's plight more particularly how she could get home. The appellant asked PW1 for her father's telephone number but PW1 could not trace it. All this happened in the appellant's office. At one time, the matron left and went to the kitchen.
  16. The appellant then decided that as it was too late for PW1 to go back home. He directed that the head girl should give her supper then give her a bed in one of the dormitories to sleep in. The appellant denied having defiled PW1 that night. He stated that the rooms/dormitories were open rooms and the other children would have known of such act. He told the court that there had never been such accusation against him in the orphanage. She told court that the matron was no longer working with them and there was no bad blood between them.
  17. The appellant closed his case on 18<sup>th</sup> August, 2010. The witness that he had intended to call on that day did not turn up in court. After analyzing the evidence that was adduced by the prosecution and the appellant, the trial court found the appellant guilty as charged. Although the evidence of PW1 was the only direct evidence in support of the prosecution's case, the trial court was satisfied that PW1 was truthful.
  18. The trial court stated that "in this case, I am satisfied that the minor complainant was telling the truth". The court also found that PW1's evidence was corroborated by the evidence of PW3 and PW4 to the effect that she was indeed defiled. The trial court rejected the appellant's defence as the same was not found to be truthful. The trial court was satisfied with the prosecution's case and held that the same had been proved on the main count as against the accused person beyond any reasonable doubt. The trial court proceeded to convict the appellant on the main count under the provisions of **section 215 of the Criminal Procedure Code**.
  19. After considering the offence and mitigation by appellant the trial court noted that the offence committed was a serious one and that the accused acted in a most dishonorable manner by taking advantage of the weak seeking his assistance to commit the offence herein. Accused was sentenced to serve twenty (20) years imprisonment.
  20. The appellant was aggrieved by the entire judgment of the learned trial magistrate and has come to this court on appeal against the same. The appellants appeal has been brought on the following

grounds that are set out in his petition of appeal date 10<sup>th</sup> June, 2013:-

- a. **That the trial magistrate erred in both law and fact in failing to find that the appellant was convicted and sentenced on a defective charge sheet.**
- b. **That the trial magistrate erred in law and in fact by failing to observe that there were contradictions and inconsistencies of the witnesses.**
- c. **That the trial magistrate failed to observe that the prosecution lacked first report which should have been the basis of the case.**
- d. **That the trial court erred in law by not ordering for an age assessment on the complainant so as to draw a finding based on established age of complainant.**
- e. **That the trial court failed to observe that according to the medical report, there was nothing to suggest that the complainant was defiled and nothing to sustain the charge sheet at all.**
- f. **That the trial magistrate failed to observe that the prosecution failed to avail essential witnesses to prove the appellants guilt.**
- g. **That the court erred in not observing that the prosecution failed to produce the exhibit material in support of the alleged offence e.g torn pant and skirt.**
- h. **That the trial magistrate failed to observe that the appellant was not medically associated to the alleged offence as he was not medically examined as required by law.**
- i. **That the trial magistrate failed to provide the appellant with the statements prior to his defence.**
- j. **That the trial magistrate failed to observe that there was no penetration or the presence of seminal fluid experienced during the examination of the complainant.**
- k. **That the judgment was a miscarriage of justice.**
- l. **That the trial court erred in law and in fact by failing to adhere to the provisions of section 200 of the Criminal Procedure Code.**
- m. **That the trial court erred in law and in fact on relying on hearsay adduced against the appellant by members of the same family.**
- n. **That the appellant prays for liberty as this was a framed allegation against his spiritual development and material things God entrusted him.**

21. The appellant prayed that the appeal be allowed, conviction quashed, sentence set aside and he be set at liberty. When the matter came up for hearing on 17<sup>th</sup> October, 2013 the appellant appeared in person while **Mr. Shabola**, state counsel appeared for the State. The appellant filed written submissions on 16<sup>th</sup> October, 2013 which he fully relied. He highlighted few issues on the said written submissions.

22. First, the appellant submitted that he was convicted on the basis of a defective charge sheet the defect being that the charge sheet was not stamped by the stamp of the police station where it originated from. Secondly that he was charged and convicted on anon-existent offence. He argued that he was charged with defilement contrary to **section 8 (2) of the Sexual Offences Act 2006**. His argument was that the charge should have been brought under **section 8(2) of the Sexual Offences Act No. 3 of 2006** and that the omission to state the number of the act makes the charge defective. He submitted that the charge herein was a frame up and that the complainant had a grudge against him because he did not give her the sponsorship and that on that material day he had an N.G.O meeting at the orphanage that was attended by several pastors and there was no way in which he could have committed the offence in those circumstances. He added that if the incident happened, the complainant who slept in a dormitory in the premises would have informed someone in the compound as to what had happened to her. Further, the appellant argued that outside the orphanage where the offence is alleged to have been committed, there was a police road block and the complainant would have easily reported the incident to the police. He prayed that his appeal be allowed.

23. In opposing the appeal, **Mr. Shabola** argued ground 1 alone and then grounds 2 to 14 together. **Mr. Shabola** left ground one of appeal for the court to determine whether the appellant was convicted on a defective charge. On grounds 2 to 12 **Mr. Shabola** submitted that the prosecution had proved their case against the appellant beyond any reasonable doubt. He submitted that, from PW1's evidence, PW1 left home at 7.00am headed for the [particulars withheld] that was headed by the appellant to pick up her letter of sponsorship from the appellant and reached there at around

- 9.00am. She found the appellant and at about 8.00pm they started filling the sponsorship forms at the appellant's office up to 11.00pm in the course of which the appellant had carnal knowledge of her. PW1'S father, PW2 had sent PW1 for assistance at the [particulars withheld]. He told the court in detail how he came to know PW1's defilement by the appellant.
24. **Mr. Shabola** submitted that PW3 who produced by P3 form concluded that PW1 was defiled. On examination, he found PW1's labia majora, bruised and tender. **Mr. Shabola** submitted further that the arresting officer PW5 had confirmed the age of the minor as 15 years. He further submitted that the defendant did not call any witness to testify on his behalf and that the appellant was properly identified. **Mr. Shabola** submitted that this appeal lacks merit and should be dismissed in its entirety.
25. Being the first appellate court, this court is under a duty to reconsider and re-evaluate the evidence on record afresh with a view to reaching its own conclusions in the matter. This duty on the part of the court has been restated in several cases such as, **Pandya vs. Republic (1957) E.A. 336** and **Okeno vs. Republic (1972) E. A.**
26. I have considered the appellant's ground one of appeal which concerned the validity of the charge with which he was charged before the trial court. In his written submissions, the appellant argued that he was charged with and convicted of a non-existent offence. **Section 8 (2) of the Sexual Offences Act, No. 3 of 2006** under which the appellant was charged provides for an appropriate sentence for an accused person who has been convicted of an offence under **section 8(1) of the Sexual Offences Act, No. 3 of 2006** (hereinafter referred to as "the Act") where the complainant is a child aged 11 years or less. **Section 8 (2) of the Act** does not in my view create an offence. I am persuaded by the appellant's submission that he was charged, convicted and sentenced for a non-existent offence. If that was not enough, although the appellant was charged under **section 8(2) of the Act**, he was actually sentenced under **section 8 (3) of the Act** without the charge sheet having been amended. As was held by Warsame J. (as he then was) in the case of, **Jon Cardon Wagner vs. Republic, Criminal Appeal No. 404 of 2007** that was cited by the appellant, a charge sheet should be clear on the offence charged so that an accused person knows what offence he is facing and in respect to which he is supposed to defend himself. The appellant herein should have been charged under **section 8 (1) of the Act** as read with **section 8(3) of the Act** on the first count, since the particulars of the charge indicated that the complainant was a girl of 15 years. Instead he was charged under **section 8 (2) of the Act** which created no offence and sentenced under **section 8 (3) of the Act**, under which he was not charged. I am in agreement with the appellant that the charge against him before the trial court on the first count was incurably defective and no valid conviction could be based thereon. As I have mentioned at the beginning of this judgment, the appellant was charged with two offences. A part from the charge of defilement that I have held to be defective, the appellant also faced an alternative charge of indecent assault contrary to **section 6 (a) of the Act**. I have considered this alternative charge if on the material before the court, the same was proved so as to justify convicting the appellant on the same although the trial court did not consider the same after convicting the appellant on the main charge. This alternative charge has also caused me some discomfort. I don't think that there is an offence known as indecent assault under **section 6(a) of the Act**. That section provides for an offence of compelling or inducing indecent act. In my view, from the particulars of the alternative charge, the appropriate offence with which the appellant herein should have been charged with as an alternative charge should have been, an offence of committing an indecent act with a child contrary to **section 11(1) of the Act**. For the foregoing reasons, it is my finding that the alternative charge that was preferred against the appellant was also defective. Due to the foregoing, the appellant's appeal against his conviction and sentence succeeds on this ground of defective charge alone. The appellant's conviction and sentence is hereby quashed and set aside. The appellant shall be released forthwith unless he is otherwise lawfully held.

**Delivered, dated and signed at KISII this 6<sup>th</sup> day of December 2013.**

**S. OKONG'O**

**JUDGE**

**In the presence of:**

Appellant present in person

Mr. Shabola for the Respondent

Mobisa Court clerk

**S. OKONG'O**

**JUDGE**