REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEAL NO. 51 OF 2010

CHARLES ODHIAMBO ONG'ANG'A.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(From original conviction and sentence in Criminal Case number 648 of 2008 of the Senior Resident Magistrate's Court at Bondo)

JUDGMENT

The appellant herein was charged with the offence of defilement of a child contrary to Section 8 (3) of the Sexual Offences Act number 3 of July 2006 in that "**on the 15th day of June 2008 in Rarieda District within Nyanza Province, unlawfully and intentionally committed an act which causes penetration with L. A.A a child of the age of thirteen (13) years. In the alternative the appellant faced the offence of an indecent Act with a child contrary to Section 5 (1) of the Sexual Offence Act number 3 of 2006, in that on the 15th day of June 2008 at around 0500 pm in Rarieda District within the Nyanza Province committed an indecent act with a child L. A.A aged thirteen (13) years"**

A perusal of the record reveals that the appellant denied commission of both the main and alternative charge necessitating the reception of the evidence. PW1 the mother of the witness testified that she was on the material day leaving her shamba heading home when she heard a child crying. She did not know whose child it was. It was at about 6:00 p.m. and therefore still day light on nearing where the cry was coming from PW1 saw appellant run from the scene towards a maize plantation. On reaching the child, PW1 found her daughter with her pant on but torn from the bottom. She was bleeding from the nose mouth and virginal opening. The pant and skirt were blood stained. She took her home, reported to her

husband who reported to the village elders, then assistant Chief. The next day, the minor was taken to hospital at Bondo District Hospital where the P3 was filled.

When cross-examined PW1 asserted that it is the appellant who defiled her daughter because when she neared the place where a childs' cry was coming from, she saw the appellant run from the scene into a nearby maize plantation. PW1 was firm that day light enabled her to see the appellant running away. She denied the suggestion that the appellant was elsewhere at the material time of the incident.

PW2 the father arrived home and found the child lying down unable to talk, where upon PW1 informed him that the child had been defiled by the appellant . He PW2 observed the child, and found her bleeding from her private parts. She also had injuries on her wrist and bruises and was also bleeding from her nose and mouth. The next day he reported to the assistant Chief and then took the child to Bondo District Hospital for treatment and P3 was filled and then took it to police station where he found appellant arrested.

When cross – examined he stated that he received the report of defilement and he took action.

PW3 the area assistant chief received accused tied with ropes from a village elder, a youth and PW2, with allegation of defilement and he escorted him to police station, reported and recorded a statement.

PW4 is the minor victim. It is observed by the learned trial magistrate that the minor aged twelve (12) years understood the sanctity of taking oath and she was to give sworn evidence. She was duly sworn. The sum total of her testimony is to the effect that on the material day and time she was on a path selling sugar cane when appellant came and asked her to sell him four (4) pieces of sugar cane. The appellant allegedly told her that he had visitors at his home and he wanted to buy the sugar cane for them. He asked her to take the sugar cane to his home and she obliged. On the way he appellant offered to carry the sugar cane and she gave the pieces to him. On arrival at the appellants' home he held her by the neck and tore her clothes including the pant but it remained on her body. He pinned her down and defiled her. She felt pain. Appellant had also removed his pant. When she heard her mother call out is when appellant ran away. The mother carried her home and was later taken to hospital for treatment. The matter was and thereafter reported to the police station the appellant arrested. When cross –examined ,she stated she talked to appellant when he was buying the sugar cane and walked with him to his house. She raised alarm and to her that might have alerted the attention of her mother.

PW5 a Police Officer was on duty on the 18th June 2008 at 3:10 a.m. when he received the appellant from members of the public with an allegation of defilement alleged to have been committed on the 15th June 2008. PW5 visited the scene and recovered the clothing torn during the struggle i.e. torn pant, skirt and T-shirt and took the minor to Bondo Hospital for examination, treatment and the filling of the P3 and then charged the appellant with the offence. He produced the exhibits. When cross – examined PW5 maintained that the appellant was present when the offence was reported and when the minor was brought to the police station and it was not true as alleged that him appellant was seeing the minor in court for the first time.

PW6 a clinical officer at Bondo District Hospital testified that he saw the complainant on 16th day of June 2008, aged eleven (11) years and tests were carried out, P3 filled, reflecting the results of the tests and he signed the same. When cross – examined, he stated that the complainant had stated that she had been defiled by a person known to her and that the appellant was not examined.

The learned trial magistrate made a ruling to the effect that the appellant had a case to answer and upon being explained his rights as to the exercise of his right of defence, the appellant decided to maintain silence.

Against the afore set out evidence the learned trial magistrate made the following findings on the same.

- **PW6 stated that there were no bruises or tears in the minors genitalia but gave no conclusion on the matter.**

- **There were traces of blood in her external genitalia but no spermatozoon was seen.**

- **The accused was not examined.**

- **In the assessment the learned trial magistrate found the medical evidence scarcity as the doctor made no conclusions and left it to the court to make guess work on the basis of his findings which was not proper as the Doctor being an expert ought to have guided the court.**

- **The court noted that the medical evidence detected some abnormality in the urine but the genitalia was normal. In the circumstances the learned trial magistrate ruled that there had been no penetration because there had been some penetration, one would have expected some bruising or laceration in the genitalia region of the minor.**

- **The court had noted something strange in that the medical Doctor had observed some blood stains in the external genitalia yet an HVS did not reveal any blood in the internal genitalia, but it was not clear where the blood came from as there were no cuts, tears, bruises in the external genitalia. That this blood had not been explained and the court not being an expert, it would not make any inference on it.**

- **By reason of what has been stated above, the learned trial magistrate stated that since the medical evidence is in conclusive, there was no evidence to support the principal charge and consequently the same failed.**

- **That as for the alternative charge, the offence described under Section 5 (1) of the Sexual offence w Act number 3 of 2006 is sexual assault and not indecent act with a child which falls under Section 11 (1) of the said Act. The charge in respect to the alternative charge was found to be totally defective and was to fail.**

- **That but under Section 179 (1) of the Criminal Procedure Code, the count is entitled to convict on a lesser offence where the ingredients of the lesser offence have been disclosed and the two offences are of the same genus.**

- **The complainant was clear on what the appellant did to her. She stated he held her by the throat and tore off her panty. He also removed his panty and defiled her but did not elaborate on what this defilement entailed. She however screamed and when the mother called out to her the**

appellant ran away.

- **The mother of the complainant stated she heard the cry of a child and when she responded, she saw the appellant while running away and on coming on to the scene she saw the child lying down with her torn panty.**

- **The panty was produced in court.**

- **The incident was at 6:00 p.m. There was light which enabled her to see the appellant.**

- **The appellant chose to say nothing.**

- **The court was aware of the principle that the burden rests on the prosecution.**

- **In the learned trial magistrate's opinion, the evidence established the ingredients of an attempted defilement.**

- **The appellant's intentions were clear and he was only interrupted from accomplishing the same by the appearance of the complainant's mother.**

- **There was nothing to challenge the prosecution's evidence and the court had no reason to doubt and for that reason found the appellant guilty of the offence of attempted defilement, convicted him and since the offence was prevalent in the area sentenced the appellant to serve ten (10) years imprisonment with rights of appeal within fourteen (14) days.**

The appellant being dissatisfied with that finding, moved to this court citing six (6) grounds of appeal namely that the learned trial magistrate erred both in law and facts:-

- **By admitting hearsay evidence into the case and by relying on circumstantial evidence which was neither tight enough to warrant a conviction and a sentence as it was adduced by PW1 and PW2.**

- **In failing to appreciate that the unexplained failure by the prosecution to call the members of the public who arrested the appellant and handed him over to police was fatal to the prosecution side.**

- **The evidence before court did not satisfy the required standard.**

- **The clothes the victim was wearing on the material day were not produced and marked as exhibits to support the evidence of PW1 and PW2 and also no evidence was produced before court to prove the age of the complainant.**

- **The court was wrong to convict on the basis of the evidence adduced by the complainant which was inconclusive.**

- **The offence was fabricated on the basis of an existing grudge between PW1 and the appellant**

The appellant with the consent of the state, filed supplementary grounds which are to the effect that **"PW1's evidence was not corroborated by that of the complainant, failed to note that PW1 could not identify a person running away from his back, he failed to give evidence because the court failed to explain and clarify the three options available to him, it was wrong for the learned trial magistrate to fail to acquit him after dismissing both the main and alternative charge.**

In his oral and written submissions the appellant reiterated the content of both the original and supplementary grounds of appeal to the effect that the offences were not proved and he should not have been convicted, that the complainant did not know him and he was pointed out to her in court, no body saw him defile the girl and that he was not examined.

The state responded (1) That submission by submitting that they oppose the appeal because there is supportive evidence from PW1, who saw appellant run away from the scene, PW1 knew appellant before, it was light at 6:50 p.m. PW1 saw torn clothes and blood stained child and clothes, the child knew the appellant before concedes that the Doctor's evidence was not conclusive hence the conviction of the appellant on the alternative charge which conviction was sound and it should be upheld.

This court has given due consideration to the rival arguments herein in the light of the evidence adduced before the lower court, and the findings of the learned trial magistrate and in this court opinion the following are the undisputed facts of this case:-

(i) That the appellant faced a main charge of defilement and an alternative charge of committing an indecent Act with a child. In the lower court.

(ii) That both offences were faulted by the learned trial magistrate mainly because of the Doctor's evidence being inconclusive in so far as the main charge was concerned on the one hand, and there being no presence of laceration, and traces on the private parts of the child to show that there was contact between the body of the appellant and that of the minor. Thirdly, that there was no evidence to demonstrate where the blood found on the child came from or what it was for. Fourthly, that the minor failed to explain how she was defiled.

(iii) The learned trial magistrate found as a fact that the section under which the alternative charge was laid was not proper it should not have been laid under section 5 (1) but 11 (1) of the same Act.

(iv) That PW1's assertion is that she saw appellant running away from the scene where the child was crying from meaning that PW1 saw appellant from behind. As contended by the appellant on appeal, it means that PW1 could only be taken to have identified the appellant from behind, if she had given reasons as to why she believed it was appellant who was running away from the scene where the child was crying.

(v) PW1 did not describe the clothing the appellant was wearing when he was running away and also add that she knew those clothes belonged to the appellant and state why she thought so.

(vi) There was mention that the minor had gone to sell sugar cane but PW1 the mother never stated that she is the one who sent her to sell the pieces of sugar cane.

(vii) There was mention that the appellant alleged that he wanted to buy sugar cane for his visitors who were at his house and on arrival is when the minor was grabbed, and defected but there is no mention as to what happened to those pieces of sugar cane, as no witness came to state that they were either found at the scene or at the appellant's house.

(viii) It was strange the way the medical evidence was in conclusive

(ix) Indeed PW1 gave no documents to confirm the age of the minor, but the court was entitled to go by the estimated age of the minor stated in the P3 form.

(x) It is on record that the learned trial magistrate after faulting the main and alternative charges, exercised his discretion and or powers under Section 179 (i) of the Criminal Procedure Code and found the appellant guilty of the substituted charge.

(xi) That the main complaint of the appellant is that the learned trial magistrate should not have exercised that discretion as the conviction was based on the same evidence which had failed to support the main and alternative charges. Where as the state is of the view that the evidence is one of recognition and as such ,that conviction is sound and it should be upheld.

This court has given due consideration of the above set out undisputed facts of the case and in its opinion, this court as a first appellate court is entitled to revisit the evidence that was adduced before the lower court, re-evaluate it and then arrive at its own conclusions on the matter. This court has done so and in its opinion the substituted conviction by the learned trial magistrate cannot stand because of the following reasons:-

(i) In the absence of an explanation on how PW1 managed to identify the appellant who was running from the scene from the back, the issue of recognition by PW1 of the appellant is ruled out.

(ii) A revisit on the evidence of PW4 the minor as recorded on the record, does come out clearly that PW4 stated that the appellant was a stranger to her during the incident and that she came to know of his name after his arrest. This therefore rules out the issue of evidence of recognition by the minor. This state of affairs called for an identification parade to be held both for PW1 and the minor child, and failure of the investigating officer to address this issue is fatal to the prosecution's case

(iii) From the evidence of PW4 the incident took place before reaching the appellant's house or any house. Both PW1 and PW4 do not state that appellant ran away with pieces of sugar cane. They gave silent as to what became of them. The learned trial magistrate did not resolve this and failure to do so raises doubt as to the existence of an object used to lure the victim to the scene of defilement.

(iv) PW1 and PW2 were categorical that the victim was unable to walk and that she was blood stained as well as her clothes and also she had torn clothes. The moment the learned trial

magistrate was satisfied that medical evidence ruled out penetration, by reason of none existence of tears and laceration on the private parts of the victim, and having ruled and found as a fact that the presence of blood was not explained, he should have interrogated the evidence to determine as to whether the evidence of PW1, PW2, PW4 offered any explanation as to why PW4 who had been allegedly dutifully following the appellant, could suddenly fail to walk. In the absence of an explanation, and in the absence of evidence of whether the blood on the body and clothes of PW4 was human blood or not it tended to suggest that the evidence was a fabrication and for this reason it could not support either the faulted charges or any other because it casts doubt on the truthfulness of the said witnesses.

(v) Indeed the appellant offered no testimony in his defence. The learned trial magistrate rightly observed that, that failure could not be construed against the appellant, and that the burden of proof rests with the prosecution. But the said learned magistrate failed to note that this silence (accused silence) had to be weighed against the totality of the evidence adduced by the prosecution in order to determine whether the appellant's innocence had been ousted or not when so weighed this appellate court is of the opinion that the appellant's innocence has not been ousted by reason of this court's findings in number 1, 2, 3 and 4 above.

For the reasons given in the assessment above a doubt has been created as regards the appellant's commission of the offence substituted, which doubt is resolved in favour of the appellant as by law established which law this court has judicial notice of. The appellants appeal is allowed and the conviction quashed and appellant ordered to be set at liberty forthwith in connection with the conviction which led to this appeal.

Dated, signed and delivered at Kisumu this 16th day of March 2011.

R. N. NAMBUYE

JUDGE

RNN/aao