REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO. 206 OF 2019

GODFREY GODI ONYIMBO alias **JOHNSTONE KODIA.....APPELLANT**

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against the original conviction and sentence in Criminal Case No.18 of 2019

at the Chief Magistrates Court Bungoma by Hon. S. W. Githogori – RM on 13/12/2019)

J U D G M E N T

1. Godfrey Godi Onyimbo alias **Johnstone Kodia,** the Appellant was charged with the offence of defilement of a child contrary to **Section 8(1)** as read with **Section 8(3**) of the Sexual Offences Act. Particulars being that on the 21st day of January 2019 at around 1300hrs at [Particulars Withheld] village, Kabula Location in Bumula Sub-County within Bungoma County intentionally and unlawfully caused his penis to penetrate the vagina of **ZNW** a child aged 16 years.

2. In the alternative, he faced a charge of committing an indecent act with a child contrary to **Section 11(1)** of the Sexual Offences Act. Particulars being that on the 21st day of January 2019 at around 1300hrs at [Particulars Withheld] village, Kabula location in Bumula Sub-County within Bungoma County intentionally and unlawfully caused his penis to come into contact with the vagina of **ZWN.** a child aged 16 years.

3. Having been taken through full trial, the appellant was convicted and sentenced to twelve (12) years imprisonment, (time spent in custody having been considered). He now faults the trial court on grounds that: it erred both in law and fact for failing to find that the scene of crime was not established; circumstantial evidence was not considered; medical results availed did not connect the appellant and complainant; the conviction was based on identification notwithstanding that there was a possibility of the appellant having been framed as a result of an agribusiness misunderstanding; evidence adduced by the Investigating Officer did not corroborate that of the arresting officer; and that rejecting the appellant's alibi defence was erroneous.

4. Evidence adduced by the prosecution was that on the 21st January 2019, **PW2 JC** the mother of the complainant got a call from an anonymous individual alleging to be the District Commissioner of Sirisia. The person addressed her regarding a bursary for her daughter **ZNW** Subsequently **PW5 MWS** the father of the complainant also received a call and the caller claimed he was calling from the Judiciary. He advised them to take the child to the District Education Office to have their Bursary form filled. Thereafter the person called and instructed him to find him at Seseki Primary School instead of Nabeki Bursary School. Later on he called and advised that they meet at Kikai Market and he carried his wife's cellphone for ease of communication. In the result **PW1 ZN**. and PW5, her father went to Kikai Market where they met the appellant and a Boda Boda rider. The appellant had documents, proceedings from Sirisia Court, an age assessment form and his (PW5's) statement. The appellant sought to know whether the complainant had a birth certificate and advised that in event that she did not have it her age would be assessed by the Doctor. Following his advise they went to Chwele. Upon arrival he was advised to go home and get the birth certificate, therefore, he went home leaving the complainant at Chwele. He returned to find them missing.

5. As soon as PW5 left, since PW1 was not party to the discussion between the appellant and her father, the appellant told her that they had agreed to meet her father at Bungoma, but they were to pass through Sipoti to collect a form for children care. They went to Sipoti but found the office closed. She boarded a motorcycle with the appellant and went through Kibanga and on reaching an unnamed road the BodaBoda rider proposed that they use a shorter route to Bungoma which was through a forested area. As she walked on with the appellant, he grabbed her neck and dragged her towards the bush. She screamed but he gagged her mouth and removed her biker and pant, then proceeded to violate her sexually.

6. PW3 Metrine Nanjala Nyongesa and **PW4 Peter Wanjala** who were herding animals nearby who heard screams and the complainant's

call of distress ran towards the place. Upon hearing them talking the appellant run and jumped into the river. In the meantime the complainant who was in her school uniform ran towards them holding her biker and underpants. Many people who had gathered went after the appellant, removed him from the water and beat him up. A village elder intervened and caused him to be taken to the Police Station.

7. PW6 No. 111598 P.C. **Stella Wamaitha** of Bumula Police Station was at the Police Station when **PW8 No. 2017016770 APC Muluke Francklin Nyainya** who visited the scene of the incident and members of public took the complainant and the appellant to the Police Station. She took them to hospital for examination and treatment. The appellant who had been subjected to mob justice was admitted to hospital. Upon discharge he was arraigned in court to answer charges.

8. PW7 Daniel Mulongo, a Clinician at Bumula Sub-County Hospital examined the complainant on the material date. He noted that she was wearing school uniform that was soiled and it had sand, but not torn. She had pain on the neck, the right eye was red and swollen, her genitalia had dry grass on the side, and lacerations on the labia minora and majora. On examination at the laboratory she was found to be pregnant but epithelial cells and few spermatozoa were seen. He filled a P3 form in that respect. He concluded that the complainant had been defiled within a few hours because of fresh lacerations that she had.

9. Upon being put on his defence, the appellant stated that having leased coffee from Metrine Nanjala's family, he called her on phone on 21st January 2019 about 10:00 am as he wanted to be connected to her brother **Maurice Wanyonyi** so as to sell the coffee to him and they agreed that he goes to her house at Kabula. He therefore went to meet Metrine who told him to go to her watermelon farm where he found her and one Peter Wanjala. He asked for payment of money for coffee that had been harvested but Metrine said that the person responsible was her brother whose daughter had turned out to be pregnant therefore had not gone to school. However, he argued that it was not his concern and Peter Wanjala told Metrine to resolve the issue of payment. The appellant proposed that they go to Metrine's house but Metrine went in search of her child at the river and returned having not found her. She found him and Peter Wanjala at the water melon farm. When he brought up the issue of payment, Metrine told him to give them time to find her child. She went to the river and emerged holding the child's hand. She slapped her and the girl fell down but Metrine dragged her towards them and alleged that the girl was pregnant. He denied being involved and advised them to have the girl terminate the pregnancy through an abortion and return to school but Metrine accused him of wanting to kill her brother's child. She shouted and people who were harvesting sand nearby went to the scene. Metrine held his shirt at the neck and people thought she was assaulting him an act that made them to assault him. A village elder who was among them called the police. Following allegations that he wanted to kill someone he was taken to the Police Station together with the complainant. Then, he was taken to the hospital and admitted for one (1) night. While at the Police Station he was called out and he found the parents of Z.N. Maurice Wanyonyi and Janet Chebet. Both Metrine and Maurice produced agreements in respect of lease of the coffee but he did not have his copy, but the agreement had been drafted by Robert Wafula Simiyu the brother of Maurice and Metrine. They were advised by the Police to negotiate but Maurice and Metrine refused. Consequently, he was charged.

10. The trial magistrate evaluated evidence adduced and reached a finding that the complainant, a minor aged sixteen (16) years was defiled and the appellant was positively identified as the person who penetrated the complainant's genital organs. It found evidence adduced by the prosecution having not been discredited as all ingredients of the offence had been established.

11. During the hearing of the appeal which was canvassed through written submissions, it was urged by the appellant that the scene of crime was not properly identified by the complainant and investigating officer for purposes of certainty as there was a contradiction as to whether there was a river or if it was at a forest/bush. He dismissed evidence adduced as mere allegations and/or fabrication as PW1 did not state what exactly she told people that she encountered and if indeed she was told to go to the Police Station. He questioned the credibility of the complainant as her father had not told her to travel to Bungoma and that she alleged that the appellant had been sent by a person who had defiled her, Collins, to kill her so that the case at Sirisia Court could be terminated.

12. That according to evidence of **Metrine (PW3**) the village elder interrogated the appellant who confessed to have been sent by Collins to kill the complainant, a key witness who was not availed to confirm the allegations.

13. That there was contradiction in evidence regarding defiling and killing as PW3 stated that the girl cried out that she was being killed and not raped. That injuries of the swollen neck and eye were caused by PW3 who slapped the complainant. On medical evidence, he argued that there was no specimen taken from the appellant to match that of the complainant and no laceration was noted on the appellant's genital organs as was noted on the complainant.

14. Further the appellant urged that PW5 having accepted that he was a coffee farmer who made money to take his children to school, used his daughter to settle his debts and Collins was not called to testify on the report in case No. 65/18. That though PW5 denied having received money from him, he adduced in evidence an agreement signed by both parties.

15. The State/Respondent argued that the appellant was arrested by members of the public within the alleged scene of crime, people who rescued the complainant, a person not familiar with the area. That there was a forest and the Investigation Officer who visited the scene confirmed that there was a forest within the area mentioned by the complainant.

16. On the question of corroboration, it was urged that the complainant's evidence was corroborated by that of the Medical Officer which confirmed that there were bruises on the genetalia of the complainant and tenderness on the genetalia of the appellant which proved the question of the defilement.

17. And, that evidence tendered by the appellant was not an alibi as alleged. That the appellant was at the scene and was properly identified.

18. This being a first appeal, the duty of the court is as set out in the case of ***Ajode Vs. Republic (2004) eKLR*** where the Court of Appeal stated that:

"In law it is the duty of the first appellate court to weigh the same conflicting evidence and make its own inference and conclusions but bearing in mind always that it has neither seen nor heard the witnesses and make allowance for that"

19. The appellant was convicted for defilement, therefore, ingredients of the offence as provided in **Section 8(1)** of the Sexual Offences Act had to be proved. The alluded to provision of the law provides that :

A person who commits an act which causes penetration with a child is guilty of an offence termed defilement

20. In the case of ***Charles Wamukoya Karani Vs. Republic***

Criminal Appeal No. 72 of 2013 it was stated that:

"The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

21. In the case of ***Francis Omuroni vs. Uganda, Criminal Appeal No. 2 of 2000*** the Court of Appeal Stated that;

"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence, apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense"

22. Age of the complainant in the instant case which is not in dispute was proved by evidence of a birth certificate number (information withheld) where it was ascertained that the complainant was born on 12th October 2002 which meant that at the time of the incident she was 16 years old.

23. Penetration is defined by **Section 2** of the Sexual offences Act as:

….Partial or complete insertion of the genital organs of a person into the genital organs of another person;

24. The complainant described how a male genetalia was inserted into her genitalia on the material date. Her evidence as to the act of penetration having occurred in her genital organ was corroborated by medical evidence adduced. The fact of having been found pregnant meant that she had engaged in coitus previously, but on the fateful date, epithelial cells and spermatozoa were noted following laboratory test that was carried out. Evidence of fresh lacerations on her labia minora and majora was evidence of the complaint having engaged in penetrative sex a few hours prior to being examined. In the case of ***Bassita vs. Uganda S.C. Criminal Appeal No. 35 of 1995*** the Supreme Court held that

"The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victims own evidence and corroborated by medical evidence or other evidence."

25. Oral evidence of how she was penetrated which was corroborated by medical evidence adduced was sufficient proof that there was penetration.

26. On the question of positive identification of the perpetrator. The complainant testified how she was carried on a motorcycle with the appellant prior to being left at a road stated to be a shortcut to Bungoma. Prior to reaching the destination, they had been elsewhere with him. That he dragged her into the bush and gagged her mouth; and after violating her sexually when members of the public answered her distress call, he ran into the river (water) but was caught and arrested in her presence. His escape was thwarted by people who ran to assist the complainant. The complainant had ample time to recognize the appellant. The events unfolded in broad daylight therefore the complainant could not be mistaken as to his identity.

27. On the question of scene of crime, evidence of the complainant was clear as she had never been to the place before. The place was however dominated by bushes or vegetation and there was a river nearby. The fact of the Investigating Officer having visited the scene and taken note of the surrounding but not the exact point where the act was committed cannot be held against the officer as he was not an eye-witness to the act. It was worth noting that the complainant ran while screaming from the exact place and the assailant also in an attempt to escape ran into the river (water).

28. An argument is raised regarding specimen of the appellant having not been taken to establish that he was the culprit. It has never been mandatory for specimen to be taken from the body of the suspect for scientific testing to link him with the sexual act in question. As long as there was suffiecient evidence to establish the identity of the assailant, such evidence was not necessary.

29. Section 124 of the Evidence Act is also clear. The proviso thereto stipulate thus:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

30. If the court believes the victim to be truthful, believes her and proceeds to record reasons for the belief, specimen evidence alleged is not necessary.

31. The appellant argues that there was an agreement between him and the complainant's father for lease of a crop (coffee). He adduced in evidence an agreement purportedly entered into between them. The purported lease agreement for coffee between Maurice Wanyonyi Simiyu and Johnstone Kodia had witnesses alleged to be Metrine Nanjala Nyongesa, Robert Wafula Simiyu, Shadrack Kwendo Chonjuli and Leonard Sande Nyongesa while Silas Wanjala Mondu was alleged to be the secretary; I do note that the prosecution objected vehemently to the production of the document.

32. Two people named in the agreement were not cross examined on it. Evidence adduced and not disputed during the prosecution's case was that PW3 and PW5 were not related. The person who ensured the appellant came out of the river was PW4. During cross examination it was not suggested to him that the problem emanated from an agribusiness agreement that went sour. In order for an agreement to be legally binding it should have been signed by both parties. Proof of the authenticity of the signature and thumbprint was important. The fact that it was not availed to PW5 for comments, its genuineness was questionable. This was not a document to establish the allegation put up.

33. The appellant complains that his alibi defence was not considered. What he was alleging was that he could not have committed the offence because he was not at the scene of the incident as he was elsewhere. If he believed so, he ought to have brought forward the defence at the earliest opportunity.

In the case of ***Republic Vs. Sukha Singh s/o Wazir Singh & Others (1939) 6 EACA 145*** the court stated that:

> **"If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped"**

34. The appellant was found and arrested by members ofpublic within the scene of the incident. Evidence adduced by PW3 and PW4 who were some of the people who arrested him was not discounted. Therefore, the purported alibi defence which was an afterthought did not hold water.

35. Further, the appellant contends that the prosecution failed to call Collins to clarify if indeed he had sent him to kill the complainant. The alluded to allegation did not amount to a confession such that the prosecution could draw an inference to pin down the alleged Collins as an offender, therefore the prosecution did not have to call the alleged person as a witness.

36. The appellant also faults the prosecution for not calling the village elder to testify. **Section 143** of the Evidence Act provides thus :

> **No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.**

37. In the case of ***Keter Vs. Republic (2007) IEA 135*** the court held that:

> **"The prosecution is not obligated to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt…"**

38. The prosecution called two (2) members of public who called the village elder, who in turn called Administration Police and PW8 who arrested the appellant and took him to the Police Station testified. Therefore failure to call the village elder was not fatal to the prosecution case.

39. From the foregoing the appellant was positively identified as the perpetrator.

40. On sentencing, Section 8(4) of the Sexual Offences Act provides thus:

> **A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years**

41. In passing the sentence, the trial court took into consideration, the fact of the appellant having been a first offender with children to support and the fact of his remorse having been shown. The court took into consideration time spent in custody and sentenced him accordingly. Looking at the events as they unfolded, it is obvious that the appellant planned the sequence of events hence deceiving the complainant's father to go back home in search of a birth certificate leaving him with the complainant to put his plan into fruition. In the premises the sentence imposed was too lenient.

42. The upshot of the above is that the appeal is bereft of merit.

Accordingly it is dismissed in its entirety.

43. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY, THIS 5TH DAY OF NOVEMBER, 2021

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Appellant

Mr. Ayekha for DPP

Court Assistant – Esther