



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 12 OF 2019(SOA)**

**GEORGE OLOO OCHANDA.....APPELLANT**

**VERSUS**

**REPUBLIC.....PROSECUTION**

*(Appeal from Judgment, conviction and sentence in Ukwala SRM's Court*

*Sexual Offences Case No. 4 of 2018 by Hon C.I. Agutu, SRM dated 19/2/2019)*

**JUDGMENT**

1. The appellant **George Oloo Ochanda** was charged before the trial court at Ukwala SRM's court with the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual offences Act. He also faced the alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The appellant pleaded not guilty to the charges. He was tried and found guilty of the main charge and sentenced to serve mandatory minimum prison term of 20 years. The offence is alleged to have taken place on the 11<sup>th</sup> day of January 2018 at [particulars withheld] village, Ugunja Sub county within Siaya County against BA [full name withheld], a child aged 15 years.

2. Aggrieved by the said conviction and sentence, the appellant filed this appeal on 25<sup>th</sup> February 2019 setting out the following grounds of appeal:

1. *That I pleaded not guilty to the charge.*
2. *That the doctor's report was doctored to fix me over a dispute we have over accountability of water project in my area.*
3. *That documents presented by PW6 before Court to ascertain the age of the victim were not authentic and were forged.*
4. *That there was contradiction of PW1 statements and her testimony before the trial Court.*
5. *That PW6 did not tell why he did not visit the scene to confirm some of the allegations made by PW2.*
6. *That my defence witness testimony was ignored by the trial Court.*
7. *That I pray for the lower Court proceedings to enable me adduce more grounds of appeal.*

3. The appellant also filed supplementary grounds of appeal through his counsel **Mauwa &Company Advocates** on 26<sup>th</sup> June 2019 complaining that:

1. *the conviction of the appellant was erroneous as the evidence of the complainant was not corroborated by and was inconsistent with the medical evidence adduced before court;*
2. *the prosecution's evidence was riddled with material contradictions, doubts and inconsistencies and the same did not prove the guilt of the appellant t beyond reasonable doubt;*
3. *the trial court did not evaluate the entire evidence as she was bound to do;*
4. *the trial court failed to consider the appellant's alibi defence, the evidence of possible alteration, manufacture , construction and*

*reconstruction of evidence set up against the appellant and whether it creates doubt whose benefit would be to the appellant.*

4. In determining this first appeal, this Court is alive to the principles laid down in ***Okeno Vs. Republic [1972] E.A. 32*** that an Appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (***see also Pandya Versus Republic [1957] E.A. 336***) and to the Appellate Courts own decision on the evidence, the first Appellate Court must itself weigh conflicting evidence and draw its own conclusions.

5. Further in ***Shantilal M. Ruwala Versus Republic [1957] East Africa 570*** it was held that 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 Court's findings and conclusions, it must make its own findings and draw its own 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 the witnesses. (***See Peters Versus Sunday Post [1958] East Africa 424.***)

6. However, before revisiting the evidence before the trial court, I must make some very material observations in the trial court proceedings and judgment.

7. PW1 and PW2 were minors. They were not subjected to proper *voire dire* examination and a declaration made by the trial court as to their intelligence to give evidence on oath or their understanding of the meaning of telling the truth.

8. Secondly, the trial magistrate began writing her judgment by faulting the testimony of PW1 the complainant by calling her less candid meaning she was not truthful in her testimony but went ahead to convict the appellant based on the evidence of PW1 who was not subjected to *voire dire* examination as required to determine whether she appreciated telling the truth.

9. ***This court is not persuaded that the trial court properly conducted the trial. In view of the above, I find and hold that there was mistrial. I quash the conviction of the appellant and set aside the sentence imposed on him by the trial court and order that the appellant shall be retried before Ukwala SRM's Court before another magistrate of competent jurisdiction other than Hon. C.I. Agutu, SRM.***

10. The Deputy Registrar of this court to ensure resubmission of the trial court record with all the exhibits intact to Ukwala SRM's Court. The appellant to be produced before the said court on 27<sup>th</sup> January 2020 for plea taking.

11. Orders accordingly

**Dated, signed and delivered at Siaya this 20<sup>th</sup> Day of January 2020**

**R.E.ABURILI**

**JUDGE**

**In the presence of:**

The appellant

His Advocate absent

Mr. Okachi, Senior principal Prosecution Counsel for the Respondent

CA: Brenda and Modestar