



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT SIAYA**

**CRIMINAL APPEAL NO. 5 OF 2019**

**PAUL ODHIAMBO ODHIAMBO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(From original conviction and sentence in Bondo PM Cr SO Case No 31 of 2018 dated 4/2/2019 before Hon. M. Obiero, Principal Magistrate)**

**JUDGMENT**

1. The appellant **Paul Odhiambo Odhiambo** was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No.3 of 2006. Particulars of the charge are that on the 23<sup>rd</sup> day of June 2018 in Bondo Sub County within Siaya County he intentionally caused his penis to penetrate the vagina of SAI, [full name withheld] a child aged 8 years. He also faced the alternative count of committing an indecent act with SAI the same child in count I, contrary to section 11 (1) of the Sexual Offences Act by intentionally touching her vagina on 23<sup>rd</sup> June 2018.

2. The appellant denied the charges and the prosecution called six witnesses to prove its case. The appellant was placed on his defence and he gave sworn testimony, he did not call any witness.

3. The trial court found the appellant guilty of the main charge and after mitigation, sentenced him to serve thirty years imprisonment. Aggrieved by the said conviction and sentence, the appellant filed this appeal on 4<sup>th</sup> February 2019 setting out five grounds of appeal which he however amended as filed together with the written submissions.

4. The grounds of appeal are:

- i. That the trial court relied on a defective charge sheet under section 214 of the Criminal Procedure Code;**
- ii. That the trial court failed to apply section 191 of the Children's Act and section 3 (2) © of the Sexual Regulations Act [sic].**
- iii. That the prosecution case was marred with contradictions and inconsistencies in their demeanour during trial**
- iv. That the medical findings on examination were not sufficient and efficient to sustain conviction on section 33 and 36 of the Sexual offences Act**
- v. That my cogent defence was overlooked by the trial court.**

5. The appellant prayed that his appeal be allowed.

6. This being a first appeal, this court must re-evaluate and reassess the entire evidence adduced before the trial court and arrive at its own independent conclusion bearing in mind the fact that it neither saw nor heard the witnesses as they testified. See **Okeno v Republic [1972] EA 32**).

7. Revisiting the evidence before the trial court, PW1 SAI [full name withheld] gave evidence after voir dire examination but she was not sworn. She was however cross examined by the appellant's counsel. She stated that she was aged 8 years old and in class two at [full name of school withheld] Academy [full name of school withheld] in Usenge. She recalled that on 23/6/2018 at 5pm she returned from church with her mother and that before reaching her home, as her mother had gone ahead of her, the appellant whom she knew as Odhis appeared on a

motorcycle and offered her a lift and that he took her to the shops where he bought sugar, soap and tea leaves. She stated that *Odhis then took her to a lodging and that while in the room, he removed her pant, took his penis and put it in her vagina*. That she experienced pain and started screaming. Police came and rescued her from the room and arrested Odhis and took him to the chief together with her. She was later taken to the police station and she explained what had happened to her. Her mother collected her from the police station. She was later taken to Bondo hospital, examined and treated. she stated that she knew Odhis very well as he used to ride her brother's motorcycle. She identified him in court.

**8. PW2 No. 247256 APC Brian Zira Otieno** attached to Siaya County Quick Response Team and based in Usenge testified that on 25/6/2018 while he was at the AP Camp one bar attendant went and reported that a man had booked a room in a lodging at Tree top bar where he worked and was accompanied by a young child so the reportee became suspicious and so he wanted the police to go and confirm. In the company of his colleagues APC Owuor and APC Mburu, they went to the place and were shown a room by the reportee but they found the door to the room locked from inside. They knocked and ordered the occupants to open and he complied. Inside the room, they found a girl and the man who introduced himself as Paul. They interrogated the child who was shy so they took the two of them to the AP Camp and called other police officers from Usenge Police Station. The witness identified the appelland in court as the person they arrested in a lodging with a child.

9. In cross examination by Mr. Simiyu Advocate for the appelland, PW2 stated that he did not hear the noise when they approached the room and that the frightened girl was drinking yoghurt. That the bed was tampered with but he never saw stains and that the girl walked normally.

**10. PW3 JAI** testified and stated that she was the mother to the complainant PW1. She recalled that on 23<sup>rd</sup> June 2018 at 5pm she was in her house when Odhis the appelland herein passed by the road and he took with him the complainant. That PW3 waited for the complainant but she was nowhere and at 6pm she called her son at Mageta to find out from him whether he had seen the appelland and the complainant which he denied. She stated that after 7.30pm one Emma Adhiambo went PW3's house and told her that a lady had called Emma and informed her that the complainant had been arrested and that a neighbour told PW3 that she was needed at the Chiefs Camp. PW3 went to the Chief's Camp and found there her daughter PW1 and Odhis. Later they were taken by Police officers from Usenge Police Station and the child was escorted to hospital at Bondo for examination and treatment. PW3 recorded her statement with the police. She stated that PW1 was aged 8 years. She identified the Birth Certificate saying PW1 was born on 3/6/2010. The child was issued with a P3 form which was filled on 25/6/2018.

11. On being cross examined by Mr Simiyu Advocate, PW3 reiterated her testimony in chief and added that when she interrogated the child, the child said that Odhis took her to a lodging and had sexual intercourse with her. She stated that Odhis was a well-known person to her as he used to visit her son. She stated that when she checked the child's genitalia she saw whitish discharge on her pant and that she looked frightened and told her mother that Odhis threatened her.

**12. PW4 Joshua Kennedy Akun** manager at Treetop Bar and Restaurant at Bondo recalled in his testimony that on 23/6/2018 at 7pm he was in the bar when the appelland herein who was their regular customer checked in with a young girl, went to the receptionist and they disagreed on the price so he was referred to PW4 and they agreed on the price. He stated that there was another time that the appelland went to the same bar with another child. That PW4 went and prepared a room for the appelland and the appelland went and bought yoghurt for the girl then the girl went to the room as Odhiambo the appelland remained out making a call. Shortly, the appelland followed the child to the lodging and PW4 rushed to inform the Administration Police who accompanied him to the room and arrested the appelland and the girl. He identified the appelland in court.

13. On cross examination by Mr Simiyu, the witness stated that he did not inquire on his relationship with the girl but that he had been to the lodging with the girl on two other occasions. He maintained that he was the one who booked the accused in the room and that when he brought in the police he found the accused and the child who was on the bed. He denied hearing any noise but stated that they found the child naked and the bed had signs of movement.

**14. PW5 NO. 67045 PC Charles Obade** based at Usenge Police station recalled on oath that on 23 /6/2018 at 9 pm he received a telephone call from Border Patrol Unit Administration Police at Usenge to go and collect a suspect who had been arrested and that in the company of Sergeant Togoch and the driver, PW5 proceeded to the Administration Police Camp and on arrival they were handed a complainant female child and the appelland herein. They rearrested the appelland and took the two to Usenge Police Station and booked them in. They were in the company of the child's mother. He interrogated the child who narrated to him how the appelland lured her when she was playing outside the church and led her to the lodging within Usenge shopping centre on a motor cycle and defiled her and she was rescued by PW4. After recording her statement, he issued her with a P3 form and escorted her to Bondo Sub County Hospital where she was examined and treated and the P3 form was later filled. He also obtained the Birth Certificate for the girl and he produced it as PEX 1 and he identified the P3 form and the appelland in court.

15. On cross examination he stated that the appelland and complainant were not related and that the complainant looked normal. He stated that he entered the room which was No.6.

**16. PW6 Kennedy Opiyo Omondi** testified and stated that he was a Clinical Officer based at Bondo Sub county Hospital. He produced the P3 form for the complainant who was taken to the hospital on allegations of being defiled by a person known to her. *On examining her he found her with lacerated genitalia on the labia minora and majora. The vaginal wall was inflamed and reddish and the hymen was absent. She had whitish foul smelling discharge from the vagina.* Laboratory tests showed no spermatozoa and no infection. Pregnancy test was negative. He concluded that there was penetration. He signed the P3 form which he produced as Exhibit 2. He also produced treatment notes dated 24/6/2018 as PEX 3. He further produced Post Rape Card Report as PEX 4.

17. On being cross examined by Mr Simiyu for the appelland, PW6 stated that at the time of examination the injuries were about 24 hours old and that the history of the patient revealed that the injuries were caused by defilement. He stated that he did not examine the suspect.

18. At the close of the prosecution case, the appelland was placed on his defence and he testified as DW1 and stated that he was a boda boda

rider from Mageta Island. He recalled that on 23/6/2018 in the evening hours he reached at Usenge at about 5pm from a funeral in Akala. That he went to the house of PW2 JAI to give her some money as he used to ride for her a motorcycle. That after she had received the money she asked him to go with her daughter the complainant herein to the shop which he did and bought what she had sent him to buy and the girl asked for yoghurt. He stated that the shop was near a bar so the shopkeeper told him to return to the shop. That as he went behind the shop which was a bar, the girl followed him behind and into the bar and one of the revellers questioned as to who had brought a child to the bar and he told him that she was in his company. That he tried to explain to them how he arrived there and they told him to accompany them so that he could learn a lesson. They arrested him and took him to the AP Camp and beat him up. Later he was escorted to Usenge Police Station by Officers who came from the Station. He was then taken to Bondo Sub County Hospital together with the girl and were both examined.

19. On being cross examined by the prosecutor, the appellant stated that he was arrested at Tree Top Bar but denied that he was in a lodging. He admitted that he was with the child and explained that it was the shopkeeper who told him to pick the items through the bar. He stated that the complainant and her mother were known to him prior to the incident. He denied ever spending a night at the bar and or knowing if the bar had rooms. He denied being found in a room and stated that PW4 and the girl gave false testimony but he could not tell why she gave false testimony. He denied defiling the complainant.

## **SUBMISSIONS, ANALYSIS AND DETERMINATION**

20. The appellant who was acting in person filed written submissions in support of each of his grounds of appeal as amended and reproduced hereinabove. In his oral submissions, he wholly relied on the written submissions and added that he was young, under 18 years when he was arrested and that investigations were not proper. Following that submission, this court ordered for an age assessment report of the appellant and the same was filed in court showing that the appellant was at least 18 years old as his third molars and root development was complete. The written submissions are fully considered in my determination below.

### **RESPONDENT'S SUBMISSIONS**

21. Mr Ngetich prosecution counsel for the Respondent submitted opposing the appeal and contended that the trial of the appellant was proper and in accordance with Article 50(2) of the Constitution. That witnesses were consistent and corroborated each other. Further, that PW1 a minor narrated how she was defiled by the appellant and that the appellant was found with the child in a bar and the fact of defilement was established by the Clinical Officer who examined the minor and confirmed penetration. Counsel further submitted that the prosecution proved all the elements of defilement. He urged the court to find that the conviction of the appellant was proper and that the sentence was merited.

### **DETERMINATION**

22. I have carefully considered the evidence before the trial court, grounds of appeal as amended and submissions by both parties. In my view, the issues for determination can be deciphered from the amended grounds of appeal as submitted on and the same are analysed below.

23. The appellant challenged his conviction and sentence claiming that the charge sheet was defective as it reads defilement contrary to section 8(1) as read with section 2 of the Sexual Offences Act and that it was never amended.

24. I have perused the charge sheet and indeed I find it defective. This is so because it ought to have read section 8(1) as read with subsection (2) of the Sexual Offences Act. And not section 8(1) as read with section 2 of the Sexual Offences Act. This is so because Section 2 of the ACT is the definitions section not the penalty section. The subsection 2 of the section 8 is the penal subsection. However, the appellant never raised this issue of a defective charge sheet before the trial court despite the fact that he was ably represented by an advocate who participated actively in the hearing and cross examination of all witnesses.

25. The appellant has not said that he never understood the charges facing him as the offence section is section 8(1) and subsection 2 is the penalty section which was erroneously written as section 2. In my humble view, the defect in the charge sheet did not prejudice the appellant in any way as he understood the charges facing him and therefore the raising of this ground at this appellate stage is an afterthought and not merited. The ground of appeal is dismissed.

26. The other issue for determination is whether the trial court failed to apply section 191 of the Children's Act and regulations thereof in sentencing the appellant who was allegedly a minor at the time of alleged offence

27. In support of his second ground of appeal, the appellant submitted that the trial court failed to apply section 191 of the Children's Act and regulations thereof in sentencing the appellant who was a minor at the time of alleged offence.

28. However, I have perused the trial court record and proceedings which were conducted with the appellant being ably represented by an advocate. The appellant never raised any issue of his being under 18 years old. If he was, nothing stopped him from raising the issue for the trial court's consideration and at any stage of the proceedings. The charge sheet indicates that the appellant was aged 23 years and the appellant never disputed this fact.

29. During the hearing of this appeal, I ordered for an age assessment report which was done and a report filed showing that the appellant was at least 18 years old. The report did not say that he was 18 years but that he was at least 18 years. There is no evidence that the appellant was on a borderline age at the time of his arrest or conviction to enable this court infer that he could have been under 18 years old. In addition, nothing prevented the appellant from availing to court his birth certificate or birth notification or baptismal card to show that he was a child at the time of trial. The appellant requested this court to allow him avail his birth certificate and he said his brother would avail it. The same was never availed. Evidence of his actual date of birth would have been by way of an extract from the Registrar of Births and Deaths (Registrar of Persons). Furthermore, in his mitigation, the appellant only asked for leniency and stated that he had children who depended on

him for support and upkeep. He did not say that he was a child himself.

30. In my view, this ground of appeal is an afterthought and baseless intended to escape lawful prison term. The same is dismissed.

31. The other issue is whether the prosecution's case was marred with contradictions and inconsistencies. The appellant also submitted in support of his third ground of appeal and stated that the prosecution's case was marred with contradictions and inconsistencies in their demeanour during trial. He relied on *Ndungu Kimani v Republic* 1979 KLR. He submitted that although PW2 claimed that the offence took place on 23/6/2018 and that the appellant was arrested the same day, however, that this was contradicted by the evidence of the arresting officer who testified that the arrest took place on 25/6/2018 at 7pm.

32. I have perused the trial court record both typed and handwritten proceedings. Whereas the typed proceedings read 25/6/2018, the handwritten proceedings read that the witness PW2 was referring to 23/6/2018 at 7pm not 25/6/2018. The overwriting is only a handwriting issue which was erroneously typed as 25/6/2018.

33. Accordingly, I find no discrepancy or inconsistency on the date of arrest, furthermore the appellant in his defence admitted that he was arrested on 23/6/2018.

34. The appellant also submitted that PW4 did not prove that he was a bartender in the premises where the appellant was allegedly found with the child and that he never produced any document from public health to confirm his position. He also complained that there was no proof of a receipt and number of the room in question. Further submission was that the scene of crime was never investigated and that although PW1 testified that she screamed for help, PW2 and PW4 stated otherwise in cross examination.

35. I have examined the evidence as a whole and in my view the main issue which was to be determined was whether the appellant defiled the complainant in the lodging or not and not whether the witness worked in that lodging and evidence thereof that he was a worker or that he had Public Health licence to work in a bar or a receipt issued to the lodger. This is because the Administration Police Officers who were called to intervene and rescue the complainant did find the appellant in the said Room which was Room 6 and the door was locked. The appellant only opened after he was commanded to do so and therein a child was found. The lack of documents to show that PW4 had a letter from public health is immaterial. In addition, whether or not there was evidence of a receipt for the booked room was immaterial as the appellant was found in the room with a child by Police Officers. The appellant did not give any reasons why the witnesses who found him with the child in a lodging would frame him for such an offence. I find the ground and submission baseless and dismiss it.

36. Further submission was that there was a discrepancy in the evidence of PW5 and PW6. That PW5 stated that he received the victim at 6pm on 23/6/2018 and PW6 stated that he received them at 6pm which contradicts the evidence that the crime occurred at 7pm. He wondered who was telling the truth.

37. I have perused the evidence as adduced by PW5 and PW6. The P3 form produced by the Clinical Officer states that the estimated time when the complainant was lured to the lodging was about 6pm. This is the information which PW6 the Clinical Officer gave in the P3 form and in his testimony that the child reported to have been lured at Usenge Centre on 23/6/2018 at about 6pm. PW5 stated that he received a telephone call at 9pm from the AP Camp. He never mentioned 6pm. I find no material contradiction or at all in the evidence of the prosecution witnesses on the approximate time when the offence is alleged to have been committed against the complainant and when the report was made to the police. PW2 received the report at about 7pm from PW4 that the appellant had checked into Tree Top Bar and restaurant with a child and were locked up in a room. PW4 also stated that it was at 7pm when the appellant checked in the bar. I find the ground of appeal and submission devoid of merit and dismiss it.

38. The other issue is whether medical evidence was sufficient to link the appellant to the offence of defilement of the complainant. The appellant in his fourth ground of appeal submitted that the medical findings and examination were not sufficient to sustain a conviction. He submitted that there was no forensic examination on the appellant to link him to the offence. That although the hymen was absent, there was no evidence as to when it got lost. Secondly that there was no classification of injuries and that there was no evidence of penetration.

39. I have considered the ground of appeal and submissions by the appellant. The evidence of the complainant who was proved to be a child born on 6/3/2010 as per the Birth Certificate No [...] dated 23/10/2014 produced as an exhibit was that the appellant on luring her into the lodging removed her pants and put his penis in her vagina and she felt pain and screamed. She was later rescued by police who took them to the AP Camp and Usenge Police station and later to hospital where she was treated and examined by PW5 who also filled her P3 form. PW5 the Clinical Officer found that the hymen was absent, the complainant had multiple lacerations in labia minora and majora and outer vaginal bruises. She also had whitish vaginal discharge foul smelling.

40. In my humble view, there was more than sufficient evidence of defilement of the complainant and defilement as defined under section 2 of the Sexual Offences Act. The appellant had been found locked himself in a room with the child hence there is no possibility that the complainant was defiled by someone else. There is no mandatory requirement, under such clear circumstances, for forensic examination of the suspect where he is found ready handed. The evidence of PW1 was well corroborated. The question of degree of injuries not being stated is a non-issue as defilement is not like an ordinary assault case. It falls in its own category of criminal cases called sexual offences hence the filling of Section C states to be filled in alleged sexual offences after completion of sections A and B. Failure to indicate degree of injury is not fatal.

41. In addition, failure to state when the hymen got lost is immaterial as there was evidence of penetration of the complainant's genitalia and the complainant was clear that she had been defiled by the appellant who used to work for her brother as a motor cycle rider. The appellant admitted that he was found with the child at the bar place but gave an explanation which was not plausible as there was evidence beyond reasonable doubt that he was found locked up in a lodging with the child.

42. On whether the appellant's defence was considered by the trial court, the appellant in support of his fifth ground of appeal that his cogent defence was never considered by the trial court submitted that he had explained himself how he was to be found at the bar and that he denied

committing the offence . that the victim's mother was her boss hence he could not understand why the matter turned the way it was.

43. I have considered the ground and submission thereof and perused the trial court record. The trial magistrate in his analysis and findings found at page 19 line 16 stated as follows:

**“I have carefully considered the evidence on record together with the defence staged by the accused person. I am of the considered opinion that evidence of PW1,2 and 4 is a well corroborated and the same clearly demonstrate that the accused person took the complainant into a room which he booked in the lodging.”**

44. In my humble view, the appellant's defence was considered and this court having re-evaluated the evidence adduced by the prosecution witnesses and the defence put forth by the appellant, I am unable to find any substance in that defence as the appellant was found locked up with the child in a lodging and arrested on the spot. The child was examined and found to have been defiled. What could the appellant have been doing with such a young child in a lodging at such a time?

45. I find the ground of appeal baseless and dismiss it.

46. On sentence, I observe that the mandatory sentence under subsection 2 of section 8 of the Sexual Offences Act, upon conviction is life imprisonment. However, the trial magistrate exercised discretion and sentenced the appellant to serve 30 years imprisonment after considering his mitigation and the fact that he was a first offender. In my view, the sentence was lenient and took into account the recent jurisprudence from the Court of Appeal applying the Francis Karioko Muruatetu Supreme Court Petition No 15 and 16 of 2015. I find no reason to interfere with that discretion of the trial court on sentencing which sentence was lawful and lenient. I decline to interfere with the sentence imposed and uphold it.

47. On the whole I find this appeal devoid of merit. I uphold the conviction and sentence imposed by the trial court. The appeal against conviction and sentence is accordingly dismissed.

Orders accordingly.

**Dated, Signed and Delivered at Siaya this 17<sup>th</sup> Day of February 2020.**

**R.E.ABURILI**

**JUDGE**

**In the presence of:**

Appellant in person

Ms Odumba h/b for Mr Okachi Senior principal prosecution Counsel for the Respondent

CA: Brenda and Modestar