REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL CASE NO. 69 OF 2010

LESIIT, J

MOBY OPIYO ODAYO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. Mr. A. R. Kithinji, SPM dated 31st January, 2019 in Makadara Chief Magistrate's Criminal Case No. 8113 of 2007)

JUDGMENT

1. The Appellant's **MOBY OPIYO ODAYO** was charged with four counts of **Defilement of a child** contrary to **section 8(1)** as read with **section 8(3)** of the **Sexual Offences Act**. Each count had an alternative count of **Indecent Act with a child** contrary to **section 11(1)** of the **Sexual Offences Act**. Count 1 was committed on 17th March 2010 against VA, count 2 on 27th May 2010 against JA, Count 3 on 8th June 2010 against RN and count 3 on 12th June 2010 against MA.

2. After a full trial the learned trial magistrate found the Appellant guilty of the main counts of Defilement of a child in counts 1, 3 and 4 and convicted him accordingly. The Prosecution did not adduce any evidence in support of count 2 thus the acquittal.

3. The Appellant was aggrieved by the convictions and sentences and therefore filed this appeal. The memorandum of grounds of appeal raises six grounds as follows:

> **(1) That the trial court erred in law and in fact by failing to appreciate that the prosecution's case was not only insufficient but fabricated, speculative, conjecture, discredited, inconsistent in material particulars, and lacked probative value.**
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> **(2) That the learned trial magistrate erred in law by relying and considering irrelevant and extraneous matters instead of considering and examining the legal ingredients of the offence charged.**
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> **(3) That trial court failed to note the witnesses were all coached and that investigations were done when I had already been arrested.**
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> **(4) That the learned trial magistrate erred in law and fact in failing to note the underlying school grudges which could necessitate the accusations that faced me.**
>
> **(5) That the learned trial magistrate erred in both law and fact by failing to find that the Investigating Officer had contrary to the law given the victims herein P3 Forms in breach of Chapter 46 Laws of Kenya – Force Standing Orders.**
>
> **(6) That the learned trial Magistrate erred in law by rejecting my defence without assigning any good reason for so doing thereby contravening the provisions of Section 169 of the Criminal Procedure Code.**

4. The Appellant had informed the court that he had a lawyer on record and sought adjournment to avail him which was granted. On the resumed date of hearing the appeal, it transpired that the person he had asked to represent him was not qualified as a lawyer and could not represent the Appellant. The Appellant then said he would argue his appeal in person which he proceeded to do.

5. The Appellant stated that he wished to highlight four points of his appeal. The first one he said was in regard to a letter to City Director of Education. This one highlighted ground four of his memorandum of appeal. He urged the court to consider that in the letters made to City Director of Education (Produced as Prosecution Exhibit 6) the distance given from the school to his house was 3 km yet the teacher testified that it was 2km to his house. The Appellant urged that his house was 4 km from the school. He urged that the school was within slums and was surrounded by the Chief, a Health Centre and a manned gate. He urged that from the school gate, GSU, NYS, Baba Ndogo and ECP were all visible. He urged that it was not possible that he could have walked from the school with the girls without being asked a question.

6. The second issue he wished to highlight was the issue of identification which he said he was challenging. He also said that the Investigation Officer did not go to his house, the scene of the crimes.

7. The other issue that the Appellant highlighted was about doctors. He urged that he was taken to a doctor before being taken to prison. He also urged that there were 3 doctors in the case and that none of them were called to testify. Finally, he urged the court to consider his health and the fact he was still in crutches and due to the corona virus he was worried about being away from his family.

8. The Appellant urged that before he was given bond, reports were required from his school but that none were availed by the Probation Officer despite having worked in many schools.

9. Ms Akunja, Learned Prosecution Counsel opposed this appeal. Counsel urged that the three victims in this case were all students where the Appellant was teaching. Counsel urged that each of the victims narrated how the Appellant led them to his house at different times, and defiled them. Counsel urged that all three victims knew the Appellant well as he was their class teacher.

10. Regarding penetration, Ms. Akunja urged that all three victims were found to have no hymen as it was broken. She urged that all the complainants were 14 years old.

11. In answer to the issue of distance raised by the Appellant, Learned Prosecution's Counsel urged that this being a sexual offences matter, no one saw him taking any of the victims. Counsel urged that corroboration was not required in this case.

12. Regarding medical reports, Counsel urged that **Section 77** of the **Evidence Act** allowed the Investigating Officer to produce expert reports, and that the requisite basis was laid for same.

13. This is a first appellate court and that being the case, I have the duty to analyze and evaluate afresh all the evidence that was adduced before the lower court, and draw my own conclusions of the matter, while giving an allowance for not having had the benefit of observing the witnesses. I am guided by the case of **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs. Republic**, Criminal Appeal No. 272 of 2005 where it was stated as follows:

> **"In the same way, a court hearing a first appeal (i.e. a first appellate court) also has a duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same. There is now a myriad of case law on this but the well-known case of** *Okeno vs Republic [1972] EA 32* **will suffice. In this case, the predecessor of this court stated:**
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> > 'The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala vs. R. [1975] EA 57). 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.' **"**

14. The Appellant was convicted of three counts of defilement of a child under **section 8(1)** as read with **section 8(3)** of the **Sexual Offences Act**, hereinafter referred to **SOA**. There were three complainants who testified in the case. One other complainant did not present herself to testify. The girls were all classmates at [particulars withheld] Primary School in Mathare North, Nairobi. They were all born in 1996, and were aged 14 years at the time of incident. The Appellant was their class teacher.

15. From the evidence adduced before the trial court, the complainants were defiled at different times. There were therefore three different incidents in this case. The first incident was on 17th March 2010 and was against PW3, V A. The second one was on 8th June 2010 against R N, PW2 in the case. The third incident took place on the 11th June 2010 against PW1, M A.

16. PW3 told the trial court that the Appellant had promised to connect her to a sponsor to pay her school fees. She testified that the Appellant told her to wear home clothes under her uniform the day before the incident as she was not allowed to appear before the sponsor in uniform. On the day of incident PW3 waited for the Appellant at stage 2930 as directed. The Appellant kept her waiting from 630am until school break time when he appeared and led to a studio for her photograph to be taken for the sponsor but it was locked. He then led her to a house which he said was for her brother. PW3 testified that G, the Appellant's son who was one class behind her in the same school found them in the house.

17. That they all had tea together after which the Appellant told his son to go back to school. The Appellant locked the door, which PW3 realized only when she stood up and to leave saying she would return later. That is when the Appellant put on music, grabbed her and forcefully threw her on the bed. As she was screaming by that time, PW3 stated that the Appellant stuffed clothes in her mouth, took out her biker and defiled her. He then left her in the house. The next day the Appellant threatened PW3 with death if she told anyone what he did to her.

18. PW2 was new in Nairobi and also in the school and had joined the Appellant and two school mate boys to school sports day which took place at a Play Grounds. PW7, the head teacher during his testimony talked of the Sports Day having taken place at Marurua Play Grounds, and that the teacher he had assigned to escort the school children to the sports was not the Appellant. PW2's evidence was that when she could not see the two schoolmates after the sports, she approached the Appellant, her class teacher to escort her back to the school so that she could make her way back home. Instead of taking her to the school, he took her to a house where he stripped naked, dumb folded her, put sponge in her mouth, took out her panty and defiled her. He then threatened her with death if she reported the matter to anybody. When the issue was discovered, PW3 was examined and found to be pregnant.

19. PW1 was the only complainant whose testimony received corroboration from a witness, PW4. According to PW1 and PW4, the Appellant asked the two of them to go to stage 2930 after tuition on 12th June 2010. The Appellant found them there and bought each a banana and escorted them to his house promising them that he was taking them to meet a sponsor for orphaned children. They landed in the Appellant's house where they met G, the Appellant's son. The Appellant first sent PW3 and his son to the shop for mandazi. After tea was cooked and they all drank, he sent the two to the shops again this time to buy colgate toothpaste.

20. PW1 testified that the Appellant put on music then carried her to the bed after locking the door and undressed her. She testified that the Appellant lay on her, defiled her as he touched her breasts and also inserted his tongue in her mouth to prevent her from screaming. He then had anal sex with her after which he threatened to stab her to death if she told anyone what he had done to her.

21. I have considered the evidence before the trial court both by the prosecution and the defence, together with the trial magistrate's judgment. I have also considered the Appellant's appeal, the grounds on which it is based as set out in the memorandum of the appeal and his highlight in court together with the submissions of the learned Prosecution Counsel.

22. The Appellants first challenge with the trial magistrate's findings and judgment is failure to appreciate that the prosecution's case was not only insufficient but fabricated, speculative, conjecture, discredited, inconsistent in material particulars, and lacked probative value. Was the prosecution's case insufficient and lacked probative value? The terms chosen by the Appellant to describe the prosecution case is that it was fabricated, speculative, conjecture, discredited, inconsistent in material particulars. I will consider the English dictionary definitions of these terms except the last one which is self-descriptive. Fabricated means *fictitious or invented*. Speculative means *theoretical or hypothetical*. Conjecture means *an opinion or conclusion formed on the basis of incomplete information*. Discredited means *disgraced or condemned*.

23. In his oral submission the Appellant urged that he had issue with identification which he said he was challenging. He also said that the Investigation Officer did not go to his house, the scene of the crimes. Ms. Akunja, Learned Prosecution Counsel on the issue of identification urged that the three victims in this case were all students where the Appellant was teaching. Counsel urged that each of the victims narrated how the Appellant led them to his house at different times, and defiled them. Counsel urged that all three victims knew the Appellant well as he was their class teacher.

24. The complainants in this case were all children aged 14 years. The incidents against them occurred on different days. Apart from PW1 who had accompanied PW4 to the Appellant's house before PW4 was sent away, the other complainants were alone. Each of them shared their experiences at the Appellant's hands. For instance, PW1 said she was defiled through vaginal and anal penetration. PW2 said that cloth was stuffed in her mouth and was dumb folded before she was defiled. For PW3 she said that she was forcefully thrown onto a bed, had a sponge stuffed into her mouth to muzzle her cries, then defiled.

25. I find that the complainants accounts of the incidents affecting each was diverse and varied. None of them contradicted their evidence as to suggest they were not clear of the facts they testified to. I find no evidence to suggest that the complainants were coached. PW4 did not witness anything, her evidence just confirms that PW1 was with the Appellant in his house on the 12th June 2010, the day of the incident against her.

26. On the issue of identification, the learned trial magistrate considered the evidence of each of the complainants and concluded '*From the evidence tendered before this court, I find that the accused person was well known to the kids as he was their teacher at school which is further corroborated by PW5 who stated that the accused was a colleague teacher at the school which is further confirmed by PW6 as he stated that he was the head teacher and that the accused had been teaching at the school for about three months. As such I find that the accused was positively identified by the witnesses.'* I find that nothing turns on this ground.

27. I will consider the third ground next as it is related to the first one. The Appellant contends that trial court failed to note the witnesses were all coached and that investigations were done when he had already been arrested. I have already found that coaching of witnesses was not evident from the record. As for investigations beginning after his arrest, that would not matter so long as the investigations were properly carried out. I find nothing turns on this ground.

28. The second ground of appeal was that the learned trial magistrate erred in law by relying and considering irrelevant and extraneous matters instead of considering and examining the legal ingredients of the offence charged. I have considered this ground and perused the learned trial magistrate's judgment. From the judgment, the learned trial magistrate found that there were four issues for determination. These were *identification; whether the elements of defilement were met; whether the Appellant was positively linked, and whether the prosecution has met its burden of proof.* These are the areas the learned trial magistrate considered. I have confirmed from the record that no irrelevant or extraneous matter was considered.

29. On the legal issues that could have been considered was penetration. That also touches on the issue of doctors' evidence. The Appellant in his oral submission highlighted about doctors. He urged that he was taken to a doctor before being taken to prison. He also urged that there were 3 doctors in the case and that none of them were called to testify.

30. Ms. Akunja for the state urged that on the issue of penetration all three victims were found to have no hymen as it was broken. Regarding medical reports, Counsel urged that **Section 77** of the **Evidence Act** allowed the Investigating Officer to produce expert reports, and that the requisite basis was laid for same.

31. The learned trial magistrate considered the issue of penetration and quoted relevant law and precedent. He also considered the complainants on penetration and came to the conclusion that they were telling the truth, and that medical evidence adduced supported penetration. I am satisfied that the learned trial magistrate considered and examined the legal ingredients of the offence charged and guided himself on the facts before him and the law and came to the correct conclusion. I find that nothing turns on this ground.

32. The Appellant raised the issue that the learned trial magistrate erred in law and fact in failing to note the underlying school grudges which could necessitate the accusations that faced him. In his oral submission the Appellant urged the court to refer to letters written to City Director of Education. The letters were produced as Prosecution Exhibit 6. The Appellant urged that in those letters, the distance given from the school to his house was 3 km yet the teacher (not specified between PW5 and 6) testified that it was 2km to his house. The Appellant urged that his house was 4 km from the school. He urged that the school was within slums and was surrounded by the Chief, a Health Centre and a manned gate. He urged that from the school gate, GSU, NYS, Baba Ndogo and ECP were all visible. He urged that it was not possible that he could have walked from the school with the girls without being asked a question.

33. The Appellant questioned PW5 and 6 in cross examination after they testified. PW5 told the court that the Appellant had been a teacher in the school for only three months when the issues of defilement were reported. She answered the Appellant about the distance from Moi Forces School to the school but was not asked about the distance from the school to the Appellant's house.

34. PW6, the head teacher of [particulars withheld] Primary School, as it was known then, was cross examined at length. He confirmed that the Appellant had been transferred to the school in March 2010. The first incident was on 17th March 2010. The last two were on 8th and 12th June 2010 respectively. It is clear that the Appellant was new when he committed these offences. As for grudges against him, PW6 in cross examination concerning procedure he followed in the matter stated that he called a Management Meeting at the School after the incidents, and after the Appellant declined to attend a staff meeting. He said that it was the Management which called for his interdiction.

35. The complainants from their evidence were directed to walk from the school to a stage, 2930, where the Appellant would meet them. For PW3, she waited at that stage from 6:30 am to school break time, a long period to wait. For PW2, the Appellant walked her to his house from Marurua Play grounds. For PW1, she walked with PW4 from school to stage 2930 where the Appellant found them. None of the complainants walked from school with the Appellant and therefore the issue of the distance and being seen in public with them does not arise.

36. The letters to the District Education Officer are on record as P. Exh. 6. I have read them. They are a summary of the reports made to the School by the three complainants. The letters were a formal report of the three incidents and were a statement of facts from the complaints against the Appellant. I see nothing wrong in them. Neither do they support or prove any grudge against the Appellant.

37. The other ground of appeal raised was that the learned trial magistrate erred in both law and fact by failing to find that the Investigating Officer had, contrary to the law given the victims herein P3 Forms in breach of Chapter 46 Laws of Kenya – Force Standing Orders. There is no evidence adduced to indicate that the law was flouted in the manner in which the P3 forms were issued to the complainants. The Appellant did not summit on it in his oral submissions. I have looked at the P3 forms and find that they are dated 18th June 2010. That was three months after PW3 was defiled and ten days and eight days after PW2 and 1 were defiled respectively. There is no evidence of flouting the law in the manner in which the P3 forms were issued apparent on the face of the record.

38. The Appellant contends that the learned trial Magistrate erred in law by rejecting his defence without assigning any good reason for so doing thereby contravening the provisions of Section 169 of the Criminal Procedure Code. I have perused the judgment of the learned trial magistrate and find that he summarized the Appellant's defence as part of his analyses of the entire case. On my part as a first appellate case, I have also analyzed and evaluated the entire evidence adduced before the trial court and I have come to the same conclusion as the learned trial magistrate that the prosecution proved its case against the Appellant to the required standard of proof beyond any reasonable doubt. The Appellant's defence was a bare denial of the offences charged. The evidence adduced against the Appellant was overwhelming. The trial court was right to reject his defence and convict him for the three main charges in counts 1, 3 and 4.

39. Having considered this appeal, I find no merit in any of the grounds raised. The prosecution proved its case against the Appellant to the required standard. Accordingly, I dismiss the appeal against conviction in its entirety.

40. In regard to the sentence the Appellant urged the court to consider his old age, being a retired teacher. He also urged that he is still using crutches to walk. He also urged the court to consider releasing him due to corona virus, urging that he was no a worried man.

41. In sentence the learned trial magistrate wrote:

> **'I have considered the mitigation and the age of the accused and the health status of the accused and the nature of offence.**
>
> **Accused sentenced to 15 years for count 1, 3 and 4, Sentence to run concurrently.'**

42. Before sentencing an accused person, the court is mandated to schedule a hearing in which the mitigation of an accused person is received, the previous record of the accused from the prosecution and where available, victim impact statement and report from Probation. In this case the learned trial magistrate did receive mitigation from the accused person. Nothing else was received apparently, not even the Appellant's previous record.

43. What I believe requires mention and direction is what a trial court is required to do before passing the sentence. There is a **Sentencing Policy Guidelines** in Kenya for use by our courts. It is a very important document which debunks sentencing and gives guidance as to what to consider and how to arrive at an appropriate sentence. I will cite two parts of that document.

44. **Paragraphs 7.13** and **7.14** provides:

CONCURRENT AND CONSECUTIVE SENTENCES

7.13 Where the offences emanate from a single transaction, the sentences should run concurrently. However, where the offences are committed in the course of multiple transactions and where there are multiple victims, the sentences should run consecutively.

7.14 The discretion to impose concurrent or consecutive sentences lies in the court.

45. The learned trial magistrate ordered the sentences he imposed on each of the three counts to run concurrently. He did not however offer any reasons for so ordering. Neither did his ruling on sentence offer any analysis or explanation. The law is clear that the decision whether a sentence should run concurrently or consecutively lies with the trial court. See **section 14 (1)** of the **Criminal Procedure Code**. However, as the guidelines provides at **paragraph 7:13** a concurrent sentence should be ordered where the offences arose out of a single transaction. However, where the offences are committed in the course of multiple transactions and where there are multiple victims, the sentences should run consecutively. In this case, the offences were committed in three different incidents and were committed against multiple victims. These are not the only factors the trial court should put into consideration. For this I will cite sections of **paragraphs 23** of the **Sentencing Policy Guidelines**.

46. Paragraph 23.4, 23.5 and **23.6** contains a general statement on following:

AGGRAVATING AND MITIGATING CIRCUMSTANCES

23.4 To determine the most suitable sentence, the court shall take into account the aggravating and mitigating circumstances.

23.5 In all cases, convicted persons should be expressly provided with an opportunity to present submissions in mitigation.157

23.6 The list of aggravating and mitigating circumstances below is not exhaustive.

47. The aggravating circumstances are listed in **paragraph 23.7**, but as it states, it is by no means exhaustive:

AGGRAVATING CIRCUMSTANCES

23.7 Aggravating circumstances warrant a stiffer penalty than would be ordinarily imposed in their absence. They include:

1. Use of a weapon to frighten or injure a victim; the more dangerous the weapon, the higher the culpability.

2. Multiple victims.

3. Grave impact on national security.

4.Serious physical or psychological effect on the victim.

5. Continued assault or repeated assaults on the same victim.

6. Commission of the offence in a gang or group.

7. Targeting of vulnerable groups such as children, elderly persons and persons with disability.

8. Previous conviction(s), particularly where a pattern of repeat offending is disclosed.

9. Intricate planning of an offence.

10. An intention to commit a more serious offence than was actually committed.

11. High level of profit from the offence.

12. An attempt to conceal or dispose of evidence.

13. Flagrant use of violence or damage to person or property in the carrying out of an offence.

14. Abuse of a position of trust and authority.

15. Use of grossly inhuman and degrading means in the commission of an offence.

16. Targeting those working in the public sector or providing a service to the public.

17. Commission of offences motivated by ethnic, racial and gender bias.

48. The learned trial magistrate should have put into consideration the guidance given on what constitutes aggravating circumstance, even if he did not quote the guidelines verbatim. I perused the ruling and can say categorically, no aggravating circumstances were considered. Were there any aggravating circumstances?

49. Considering this case, I can identify several aggravating circumstances applicable to it from the provided list.

2. Multiple victims. In this case there were three victims.

4.Serious physical or psychological effect on the victim. The victims lost their innocence and one of then was impregnated and had to choose abortion. The psychological impact will live with the victim.

7. Targeting of vulnerable groups such as children, elderly persons and persons with disability. The victims were all aged 14 years.

8. Previous conviction(s), particularly where a pattern of repeat offending is disclosed. In this case, the three offences were committed singly over a period of three months.

9. Intricate planning of an offence. The Appellant meticulously planned how to meet his victims without being detected by the school. He also used the promise of getting them sponsorship to lure them to his house, knowing they would be vulnerable and the promise of assistance to meet school fees would be welcome any time. These were children from slum areas. Any help to meet part of the school costs would be a welcome relief to them and their families.

13. Flagrant use of violence or damage to person or property in the carrying out of an offence. The Appellant used pieces of cloth or sponge to stuff his victims to muzzle their cries. He also violently grabbed them, throwing them on the bed before stuffing their mouths and defiling them. The fact the victims were children makes the crime more serious.

14. Abuse of a position of trust and authority. The victims were all students in class 5 in which the Appellant was the class teacher. The Appellant abused his position of not just trust but guardian over his victims.

15. Use of grossly inhuman and degrading means in the commission of an offence. For the child victim, PW1, the Appellant defiled her through penetration of her vagina and anus. He also put his tongue in her mouth to forcefully muzzle her as he did his heinous act. The force used in the process was traumatic to his victims.

17. Commission of offences motivated by ethnic, racial and gender bias. His victims were girls. It was gender bias. In two of the incidents, the one against PW1 and 3, his son was around the home. In the case of PW1, he was sent to buy stuff with PW4. In the case of PW3, he was sent back to school as the Appellant against his victim. That speaks of bias in no uncertain terms. He was protective of boys but not so of girls.

50. Is this a case where concurrent sentence should have been ordered? Definitely not. The learned trial magistrate misdirected himself on a point of both law and fact. I have to reconsider the mitigation and the circumstances that affect sentence including the aggravating factors. I have considered the Appellants mitigating circumstances. That he is a retired teacher. He is on crutches. He urged the court to consider covid-19 and potential impact on people his age. I have also considered the aggravating factors as set out above.

51. Having done so, I find that the learned trial magistrate made an error in declaring that a concurrent sentence order was appropriate in this case. The error he came to should be corrected. Had a notice of enhancement been given to the Appellant before the appeal was heard, this could have been a good case to enhance the sentence given the circumstances of the case. Since no such notice was given to the Appellant, I will merely correct the error in the order on sentence.

51. In the result, I set aside the order of the learned trial magistrate to have the sentence imposed on each count to run concurrently, and in substitution order the sentence of 15 years' imprisonment on each of the counts 1, 3 and 4 should run consecutively.

52. The total result of the appeal is that the appeal against conviction fails for lack of merit and is dismissed. The appeal against sentence also fails. The sentence imposed against the Appellant will run consecutively and not concurrently as herein above ordered.

53. Those are the orders of the court.

54. The Appellant has a right of appeal as by law prescribed within 14 days of today.

DELIVERED BY SKYPE THIS 8TH DAY OF JUNE 2020.

LESIIT, J.

JUDGE

DATED IN NAIROBI THIS 8TH DAY OF JUNE, 2020.