REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 148 OF 2016

ISAAC OBONGO ONYINKWA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(An Appeal from the original conviction and sentence in the Chief Magistrate's Court at Kibera S/O Case No. 40 of 2015 delivered by Hon. J. Kamau, RM on 30th August 2016).

JUDGMENT.

1. The Appellant, **Isaac Obongo Onyinkwa** was charged with the offence of defilement contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**. The particulars of the offence were that on the 16th day of August 2015 within Nairobi County unlawfully and intentionally caused his male genital organ (penis) to penetrate the female genital organ (vagina) of LN, a child aged eleven (11) years. In the alternative, he was charged with committing an indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006** in that he intentionally touched the vagina of LN a child aged eleven (11) years. The Appellant pleaded not guilty to both offences but he was convicted of the main charge and sentenced to serve twenty (20) years imprisonment. He was aggrieved by both his conviction and sentence and preferred the instant appeal challenging the same.

2. The Appellant relied on the amended Grounds of Appeal filed alongside his written submissions on 29th October 2018. The said grounds have been reproduced verbatim hereunder;

> ***a) Failure to abide by the provisions of Article 25 (c) and 50 (a) of the Constitution.***
>
> ***b) THAT the learned trial magistrate failed in point of law and fact by not considering that the prosecutor did not discharge one of the elements of the offence that is that whether the alleged act was committed by the Appellant herein.***
>
> ***c) THAT the learned trial magistrate erred in law and fact by not considering that his mode of arrest was blurred with inconsistencies that were more questionable.***
>
> ***d) THAT there was misapprehension of facts by the learned magistrate.***
>
> ***e) THAT the learned magistrate failed to evaluate and analyze the entire record and improperly rejected his unchallenged defense thereby shifting the burden of proof.***
>
> ***f) THAT the trial magistrate erred on points of law and fact by failing to realize that there was evidence of bad blood/grudge which was sufficient to justify a frame up.***
>
> *g)* ***THAT the trial magistrate erred on points of law and fact by not resolving the explicit contradictions apparent in the prosecution evidence in favour of the defense****.*

Evidence

3. This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced and arrive at its own independent conclusion. In so doing, the court is required to always bear in mind that it neither saw nor heard the witnesses and give due regard for that. (See **Okeno v Republic (1972) EA 32).** I summarize the evidence adduced as as follows;

4. On 16th August 2015 at around 6.00 pm, **LN (PW1**) a minor aged eleven (11) years at the time was sent by her mother to buy charcoal at Uthiru market. As she was nearing the market, the Appellant grabbed her, covered her mouth, and dragged her into an iron sheet house near the road. He made her lie on a sack on the floor and removed her dress and underwear. He then removed his trousers and slept on her. Thereafter, he defiled her and covered her mouth so that she could not scream. While the Appellant was still in the act, his wife walked in on them and started screaming. The Appellant stood up, pushed his wife to the ground and ran away.

5. Linet Anangwe (PW2) was walking home from work around the same time when she heard a woman screaming from an iron sheet house near the road. The woman who was well known to her as the Appellant's wife was saying that her husband had defiled a child. Soon thereafter, she saw the Appellant who was also well known to her since he sold mandazis in the estate, running away. PW2 went into the said house to rescue the child and found the Appellant's wife on the floor. Accompanied by other women, they took PW1 to her mother **MWW (PW5)**. Upon examining PW1, they discovered that she had whitish discharge on her vagina. The incident was reported at Kabete Police Station and thereafter PW1 taken to Nairobi Women's Hospital for medical examination and treatment.

6. Upon examination at the hospital on the same night, PW1's vagina was found to be hyperemic. Her hymen had been broken and she had a small tear on her anus. A vaginal swab also revealed that there were epithelial cells which had detached from the vagina wall due to friction thereon with a blunt object. Her vagina was inflamed and reddened from the penetration by the assailant. Since the injuries sustained by the PW1 were still fresh, it was concluded that she had been defiled. A Post Rape Care Report was prepared to that effect and produced in evidence by **Joseph Mwanzia (PW4)** on behalf of his colleague who had since left the institution.

7. On the following day, 17th August, 2015, **PW6, Pauline Katungi** who was the investigating officer visited the scene of the crime. She observed that the house where the incident took place looked like a shop. She also spoke to the Appellant's neighbours who informed her that he had gone into hiding. The Appellant was arrested at Uthiru shopping centre on 19th August 2015 by a mob of women upon being alerted by Mary Muthoni (PW3). He was then handed over to PW6 who put him in police custody.

8. Dr. Joseph Maundu of Police Surgery **(PW7)** further examined PW1 on 19th August 2015. He also formed the opinion that PW1 had been defiled since her genitals were inflamed. She had bruises on the fore cheeks of her private parts, a small tear on the vagina and her hymen was broken. PW7 also examined the Appellant on the same day. His genitals were normal but he had bruises on his chest and back as well as laceration on his lips sustained from the beating he got from the mob.

9. In his sworn defence, the Appellant **(DW1)** testified that on 16th August 2015, he was with his wife working all day long. While at his place of work, he had a confrontation with a man who was flirting with his wife. On 19th August, 2015 at around 11.00 am, he was stopped on the road by some men, one of them being the one he had confronted earlier. Thereafter, a lady appeared claiming that he had defiled her niece and made a phone call. Then, four other women appeared and started beating him while a crowd gathered around them. He was rescued and taken to the police station where he was booked and charged with the offence in question. He denied committing the offence and claimed that the man who wanted his wife and the four women who arrested him were in the same 'chama' with him and wanted to fix him so that they could withhold his money.

10. Schola Kerubo (DW2) was the Appellant's wife. She denied having caught the Appellant defiling PW1 on 16th August 2015 and screaming as a result thereof. She asserted that the only incident that occurred on the said date was a confrontation between the Appellant and a man who had been flirting with her. The incident caused her to flee when she heard some women screaming as she feared they would beat her. She also testified that she was aware the Appellant was in a 'chama' with the complainant's mother.

Analysis and determination

11. The Appeal was canvassed by way of written submissions. The learned state counsel Ms. Atina opposed the Appeal. This court has carefully re-evaluated the evidence on record and considered the parties respective submissions and found that there are four issues for determination. The First issue is whether the charge sheet was defective. Secondly, is whether the prosecution proved beyond reasonable doubt that the offence was committed by the Appellant. Thirdly, whether the trial court considered the alibi defence raised by the Appellant and fourthly, whether the sentence meted by the trial court should be enhanced to life imprisonment.

Whether the charge sheet was defective.

12. As regards the issue of defective charge sheet, the Appellant submitted that his conviction was based on a defective charge sheet since the same did not indicate his name as alias "Domi" which PW5 stated he was commonly referred by. In his view, this defect prejudiced him and violated his right to a fair trial as it was not clear who PW5 was referring to. **Section 134** of the **Criminal Procedure Code** provides as follows regarding the essential ingredients of a charge sheet:

> ***"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."***

13. The main charge for which the Appellant was convicted was framed as follows:

> ***"Defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act, No. 3 of 2006.***
>
> ***ISAAC OBONGO ONYINGWA. The Particulars were that on the 16th day of August 2015 at "N" market within Nairobi County, unlawfully and intentionally caused his male genital organ (penis) to penetrate the female genital organ (vagina) of LN a child aged 11 years."***

14. Clearly, the charge sheet did not refer to the Appellant by his other name, Domi. However, this did not render it defective as a charge sheet can only be deemed defective if it is not drawn in a manner that would enable an accused to understand the offence with which he is charged so as to enable him to defence himself. In the present case, the Appellant pleaded to the offence of defilement for which evidence was adduced. He was able to cross examine the prosecution witnesses most of whom consistently identified him as the offender. He was also able to defend himself accordingly. Further, and in any case, the charge was consistent with the evidence adduced during trial.

15. In the premises, this court finds that the charge was not defective and the failure to indicate the Appellant's alias name did not occasion any miscarriage of justice or violate his constitutional right to a fair trial as alleged.

16. The court is guided by the case of **Isaac Nyoro Kimita & Another v Republic [2014] eKLR** where the court of appeal cited the case of ***Willie (William) Slaney V State of Madhya Pradesh, [A.I.R. 1956 Madras Weekly Notes 391]*** **in which** the Supreme Court of India held that:

> ***"Whatever the irregularity, it is not to be regarded as fatal unless there is prejudice. It is the substance that we must seek. Courts have to administer justice and justice includes the punishment of guilt just as much as the protection of innocence. Neither can be done if the shadow is mistaken for the substance and the goal is lost in the labyrinth of insubstantial technicalities."***

Whether the case was proved beyond a reasonable doubt.

17. The court is enjoined to determine whether the key elements of the offence of defilement were sufficiently established. The elements are penetration, identification of the Appellant and the age of the complainant. It is not in doubt that PW1 was eleven years old at the time of the incident. This can be gleaned from her own evidence and that of her mother, PW5, as well as the Birth Certificate tendered in evidence which clearly indicates her date of birth as 29th September, 2003. This court therefore finds that the prosecution proved that the complainant was eleven years old as at 16th August, 2015 and not twelve years as was held by the trial magistrate.

18. As regards the issue of penetration, PW1 testified that the Appellant inserted his penis inside her private parts which caused her to feel a lot of pain. PW1's evidence was corroborated by the Post Rape Care Report produced in evidence by PW4 in which it was concluded that PW1 had been defiled. This evidence was further corroborated by PW7 who opined, upon examining the complainant, that she had been defiled since her vaginal wall was hyperaemic and/or inflamed. She had bruises on the fore cheeks of her private parts, a small tear on the vagina and her hymen was broken. In the premises, this court concurs with the learned State Counsel's submission that the prosecution sufficiently established that the complainant had been defiled.

19. On whether it is the Appellant who committed the offence, the Appellant claimed that the prosecution's evidence was marred with inconsistencies and contradictions. The Appellant contended that PW1's narration of the events that took place on the evening of 16th August, 2015 was impracticable as it was not possible to do all that on his own. However, in her *voire dire* examination, it can be deduced that PW1 knew the importance of telling the truth in court and that is why she gave a sworn statement. It is also clear from the events narrated by PW1 that she had enough time with the Appellant to enable her positively identify him as the perpetrator.

20. The proviso to **Section 124** of the **Evidence Act** allows a court to convict an accused person in defilement cases on the sole evidence of the minor if the court believes that the minor is telling the truth. From the evidence on record, it is clear that PW1's testimony that the Appellant's wife walked in on them at the time of the incident and screamed was corroborated by the evidence of PW2 who testified that she heard a woman whom she knew screaming that her husband had defiled a child, and indeed saw the Appellant running away. Both the Appellant and his wife were well known to PW2. They resided in the same estate and she used to see the Appellant selling mandazi before the incident and even bought the same from him. It is evident therefore, that the Appellant was identified by way of recognition. In the circumstance, the court is satisfied that the Appellant was positively identified as the offender.

21. The court relies on the case of **Peter Ngure Mwangi v Republic [2014] eKLR** where the court of appeal held as follows:

> ***"In the instant appeal, applying the above principles to the rival arguments on this issue, it is our finding that PW1 and PW2 identified the appellant by recognition as he had worked for them on their construction site. He was also a local resident. PW1 and PW2 had been seen with him from time to time in circumstances while not under an apprehension, with his face bare. On the day of the incident the appellant had not covered his face. The circumstances of identification were favourable and free from the possibility of error. In the circumstances of this appeal, we find therefore and hold that the learned Judges of the High Court cannot be faulted for finding as they did, that the appellant was positively identified by recognition by PW1 and PW2."***

22. Further, it was the Appellant's contention that there were contradictions and inconsistencies regarding the mode of his arrest. This court has reviewed the evidence on record and established that both PW3 and PW5 testified that the Appellant was arrested by a mob on 19th August, 2015 and thereafter taken to the police station. This was confirmed by PW6 who stated that she arrested the Appellant with the help of her colleague on the said date after he had been arrested by a mob. The court therefore finds that there were no contradictions as to how the Appellant was arrested.

23. As regards the issue of crucial witnesses, the Appellant submitted that the prosecution was obliged to call all the witnesses who were in the mob to shed light on the reason for his arrest. However, this court is alive to the fact the prosecution has the discretion to determine the witnesses who are material to its case and thus not obliged to call all witnesses. (See ***Bukenya and Others v Uganda [1972] EA 349***). *In any case, this court notes that the prosecution called PW3, PW5 and PW6 all of whom were present when the Appellant was arrested and who had prior information regarding the incident. It was therefore not necessary for the prosecution to call everyone who participated in arresting him to testify.*

24. The Appellant also raised issues with the contradiction in the Post Rape Care Report tendered in evidence which indicates that PW1 was

examined on 16th August, 2015 and the incident occurred on 20th August, 2015. From the evidence on record, it is clear that all witnesses consistently testified that the offence was committed on 16th August, 2015. It is therefore obvious that the date 20th August, 2015 was merely a typographical error which is curable under **Section 382** *of the* ***Criminal Procedure Code.***

25. In the circumstances, this court is convinced that there was no doubt that the offence in question was committed by the Appellant and there were no inconsistencies and contradictions in the testimonies of the prosecution witnesses as alleged. It was therefore not necessary for the prosecution to produce in evidence the clothes that the minor was wearing on the material day for purposes of a DNA test as contended by the Appellant.

Whether the Appellant's alibi defence was considered.

26. In the judgement delivered by the trial court on 30th August 2016, the trial magistrate noted that the alibi defence was not plausible as DW2 appeared to have been couched by the Appellant. The court also dismissed the assertion that the offence was fabricated. This was in view of the fact that DW2 claimed that she had not been in communication with the Appellant since his arrest but was able to come to court to testify in his support. This court is of a similar opinion. I do also find and hold that the Appellant's defence lacked merit and was ousted by the strong prosecution case. It is not factual that it was not considered by the learned trial magistrate.

Whether the sentence imposed was proper.

27. Finally, on the issue of sentencing, the learned State Counsel urged the court to enhance the twenty (20) years imprisonment sentence imposed on the Appellant by the trial court to life imprisonment. This was in view of the fact that it was sufficiently established that the complainant was eleven (11) years old at the time of the incident. The sentence prescribed under **Section 8 (2)** of the **Sexual Offences Act** for the offence of defilement of a child aged eleven years or less is life imprisonment. The provision reads;

> ***"8. (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."***

28. Section 354 (3) (ii) and **(iii)** of the **Criminal Procedure Code** empowers the High Court to enhance or reduce a sentence upon hearing an appeal. This mandate was buttressed in the case of **J.J.W. v Republic [2013] eKLR** where the court observed as follows:

> ***"…..It is correct that when the High Court is hearing an appeal in a Criminal case, it has power to enhance sentence or alter the nature of the sentence….However, sentencing an appellant is a matter that cannot be treated lightly. The court in enhancing the sentence already awarded must be aware that its action in so doing may have serious effects on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or commencing of the hearing of his appeal that the sentence is likely to be enhanced. Often times this information is conveyed by the prosecution filing a cross-Appeal in which it seeks enhancement of the sentence and that cross appeal is served upon the appellant in good time to enable him prepare for that eventuality. The second way of conveying that information is by the court warning the appellant or informing the appellant that if his appeal does not succeed on conviction, the sentence may be enhanced or if the appeal is on sentence only, by warning him that he risks an enhanced sentence at the end of the hearing of his appeal"***

29. During the hearing of this appeal, the court duly informed the Appellant that the sentence imposed by the trial court would be enhanced should his appeal fail and also if it is established that the complainant was eleven years at the time the offence was committed. This court has found that the Appellant's appeal against his conviction and sentence lacks merit. In the circumstances, the Appellant's conviction is upheld and the sentence of twenty years is accordingly set aside and substituted with the lawfully prescribed life imprisonment.

DATED and **DELIVERED** this 5th day of **March, 2019**

G.W. NGENYE-MACHARIA

JUDGE

In the presence of;

1. *Appellant in person.*

2. *Miss Sigei for the Respondent.*