REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO. 65 OF 2016

ISAAC ODUOR .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(From the original conviction and sentence in SOA case No. 26 of 2015 of the Chief Magistrate's Court at Busia by Hon. J.N Maragia– Resident Magistrate)

JUDGMENT

1. **Isaac Oduor,** the appellant herein, was convicted for the offence of defilement contrary to section 8 (1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006.

2. The particulars of the offence were that on 16th October 2015 in Bunyala **East location** of **Busia** County, intentionally and unlawfully caused his penis to penetrate the vagina of **SAO,** a child aged six years.

3. The appellant was sentenced to life imprisonment. He has appealed against both conviction and sentence.

4. The appellant was in person. He raised the following grounds of appeal:

a) That the trial magistrate erred both in fact and in law by disregarding gross infringement of the appellant's constitutional rights.

b) That the trial magistrate erred both in fact and in law by relying on hearsay and contradicting evidence.

c) That the trial magistrate erred both in fact and in law by disregarding appellant's defence.

5. The state opposed the appeal through Ms. Ngari, learned counsel.

6. The facts of the prosecution case were briefly as follows:

On 16th October 2015, the appellant called SAO and defiled her twice. The matter was reported to the police. The appellant was arrested and charged with the offence.

7. In his defence, the appellant contended that he was arrested and charged with an offence he did not commit.

8. This is a first appellate court. As expected, I have analysed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will therefore be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32.**

9. Section 8(1) of the Sexual Offences Act defines defilement in the following terms:

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

An offence of defilement therefore, is established against an accused person when the prosecution has proved the following ingredients:

a) Whether there was penetration;

b) Evidence must show that the accused is the perpetrator; and

c) The age of the victim must be below eighteen years.

In **Fappyton Mutuku Ngui vs. Republic [2012] eKLR** Joel Ngugi J. said:

> **Going by this definition of defilement, I agree with Mr. Mwenda on the issues which the court needs to determine. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant.**

These are the ingredients I will endeavour to find if the prosecution proved against the appellant.

10. The doctor who examined the complainant indicated in the P3 that was produced that her age was six years. The complainant (PW2) and Her mother (PW1) testified that she was aged six years. I find that there was no dispute on the issue of age. This ingredient was therefore proved to the required standards.

11. There were contradicting evidence as to what transpired. According to the complainant's mother (PW1), when Mama Jerida called her to her house, the complainant informed them that the appellant attempted to do bad manners to her. However, in court SAO testified that the appellant defiled her twice on that day. After the alleged defilement, the complainant went to play with other children.

12. Other than the issue whether the complainant testified truthfully, we have to appreciate that this is a child aged six years allegedly being defiled by an adult. Not once but twice. It is instructive to note that at time of the alleged defilement she never talked of any pain. As expected, sexual liaison between a child of this age and an adult would been a harrowing experience due to the excruciating pain. After the first alleged experience, she went to play with other children. When she was narrating to her mother about the alleged incident, she did not exhibit signs of pain or distress; her mother could have testified about it.

13. According to the evidence of the complainant, she was defiled in goat's house. However, according to corporal Pricilla Komen (PW5), the complainant was defiled in a neighbour's kitchen. There was no attempt by the prosecution to reconcile these discrepancies.

14. The medical report by Dr. Opiyo and which was tendered in court by Dr. Angira Steven (PW4) was that the hymen of the complainant was missing. The other observations were that there were no lacerations on the genitalia and it was not possible to tell when the hymen was broken. The absence of lacerations on the complainant, ought to have raised a red flag in the mind of the learned trial magistrate. The broken hymen of the complainant may have influenced the trial magistrate to conclude that there was defilement. It is trite that the absence of hymen cannot be proof of defilement without other material evidence. In the case of **PKW vs. Republic [2012] eKLR** on the issue of the absence of a hymen the court of appeal observed:

> **Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina (sic) with which most female infants are born.In most cases of sexual offences, we have dealt with, courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge.That is, however, an erroneous assumption.Scientific and medical evidence has proved that some girls are not even born with hymen.Those who are, there are times when hymen is broken by factors other than sexual intercourse.These include insertion into the vagina of any object capable of tearing it like the use of tampons, masturbation injury, and medical examinations can also rupture the hymen when a girl engages in vigorous physical activity like horseback riding, bicycle riding, and gymnastics, there can also be a natural tearing of the hymen.See the Canadian case of The Queen vs Manuel Vincent Quintanila [1999] AB QB 769.**

15. Other than the evidence of the complainant, there was no other evidence that connected the appellant with the offence. It was not safe to rely on her evidence considering the contradictions and the lack of credibility in her evidence. The court of Appeal in the case of **Ndungu Kimanyi vs. Republic [1979] KLR 283** held:

> **The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.**

In the instant case, the complainant falls in the category of such a witness as described by the Court of Appeal. She cannot be relied upon.

16. From the analysis of the evidence on record, I find that there was no sufficient evidence to convict the appellant. I therefore quash the conviction, set aside the sentence. The appellant is set at liberty unless if otherwise lawfully held.

DELIVERED and **SIGNED** at **BUSIA** this **4th Day** of **March, 2019**

KIARIE WAWERU KIARIE

JUDGE