**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 85 OF 2017[SOA]**

**(CORAM: R. E. ABURILI - J.)**

**ERASTUS OMWONYA MADOWO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an appeal against conviction and sentence on a judgment delivered on 5/9/2017 at Siaya PM's Court vide Cr. Case No. 991 of 2016, before Hon. T.M. Olando, SRM)***

**JUDGMENT**

1. The Appellant **ERASTUS OMWONYA MADOWO** was charged with the offence of Defilement contrary to **Section 8(1) as read with subsection (2) of Sexual Offences Act No. 3 of 2006**. Particulars were that on 16/10/2016 at Barding, the appellant intentionally caused his penis to penetrate the vagina of HAO, [full name withheld] a child aged 6½ years. In the Alternative, the appellant was charged with the offence of committing an indecent act with the same child contrary to **Section 11(1) of the Sexual Offences Act No. 3 of 2006**.

2. After a full trial, the trial court found the appellant guilty of the main charge, convicted him and sentenced him to serve life imprisonment in accordance with section 8(2) of the Sexual Offences Act.

3. Being dissatisfied with the judgment conviction and sentence imposed, the appellant filed this appeal setting out the following grounds of appeal:

> ***i. That, the Learned Trial Magistrate erred in law and fact by conducting a complete trial without observing provisions of Article 50(2)(j) of the Constitution of Kenya.***
>
> ***ii. That, the learned trial Magistrate erred in law and fact by failing to find that the trial was conducted on a defaulted (sic) charged sheet.***
>
> ***iii. That, the Appellant cannot recall all that transversed[sic] during the trial hence pray for trial proceedings to adduce more evidence.***
>
> ***iv. That, the Appellant prays for order of habeas corpus.***

**4.** This being a first appeal, this court is called upon to reevaluate, reassess and reexamine the evidence adduced before the trial court and arrive at its own independent conclusion bearing in mind that it did not hear or see the witnesses as they testified. This is a principle espoused in several decisions as pioneered by ***Okeno v Republic [1972] E.A. 32.***

5. Revisiting the evidence before the trial court, the Prosecution called four witnesses while the appellant put on his defence gave evidence but did not call any other witnesses.

6. **PW1, HA** [full name withheld] gave unsworn evidence after a *voire dire* examination and recalled that on 16/10/2016, she was at the home of the father to Odhis and that the father of Odhis went and put her on the bed and he removed his clothes and he removed his thing and put it on her and wiped it with the curtain. Thereafter, he removed her pant, then he removed his trouser and remained in a pair of shorts and did to her 'tabia mbaya'-bad manners. He then wiped his penis using a curtain and told her that he wanted to leave so he told her to go to her home. The complainant went and told her mother as to what the father of Odhis had done to her and she was taken to the police where she informed them of what had happened to her and she was escorted to hospital. She identified baba Odhis as the appellant in court and said that he was the one who defiled her and said that they do not leave far apart.

7. On cross examination by the appellant, PW1 denied that she had been sent to his home to collect githeri she stated that she found Lucy, Margaret and Linda at the appellant's home. She stated that she left the appellant's home in his company and stated that she was told to come to court and tell the truth of what happened.

8. PW2, **EA,** the mother of the complainant testified that on 16/10/2016 she was at her farm when the child PW1 HA went to her running saying that Baba Odhis had defiled her. She stated that the child told her that he had been defiling her since September. She stated that the complainant's father came and took the child to the village elder and they took her to hospital after which they reported to the police where they were issued with a P3 form. She stated that the child was born 23/6/2010. She identified the appellant as Baba Odhis.

9. In cross examination by the appellant, PW2 stated that the child had followed him when she noticed him pass by her parents' door and that it was not true that she had sent the children for githeri. She denied that he spent the night in his house or that he left for the shops at 7 or that there were many children at his home.

10. **PW3 CPL Catherine Nzinga Mfisila** testified and stated that on 17/10/2016 at 17.4hrs she was in the office when she received PW1 who was in the company of her parents and that she alleged to have been defiled by one Omonya in his house. PW3 recorded the statement and issued PW1 with a P3 form which was taken to Siaya Referral Hospital and that the suspect was arrested on 24/10/2016 and she charged him with the offence before Court. She produced the Health card for the Complainant indicating that she was born on 20/6/2010.

11. In cross examination by the appellant, PW3 stated that the child told her that she was defiled by the appellant.

12. PW4 **Sila Omondi Oluoch** a Clinical officer at Siaya County Referral Hospital testified and produced the P3 form for the complainant. He stated the complainant had a history of being defiled by a person well known to her on 16/10/2016 at about 3pm. That on examination of the complainant herein who was aged about six years, in the company of her father and who had previously been seen at Siaya Referral Hospital on 17/10/2016, had tender *labia minora*, inflamed and reddened vaginal orifice (opening). That her vagina was opening spontaneously and that the hymen was absent. Foul smell was coming from the vagina. There were tears or lacerations noted and that the inner vaginal wall seemed normal. There was no vaginal discharge nor bleeding. He stated that the laboratory tests were normal and HIV test was negative. He further stated that based on the findings there was conclusive evidence that a blunt object was forcefully used to either try to or to penetrate the vagina of the complainant. The Clinical Officer signed the P3 on 18/10/2016 and produced it as exhibit. He also produced the treatment notes for the complainant as exhibit.

13. In cross examination by the appellant, PW4 stated that the complainant was able to walk when she was taken to hospital and that he did not ask if there was a witness to the defilement.

14. On being placed on his defence, the appellant gave sworn testimony and called no witness. He denied committing the offence. He stated that on the 16/10/2016 he was at his home and did not go to work. That he prepared githeri and called his grandchildren from Madowa and the other from kodima and another who helped him prepare maize and beans. That he then prepared tea and in the evening at about 6pm they served food and ate together and the children left for their respective homes then he left for the shops to buy kerosene and returned at about 10pm. The following day and on 18th he went to work and the following morning he was called by a village elder who went to his house and told him that Ochieng Okode had said that the appellant had defiled Ochieng Okode's child. That later he went to see Ochieng but did not find him and found him in the evening and asked him about the matter but he got no answer. That later he was told that the Chief and Assistant Chief were looking for him and he went to the Chief and the Assistant Chief where he was arrested and taken to Siaya Police Station.

15. On being cross examined by the prosecutor, the appellant admitted that on that material day, children, including PW1 were at his home. He stated that he lived alone because his wife lived in Nairobi. He stated that he personally called the children to assist him and that he eats with them. He denied enticing the children to defile them. He stated that the children left at 7 pm and that their parents had advised them.

**SUBMISSIONS**

16. In support of his appeal, the appellant filed written submissions which he adopted as canvassing the appeal as follows:

***Ground 1 and 2 Merged: Insufficiency and inconveniency of evidence (charge sheet & corroboration):***

17. The appellant submitted quite incoherently that, the trial court veered off the statement(s) for framing this charge and the police took a wrong approach when crafting the charge under the penal code for Sexual Offence Act No. 3 of 2006. In that the charge read: "***DEFILEMENT CONTRARY TO SECTION 8(1) (2) OF THE SEXUAL OFFENCES ACT No. 3 of 2006, instead of DEFILEMENT CONTRARY TO SEC 8(1) as read with SEC (2) of the Sexual Offence Act No. 3 of 2006."***

18. It was therefore submitted that the fatal omission demonstrate miscarriage of justice and that therefore this court should declare the charge(s) not lucid in its entirety. It was the appellant's submission that these technicalities went to the root of the case.

19. The appellant further submitted that the evidence in chief as adduced by the complainant was a frame up and contained inconsistencies. That the trial court could not distinguish between the truth and lies and moreover went to collectively rely on the non-facts which were not emphasized, and that the evidence of PW1 and PW2 was not corroborative.

20. The appellant further claimed that the evidence of witnesses in cross examination revealed that they were liars who were illogical and inconsiderate. He urged this court to be guided by the principles on the duty of the first appellate court as laid down in **Okeno v Republic** and reassess and reevaluate the evidence before the trial court afresh and arrive at its own independent conclusion.

21. According to the appellant, a child aged 6½ could not have been defiled by the appellant from September to October without showing the signs of malady or signs and/or without revealing to her parents what had befallen her yet they were neighbours and she knew him well or exhibit difficulty in walking or any sensitive effect. He claimed that there were contradictions in the evidence of the prosecution witnesses as to whether there were other children in the home or not. He claimed further that the evidence of the complainant was not corroborated and that his right to fair trial was violated.

**22.** On ***Grounds 3 and 4 Merged that there was no Forensic evidence and scientific proof that the appellant defiled the complainant***, the appellant submitted that the evidence of the medical expert Mr. Sila Omondi Oluoch (PW4) who filled the P3 form for the complainant and which P3 form was produced as an exhibit was not fool proof. That no blood sampling was done, no post rape form was filled and that no blunt object was recovered. That the whitish vaginal discharge was tested, no epithelial cells were seen and that the nature or degree of injury was stated –whether harm, maim or grievous harm.by the medical expert.

**23.** The appellant submitted that the appellant was not tested to find out whether he ejaculated, that it was not stated whether the child felt pain or whether she had changed her clothing or not prior to medical examination. He further submitted that only external genitalia of the child was done not the inner part. That the child did not scream yet there was light. In addition, the appellant submitted that the alleged young girls mentioned were not called as eye and independent witness. He maintained that failure to test the blood and the discharges was prejudicial. Further, that the judgment as drafted was not in tandem with the evidence on record.

**24.** The appellant also submitted that his alibi defence which was strait forward, consistent, firm and even truthful was never considered. He also submitted that the investigation was shoddy, shambolic and flimsy. That PW3, Mrs. Catherine showed laxity in apprehending the appellant despite the fact that he never fled or went at large.

**25.** In his oral submissions the appellant relied on his written submissions which were adopted as canvassing the appeal.

**26.** In opposing this appeal, the Senior Principal prosecution Counsel Mr. Okachi submitted that the prosecution proved its case against the appellant beyond reasonable doubt, that the victim of the offence knew the appellant very well as baba Odhis and narrated clearly how the incident occurred severally not once. That her evidence was corroborated by the doctor who examined her hence the issue of being framed is a lie.

**27.** Counsel submitted that the offence of defilement is serious and traumatizing to the victim and her family hence the appellant deserved a deterrent sentence. That sentence was meted out after he was given an opportunity to mitigate hence it was lawful and that no grounds have ben advanced for this court to interfere with that sentence. Counsel urged this court to dismiss the appeal.

**DETERMINATION**

28. I have considered and reevaluated the evidence by the prosecution and the defence on record. I have also considered the grounds of appeal and the submissions for and against the appeal herein. In my humble view, the main issues for determination are:

1. ***Whether the appellant's rights to fair trial were violated.***
2. ***whether the charge sheet was fatally defective and the effect thereof***
3. ***whether the complainant was defiled and whether there was corroborative evidence***
4. ***Whether forensic DNA evidence was necessary***
5. ***Whether the complainant's age was proved and whether there was evidence that she was defiled by the appellant herein.***
6. ***Whether there were material inconsistencies and contradictions in the prosecution's case***
7. ***Whether the prosecution proved its case against the appellant beyond reasonable doubt to warrant a conviction***
8. ***Whether sentence imposed was lawful and if so whether it was harsh and excessive.***

***29.*** On whether the appellant's rights to fair trial as guaranteed in Article 50(2) (j) of the Constitution was violated, the appellant never made any submissions in support of this ground of appeal. Article 50(2)(j) of the Constitution guarantees every accused person the right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.

***30.*** I have read the trial court record. On 26th October 2016 when the accused /appellant herein was arraigned before Hon H. Wandere principal Magistrate, he pleaded not guilty to the charge and a pre bail assessment report was ordered by the trial court. The trial court after fixing a hearing date ordered that the accused be provided with copies of witness statements. On 16/11/2016 the appellant's bond was approved and he was released on bail pending Trial. The hearing commenced on 31/1/2017 and the appellant stated that he was ready to proceed after the prosecution intimated that they were ready with witnesses. The appellant never ever indicated that he did not have the evidence that the prosecution intended to rely on after the court had ordered that he be supplied with the same. Accordingly, I find and hold that the ground of appeal is devoid of merit and the same is hereby dismissed.

***31. On whether the charge sheet was defective***, the appellant claimed that the charge sheet was fatally defective because it reads ***'Defilement contrary to section 8(1)(2) of the Sexual Offences Act No.3 of 2006,'*** as opposed to the charge reading '***Defilement contrary to***

***section8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006'.***

32. Section 134 of the Criminal Procedure Code provides for framing of charge sheets as follows:

> ***"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."***

33. Thus, a charge should contain an offence known in law, the offence should be disclosed and stated in clear and unambiguous terms so that an accused may plead to a specific charge that he can understand and to enable him prepare for his defence. See **Sigilai v Republic [2004]2 KLR 480**.

34. I have perused the charge sheet and indeed it reads as stated by the appellant. However, I find no prejudice occasioned by the failure by the prosecution to state that the section8(1) is as read with subsection 8(2) of the Sexual Offences Act, as the appellant has not alleged that he did not understand the charge or that the particulars of the charge did not disclose an offence against him. In my humble view, the alleged defect is immaterial and too minor to affect the appellant's trial for the offence as charged.

35. Furthermore, the appellant did not during the trial raise this issue hence I find it to be an afterthought and devoid of merit. The appellant does not say that the defect affected in any way his rights to a fair trial. In **Peter Ngure Mwangi v Republic [2014] e KLR,** the Court of Appeal held that there are two limbs to the issue of a defective charge sheet. The first one deals with the issue as to whether the charge sheet is indeed defective, whereas the second one deals with the issue as to whether eve if the charge sheet is defective, the defect is curable or not.

36. In my humble view, the error in the charge sheet is so minor that it does not go to the root of the case as to render the trial of the appellant a nullity. The noted defect is curable under section 382 of the Criminal Procedure Code which stipulates:

> ***" Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complainant, summons, warrant, charge, proclamation, order, judgment or other proceeding before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."***

37. As the defect in the charge was not material as to affect the substance of the proceedings before the trial court, or as to make the appellant not understand the charge facing him, I find the ground of appeal devoid of merit and I dismiss it.

38. ***On whether the complainant was defiled and whether there was corroborative evidence,*** the appellant claimed that there was no evidence that the complainant was defiled, that the evidence on record was inconsistent and that that there was no corroboration as required by section **124 of the Evidence Act** and **section 19 of the Oaths and Statutory Declarations Act, Cap 15 Laws** of Kenya.

39. I have rehearsed the evidence adduced by PW1 the complainant on how she was lured to the appellant's house, placed on the bed and how the appellant removed his 'thing' and wiped it with a curtain then removed his clothes and removed her pants and removed his penis and put it in her vagina and told her to go home because he also wanted to leave. I have also considered the evidence of PW2 that the complainant ran to her from the appellant's home crying and saying the appellant had defiled her. I have equally considered the evidence of PW4 the Clinical Officer Siaya County Referral Hospital who examined the complainant and concluded that she had been penetrated by a blunt object as her hymen was missing and she had inflamed vaginal orifice and foul smell from her vagina although there was no discharge, lacerations or bruises or bleeding. The Clinical Officer also found that the complainant had tender labia minora.

40. Iam satisfied that the evidence above proved that the complainant was defiled and although there was no eye witness to the offence, I take judicial notice of the fact that sexual offences are committed in secrecy as the offenders would never want to be found in the act.in addition, there was sufficient evidence that the appellant was positively identified as the complainant's defiler. The complainant described that the appellant went to where she was and called her. She knew him as baba Odhis. The appellant too conceded that the complainant was among the children who went to his house to help him prepare githeri-maize and beans meal although he denied defiling her. He also conceded that he was at his home on that day throughout as he did not go to work as usual and that on that day he left his home at 7pm going to the market. If at all he went to the market then it was after the victim herein was defiled. Accordingly, the idea that he raised an alibi does not arise. No alibi was raised by the appellant at the trial stage and therefore the same cannot be raised on appeal.

41. ***On the allegation that the evidence presented by the prosecution witnesses was contradictory and was not corroborated, it*** is in my humble view unfounded as the evidence of PW1 was corroborated by PW2 who saw her immediately after she left the appellant's home crying and saying the appellant had defiled her. The evidence of penetration was proven by the physical and medical examination by PW4. This is notwithstanding the fact that under the proviso to section 124 of the Evidence Act, corroboration of the evidence of a child of tender years in sexual offences is not mandatory if there is sufficient evidence adduced by the complainant to prove occurrence of the offence and if the court is satisfied that the complainant was telling the truth. Therefore, section 19 of the Oaths and Statutory Declarations Act must be read together with section 124 of the Evidence Act and the proviso thereof.

42. Section 124 of the Evidence Act provides:

> ***"Notwithstanding the provisions of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.***

***Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."***

***43.*** The trial magistrate stated in his judgment ***"I find no reason to doubt the testimony of the complainant and as such I find that the complainant was defiled by the accused."*** The trial court also found that there was no reason given why the complainant child would frame the appellant with such an offence and neither do I find any reason to interfere with those findings by the trial court.

44. Although there were no tears and lacerations of the complainant's genitalia, but the Clinical Officer who examined her was satisfied that a blunt object was used to forcefully attempt to or to penetrate her vagina which was inflamed with redness. In my humble view, the description of the injuries by the Clinical Officer conclusively determined beyond reasonable doubt that the complainant's genitalia was penetrated as defined in section 2 of the Sexual Offences Act and therefore it matters not that the P3 form does not state the degree of injury whether harm, grievous harm or maim as claimed by the appellant. Section 2 of the Act defines penetration as: ***the partial or complete insertion of the genital organs of a person into the genital organs of another person."*** Penetration need not be complete and it does not have to involve tears and lacerations of the child's genitalia.

45. Sexual offences belong to a special category of offences as defined under the Sexual Offences Act and therefore they are not ordinary offences as against a person, like assault causing actual bodily harm or grievous harm. Section C of the P3 Form produced as exhibit 1 relates specifically to sexual offences and provides for nature of offence. The Clinical Officer filled the said Section and found the complainant with tender labia minora, reddened vaginal orifice at the entrance site, vagina opened spontaneously, hymen absent, and foul smell from vagina. That in my view is sufficient evidence of penetration.

46. In my view, the act of the appellant as described by the complainant that he removed his thing and put it in her thing is sufficient description of what entails insertion of the appellant's penis into a vagina of the complainant child as the child may not know the anatomical names of genital organs.

47. ***On whether DNA forensic examination was not conducted on the appellant and the complainant to link him to the offence, and the effect thereof,*** the Court of Appeal in the **Nyamai Musyoka v Republic [2014] e KLR,** faced with the same complaint by an appellant stated:

***"This court has had occasion to address this issue on several occasions before. See for instance Ami v Republic [2012] e KLR (Mombasa) where we expressed the view that:***

***"The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."***

48. The above holding was further affirmed in the case of **Kassim Ali v Republic Cr. App No. 84 of 2005 (Mombasa)** where the Court of Appeal stated:

***"…the absence of medical examination to support the fact of rape can be proved by the oral evidence of a victim f rape or by circumstantial evidence."***

49. The Court of Appeal in **Mohamed v Republic [2006]2 KLR138 cited in Nyamai Musyoka v Republic [supra]** stated:

***"It is now settled that the courts shall no longer be hamstrung by the requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful."***

50. The appellant also claimed that there is no way a child who had been defiled from September could not show any sign of sickness or reveal to her parents or display difficulty in walking. In my humble view, this is a far-fetched allegation as the appellant was charged with an offence that took place on 16/10/2016 not any other previous offence. In addition, it is not the style of walking or degree of injury sustained by the complainant that would be evidence of defilement, going by the definition of penetration in section 2 of the Act, that defilement means partial or complete insertion of ones' genital into the genital organ of another person. It is therefore possible for a child to be defiled and walk without difficulty depending on whether her genitals were torn or lacerated or were swollen or whether she had developed a serious a sexual transmitted infection after the defilement.

51. Nonetheless, in the instant case, the child was examined and found with no lacerations or tears save that she had an inflamed vaginal orifice and she was examined a day after the defilement.

52. From the foregoing and the evidence on record by the complainant and PW2 as well and PW4, Iam satisfied that the prosecution proved beyond reasonable doubt that the appellant defiled the complainant.

53. On the age of the complainant, the prosecution produced as exhibit the child Clinic Card showing her date of birth as 26/6/2010. Accordingly, the complainant was proven to be aged 6 years and therefore the charge under **section 8(1) as read with section 8(2) of the Sexual Offences Act** was proved to the required standard with all the elements of defilement namely, penetration, identification/ recognition of the offender and age of the complainant being established.

54. On ***alleged contradictions and inconsistencies in the prosecution's evidence,*** this court finds that the alleged inconsistencies in the evidence of PW1 and PW2 on whether there were children at the appellants' home was cleared by the appellant himself who stated on oath that he invited several children to his home, including the complainant who stayed there, assisting him to prepare a meal of maize and beans.

55. On the other alleged inconsistency that PW1 said that she was at the home of Baba Odhis whereas PW2 said that the child saw the appellant pass by her door and noticed him and followed him, I find that there is no material inconsistency as the child did not explain how she reached the appellant's home from her home whereas her mother gave an explanation that the appellant was passing by when the child saw him and followed him to his place. Furthermore, it is not in dispute as admitted by the appellant himself that the child complainant was to be found at his house and he even asked her whether she had been sent for githeri. Accordingly, I find that there was no material inconsistency in the evidence of PW1 and PW2 and I therefore dismiss the invitation by the appellant to find that there was material contradictions in the prosecution evidence which vitiated his trial and conviction.

***56. On the whole, I find and hold that the prosecution proved their case against the appellant beyond reasonable doubt and therefore his conviction was safe and sound I dismiss this appeal against conviction.***

57. On sentence, I note that the trial court meted out the mandatory minimum sentence of life imprisonment as stipulated in section 8(2) of the Sexual Offences Act, which sentence is lawful. This was after the prosecution indicated that the appellant was a first offender. The appellant was also given an opportunity to mitigate and the asked the court to ensure that should he die, his body should be taken back to his home for burial.

58. As the mandatoriness of sentences is now under serious challenge following several pronouncements by the Court of Appeal including **Jared Koita Injiri v republic CA CRA No. 93 of 204- Kisumu**, I shall accord the appellant another opportunity to mitigate afresh and call for a social inquiry report to be filed by Siaya County Probation Officer for consideration. I shall also require a victim impact statement to be filed by the Respondent.

59. Orders accordingly.

Dated, signed and Delivered in open court at Siaya this 9th Day of October, 2019.

**R.E.ABURILI**

**JUDGE**

**In the presence of:**

The Appellant in person

Mr. Okachi Senior Principal Counsel for the Respondent

CA: Brenda and Modestar