REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CR. A. NO. 55 OF 2017[SOA]

JOSEPH OWINO OMOLLO...APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(Being an Appeal against sentence and conviction 8.6.2017 in Criminal Case No. 539

of 2016 on 8.6.2017 in Siaya Law Courts before C. A. Okore – SRM).

JUDGMENT

1. The Appellant **JOSEPH OWINO OMOLLO was** charged with the offence of **Defilement Contrary to Section 8(1) as read with subsection (2) of the Sexual Offences Act No. 3 of 2006.** Particulars of the offence are that on 3.6.2016 in Siaya District within Siaya County, the Appellant intentionally caused his penis to penetrate the vagina of CAO (full name withheld), a child aged 10 years. The appellant also faced the alternative charge of committing an indecent act with a child Contrary to Section 11 (1) of the sexual offences Act by intentionally touching the vagina of CAO a child aged 10 years.

2. The appellant denied both the main and alternative charges and the Prosecution called a total of (6) witnesses.

3. After a full trial, the trial court found the appellant guilty of the offence, convicted him and after mitigation, sentenced him to serve life imprisonment as stipulated in section 8(2) of the Sexual Offences Act.

4. This being a first appeal, this court is under an obligation to re-consider and re-evaluate afresh the evidence tendered before the trial court with a view to arriving at its own independent conclusion. **See Okeno vs Republic [1912] EA 32.**

5. The prosecution's case was that PW1 CAO, the complainant herein on the material date at about lunch hour "saa saba" (1.00 p.m.) while in company of her grandmother, **RA** and sister **SA,** the Appellant whom she called **Owino** visited them and he told her grandmother that he wanted to give (PW1) something nice, so her grandmother allowed her to follow him to go and collect what he wanted to give her. She stated further that the Appellant took her to his house. She refused to enter the house and the Appellant pushed her inside and took a piece of cloth which he used to tie her mouth and he undressed her. He also undressed himself and laid her on his bed. He then lay on top of her and inserted his penis inside her vagina. She called the penis *"dudu yake"* and the vagina *"dudu yangu"* and that the Appellant had sexual intercourse with her. She called the sexual act as-*"Tabia mbaya."*

6. While still at the appellant's house, the complainant's sister R called her and that the Appellant told R to go to school since she complainant, (PW1), had already left for school. After the appellant was done with defiling the complainant, he assisted her to wear her clothes and he hid her under his bed.

7. PW1 stated further that her grandmother came and shouted at the Appellant to open the door, and that the appellant bolted out of the house and attempted to run away but the crowd of people who had responded to the grandmother's alarm arrested him. The complainant was rescued and taken to hospital for treatment and later to Siaya Police Station to report the incident. She identified the Appellant as **OWINO**, who was her neighbor at home, and that she used to see him coming to her grandmother's home all the time to ask for alcohol, although her grandmother never used to sell alcohol.

8. **PW2 RA a minor** the younger sister of PW1 stated that on the material date, she went home with her sister (PW1) for lunch from school when they met the Appellant, whom she referred to as **Owino**. That the Appellant followed them to their grandmother's home and told their grandmother that he wanted to give (PW1) something good. That their grandmother allowed PW1 to go with the Appellant. PW2 later followed the appellant and her sister to the Appellant's house where she found the door locked. She called out PW1's name and she heard

the Appellant's voice telling her to go to school. She went and told her grandmother of what she had been told by the appellant and her grandmother who went to the Appellant's house shouting for help, attracting people who came and arrested the Appellant as he attempted to run away. She identified the Appellant as **Owino** whom she used to see every day at the road near her home.

9. **PW3 AAO** the grandmother of PW1 and PW2 confirmed that on 3.6.2016 at about 1.00 p.m. while preparing lunch for her 3 grandchildren, one Owino, the Appellant herein came to her house and asked for permission to go with PW1 so that he could give her something. She stated that since the Appellant's mother sells sugarcane, she (PW3) thought that the Appellant was going to give Pw1 sugarcane. She therefore allowed PW1 to follow the Appellant to his house nearby. Later, PW3 sent Pw2 to look for PW1 inside the appellant's house. When PW2 returned saying the complainant was not at the appellant's house on account that she had gone to school, PW3 ran to the Appellant's house and shouted at him to open the door. She found the Appellant seated with his bare chest. She searched for PW1 and found her under the Appellant's bed. She pulled PW1 out as she shouted for help. A crowd responded to her alarm and arrested the Appellant who was now attempting to flee.

10. **PW3 further** stated that both PW1 and the appellant were taken to hospital for examination and the matter was reported to the Police for action. She identified the Appellant as **Owino** whose mother sells sugarcane to school children and that they are neighbours. She had known him since his birth and that he often visited her home.

11. PW4 **JACOB ONYANGO OUMA** the area Assistant Chief of Kadenge Sub-Location received news of the incident and also received the Appellant after arrest. He escorted the Appellant to Ratuoro AP Camp and later to Siaya Police Station.

12. PW5 **SILA OLUOCH** a Clinical Officer examined and filled a P.3 form for the complainant PW1. On examination he found that she had blood-stained pant. She had lacerations on labia minora. Her hymen was torn. She also had fresh blood on the wall of labia minora. He formed an opinion that there was clear evidence of forceful vaginal penetration. He stated that the complainant was first treated at Kadenge Ratuoro dispensary where the observations above were made on 3.6.16 just a few hours after the incident. He filed the P.3 form on 6.6.2016.

13. PW5 also examined the Appellant who was aged 25 years. He had an unstitched cut wound on the head. No abnormality was noted on his penis. A test conducted on his urine indicated the presence of red blood cells and sperm cells. He formed an opinion that based on the laboratory findings it demonstrated the presence of blood cells and sperm cells which was clear indication of occurrence of ejaculation and that ejaculation was recent. He also stated that he based his opinion on the tests done at Kadenge Ratuoro dispensary where the Appellant was examined just a few hours after the alleged defilement of a minor. He produced as exhibits the following: P3 form in respect of PW1 – Exhibit 1. P3 in respect of Appellant – Exhibit 2 Age Assessment report in respect of PW1 to show she was aged 10 years – Exhibit 3.

14. **PW6 101322 P.C. FATUMA CHERONO** investigated the case, she later preferred charges against the Appellant. She collected a white blood stained pant for the complainant which she produced as exhibit 4.

15. Placed on his defence, the appellant gave sworn testimony. He did not call any other witness in his defence. He testified as DW1 and stated that he was JOSEPH OWINO OMOLLO. He denied committing the offence. He stated that he knew PW1 well and that he calls her Chris at home and that he always greets her whenever she goes to the market. He also stated that on 3.6.2016 while sitting next to his door, PW3 and members of the Public went and arrested him. He had no grudges with PW1 or PW3 and had no reason to believe that they intended to fix him. He closed his defence.

16. After considering the prosecution and defence case, the trial court concluded that the prosecution had proved its case against the appellant beyond reasonable doubt that the appellant had defiled the complainant as charged in the main count. He convicted him and after mitigation, sentenced him to serve life imprisonment as stipulated in section 8(2) of the Sexual Offences Act.

17. Dissatisfied with the conviction and sentence, the appellant filed this appeal setting out the following grounds of appeal:

> 1. ***The learned trial Magistrate erred in law and fact by failing to accord the accused person fair hearing enshrined in Article 50(2) (c) of the Constitution.***
>
> 2. ***THAT: I cannot recall all that transverse during the trial hence pray for trial proceedings to adduce sufficient grounds.***

18. The appellant also filed written submissions together with supplementary grounds of appeal. n the supplementary grounds of appeal, the appellant contended that:

> ***1. That the trial court failed to consider that the charge sheet was defective.***
>
> ***2. That my rights under Article 50(2)(1) of the Constitution were violated.***
>
> ***3. That the trial Court failed to consider that the medical examination report had gaps hence unable to support a conviction in a matter of this magnitude of seriousness.***
>
> ***4. That the trial court failed to accord me the rights under Article 50(1) (k) of the Constitution.***

19. The respondent through Senior Principal Prosecution Counsel Mr. Okachi opposed the appeal and contended that the prosecution proved its case against the appellant beyond reasonable doubt. Further, that the evidence on record proved the ingredients of the offence of defilement of a child. Counsel urged the court to dismiss the appeal both on conviction and sentence.

DFETERMINATION

20. I shall determine this appeal in line with the appellant's supplementary grounds of appeal which also contain submissions, having considered the evidence adduced before the trial court, both for the prosecution and the defence.

21. The following in my view, from the grounds of appeal and submissions, are the issues that fall for determination:

a) Whether the charge sheet was defective.

22. The appellant submitted that the charge sheet on record does not disclose with clarity the particulars of the offence so far as to comply with the provisions of **Section 43 of the Sexual Offences Act.** He stated that for the charge to have been properly framed, the words "***intentional and unlawful***" should have been reflected on the statement. In his view, the omission stated above renders the charge sheet defective under **Section 214(1) of the Criminal Procedure Code.**

23. I have perused the charge sheet dated 6th June 2016. It states:

> ***"Defilement contrary to section 8(1)(2) of the Sexual Offences Act No. 3 of 2006.***
>
> ***PARTICULARS: Joseph Owino Omollo: on the 3rd Day of June 2016, at [Particulars Withheld] Sublocation. In Siaya District within Siaya County, intentionally caused his penis to penetrate the vagina of CAO a child aged 10 years."***

24. I have also read section 8(1) and 8(2) of the Sexual Offences Act. The requirement for the charge of defilement in that section is committing an act which causes penetration with a child. There is no requirement that the words ***unlawfully and intentionally*** must be present in the charge. It is only when the charge is committing an indecent act with a child that the words an unlawful intentional act are used and in this case, although the words "unlawfully" were not used in the alternative charge, the trial court did not make any finding on the alternative charge hence the ground of appeal fails for want of relevance and merit.It is dismissed.

b) Whether there was violation of Article 50(2)(j) of the Constitution

25. The appellant claimed that he was represented by an advocate and that on the date of plea taking, he did request to be served with the witnesses' statements and any other document that the prosecution intended to rely on in support of their case. (see Pg. 5 lines 15 – 19 and 7 lines 1 – 3). However, he claims that the records do not show anywhere that he was ever served with the same. He claims that his advocate also withdrew his services and that the record at Page 8, show that the case commenced without the prosecution complying with the court orders that he be served with the copies of relevant documents that the prosecution intended to rely upon in their case against him in order for the appellant to prepare well for his defence defense.

26. I have perused the trial court record. It shows that after the plea was taken on 6/6/2016, the trial court granted the appellant bond and also on 18/7/2016, the appellant was represented by Mr. Ochieng Advocate who requested for witness' statements and documents that the prosecution intended to rely on, which request was granted by the court including reduction of his bond terms. The appellant was present and on bond at the hearing and he said **"READY TO PROCEED"** this was after the prosecutor indicated to court that he had four witnesses present. The appellant never stated that he had not been supplied with the witness' statements and documents by the prosecution. Having stated that he was ready to proceed, the hearing proceeded with a voire dire examination of PW1 after which the appellant stated: ***"I will use kijaluo language. I have statements of witnesses. Iam ready to proceed with hearing.***" The trial court then noted and progressed with the hearing. On that very day, 4 witnesses testified.

27. Accordingly, I find and hold that the ground of appeal fails because the appellant was supplied with witness' statements and he confirmed that to the court before the substantive hearing commenced. His allegation of denial of fair trial is devoid of merit. The ground is dismissed.

c) Whether the medical examination report was porous

28. The appellant submitted that the records indicate that penetration was achieved while medical examination report does not support the same. He claimed that there was no corroboration of the complainant's evidence and that DNA was not carried out to link the blood found on the complainant's pant with the complainant or with the appellant. The appellant also claimed that the degree of injury, the type of weapon used to inflict such injury was not stated in the P3 form.

29. I have perused the trial court record. PW1 was clear that the appellant whom she knew well took her from her grandmother's house in the presence of PW1, PW2, PW3 and PW4 saying he was going to give her something and when he reached his house he covered her mouth with a cloth, removed his clothes and her clothes and put his thing in her thing and did to her tabia mbaya, bad manners. When he heard PW2 call PW1 he told PW2 that the complainant had gone to school that is when the children' grandmother became suspicious and rushed to the house of the appellant to establish what the matter was. She pushed the door and found the appellant bare-chested on his bed. She also found the child under the bed. The appellant tried to escape but he was arrested by the public who had gathered after the grandmother raised an alarm.

30. PW5 testified that, ***"On examination to the private part she had blood stained pant. She had lacerations on labia Minora. Hymen was torn. Fresh blood noted on the wall of the labia minora" (see page 21 line 1.*** This piece of evidence properly corroborates the complainant's evidence that she was defiled and more so, the appellant was arrested at the scene in broad daylight and the clothes for the child recovered and both were taken to hospital immediately and produced in evidence as exhibits. The appellant was also examined and was found to have had recent ejaculation. It is therefore immaterial that the approximate age of injury or probable type of weapon used in penetrating the child's vagina or degree of injury was not indicated as harm or maim or grievous harm. This is so because defilement is in its own special category of offences. Furthermore, it is not mandatory that DNA be carried out as the appellant was found minutes after he had

defiled the child and in his own house at the scene of crime immediately after he had defiled her and before he could leave the scene of crime, with the child hidden under his bed.

Accordingly, I find and hold that the ground of appeal herein lacks merit and the same is hereby dismissed.

d) Whether there was Violation of Article 50(1) of the Constitution

31. The appellant complained that the trial court failed to give him an opportunity to adduce and challenge evidence as per **Article 50(1)(k) of the Constitution**. He asserted that PW5 erroneously produced the assessment report on behalf of its author whose failure to be availed in court to testify and be subjected to cross-examination was not explained to court. That the prosecution failed to comply with Section 83 of the Evidence Act and prove to court that the author of the age assessment report could not be availed without any reasonable delay and or could not be found for any reason. He submitted that the age of the complainant having been tainted with variances (8, 10 and 14 years), should have been properly established before basing a conviction upon. That the author of the said document should have been subjected to cross-examination in order to ascertain the methodology that applied in the examination.

32. I have perused the trial court record. The charge sheet states that the minor was aged 10 years. The age assessment report dated 26th October 2016 shows that the child was aged 10 years. The P3 form stated that the child was aged 8 years.

33. The Age assessment report was produced by the clinical officer and it is true that no basis was laid by the prosecutor why its maker was not available to produce it. However, the appellant did not object to its production and as there is no other contrary evidence that the child's age was 10 years as assessed in hospital by an expert, and as the appellant himself in his defence stated that he knew the complainant to be aged about 8-9 years, and that he knew her very well as she was his neighbour, I find that no prejudice or miscarriage of justice was occasioned by the production of the age assessment report by PW5, who was not its maker.

34. Furthermore, the appellant also stated that he had no grudges with the complainant with her family and that they had no reasons to fix him. The ground of appeal accordingly fails and is hereby dismissed.

35. There was therefore sufficient evidence beyond reasonable doubt that the child was aged 10 years.

e) Whether the prosecution proved its case against the appellant beyond reasonable doubt that he had defiled the minor

36. On the whole and from the evidence of the prosecution witnesses, it is clear that the appellant lured the child into his house in broad daylight, defiled her in his bed, and was found by PW2 and PW3, having locked himself and the child inside his house.

37. The clinical examination proved that the child was aged 10 years and that her vagina was penetrated into. The appellant was positively recognized as the person who defiled the child as there was no reason for framing or mistaking him or any other person. Accordingly, I find and hold that the prosecution proved beyond reasonable doubt that the appellant was the person and no other, that defiled the minor child in broad daylight. The age of the child was established to be 10 years and that he penetrated her vagina. The offence of defilement was proved beyond reasonable doubt against him. The conviction by the trial court was therefore in my view, sound and safe. I dismiss the appeal against conviction.

f) Whether sentence meted out on the appellant was excessive

38. On sentence, I find that the appellant was given the mandatory life sentence having regard to the age of the victim as stipulated in section 8(2) of the Sexual Offences Act. The appellant had the audacity to go and pick the innocent child in broad daylight from her family and proceed to defile her on his bed. In his mitigation he stated that he had a fiancée and that his mother only sells sugarcane to support them. He prayed for non- custodial sentence to go and help his mother. He stated that he was 25 years old.

39. I have taken into account the above mitigations which the trial court too considered. However, a 25 years old man with a fiancée had no reason whatsoever to lure the innocent 10 year old child from the custody of her grandmother only to defile her in broad daylight. The appellant in my view, was a very daring person. He must have known or had reason to know the consequences that come with such a daring act to a child of that age. He deserved deterrent sentence owing to the prevalence of the offence and the fact that the offence is very traumatizing to the child.

40. The trial court had no discretion to mete out any other alternative sentence. However, as the Court of Appeal has reviewed the Mandatoriness of the Minimum mandatory sentences in defilement cases under the Sexual Offences Act, see **Jared Koita Injiri v Republic [2019] eKLR,** I would interfere with the mandatory life sentence imposed on the appellant and substitute the life sentence and impose on the appellant a prison term of seventy five (75) years Imprisonment for the sex pest who in my view must be kept away from the community for the safety of humanity and the vulnerable children like the complainant herein. Such a child looked up to the appellant for protection but he turned out to be a villain.

41. Accordingly, this appeal against conviction is dismissed. The appeal against sentence is allowed to the extent that the life imprisonment is set aside and substituted with a prison term of Seventy Five (75) years to be calculated from the date of the appellant's arrest on 3/6/2016.

42. Orders accordingly.

Dated signed and delivered at Siaya this 7th day of October 2019.

R.E. ABURILI

JUDGE

In the presence of:

The appellant in person

Mr Okachi Senior Principal Prosecution Counsel

CA: Brenda and Modestar