



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT SIAYA**

**CRIMINAL APPEAL NO. 64 OF 2017 [SOA]**

**JOA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(An appeal from the judgment, conviction and sentence passed by Bondo PM***

***Cr SOA case No 1092 of 2016 by Hon M. Obiero on 18/7/2017)***

**JUDGMENT**

1. The appellant herein **JOA** was charged with the offence of defilement contrary to Section 8 (1) as read with Sexual Offences Act No. 3 OF 2006. The particulars are that on the **6<sup>th</sup> day of October 2016 at about 4.00pm** at Bondo Sub-county within Siaya County, intentionally and unlawfully caused his penis to penetrate the vagina of S.A.O [full name withheld], a child aged 1 year and 4 months.
2. The appellant was also charged with the alternative charge of committing an incident act with a child contrary to Section 11 Sexual offences Act No. 3 of 2006. The particulars are that on the 6<sup>th</sup> day of October 2016 at about 4.00 pm at [particulars withheld], Bondo sub-county within Siaya count, unlawfully and intentionally touched the vagina of S.A.O. a child aged 1 year 4 months with his penis.
3. The appellant denied the charges and the prosecution called four (4) witnesses who testified in support of their case.
4. This being a first appeal, this court is obliged to reassess and reevaluate the evidence adduced before the trial court and arrive at its own independent conclusion bearing in mind that I never heard nor saw the witnesses as they testified. See **Okeno v Republic**.
5. Revisiting the evidence before the trial court, PW1 SYLVIA ACHIENG OLENG'O testified that on the 7<sup>th</sup> day of October 2016, at about 7.00 pm, she was in her house when PA that is the complainant's mother went while carrying the complainant baby. She stated that the complainant's mother explained to her that she had gone to the hospital to deliver and left the complainant in the custody of her father that is the appellant herein. That when she returned home the following day, she found the complainant lying on the chair while crying. That on checking the complainant's private parts, she realized that the complainant was bleeding and when she asked the complainant's father [appellant] on what had happened, the appellant turned hostile.
6. It was her further testimony that when she checked the complainant's private parts, she confirmed that the complainant was bleeding. That when they went to the appellant's home, they did not find him. Members of the public went to look for him and he was found after about 30 minutes. They bayed for his blood but that the appellant was rescued by the Assistant Chief who called police officers who went and arrested him and the child was subsequently taken to the hospital.
7. PW 2 MICHAEL OSARE AMOLLO testified that he is the Assistant Chief of Sirongo beach. He stated that on the 7<sup>th</sup> day of October 2016 at about 7.00 pm, he was at home when he received a phone call from PW1 who informed him that one JO was being accused of having defiled a child and members of the public wanted to lynch him. He called police officers and he proceeded to the home of PW1. On reaching there, he found a crowd of people who were shouting while calling the name of the appellant. After that, police officers arrived and they proceeded to Nango Health Centre where he saw the child who was being treated.
8. PW3 Peres AO testified and stated that the complainant was her daughter while the appellant was her husband. She stated that on the 4<sup>th</sup> day of October 2016, she went to Uyawi health Centre to deliver and she left the complainant in the custody of the appellant. She had a successful delivery and she returned home with the new born baby on the 5<sup>th</sup> day of October 2016 at 7.00pm. That when she reached home, she found the house in darkness and that her husband who is the appellant was not there. That when she enquired from her neighbors on the whereabouts of the appellant, they told her that they did not know. When she touched the chair, she realized that the complainant was lying

on the chair. When she carried the complainant she observed that the complainant was touching her buttocks and complained of pain. When she checked the complainant's private parts, she realized that the complainant was bleeding from the vagina. When she asked her neighbors on what had happened to the child, they told her that they did not know. She stated that after a short time, the appellant returned home and when she asked him what had happened, the appellant explained to her that the child fell on the basin when he was washing her.

9. PW3 further testified that after a brief argument, the appellant went away and returned after a few minutes. She stated that when the appellant returned, the appellant threatened her and told her not to disclose to anybody what had happened. The appellant then locked the door to the house from the outside leaving the PW3 inside and he went away. PW3 called her neighbor's child who went and informed the appellant's brother and the chairman of the beach and she took the child to Uyami health Centre for treatment. She stated that the appellant was arrested by members of the public who wanted to lynch him but he was rescued by police officers.

10. PW3 further stated that the child was referred to Moi Teaching and Referral Hospital where she was admitted for treatment for one month. She was discharged and issued with a P3 from which was subsequently filled by a doctor.

11. On cross examination, PW3 reiterated her evidence in chief and stated that the appellant told her that the child fell on the basin when he was washing her.

12. PW4 Dr. EVANS OGOTI a Medical Officer based at Bondo Sub county Hospital testified that he filled the P3 form in respect of the complainant child S.A. on the 15<sup>th</sup> day of January 2017. He stated that the patient was first received at the hospital on the 7<sup>th</sup> day of October 2016 with the history of having been defiled by her father. He stated that at the time the patient was received, she was bleeding from the vagina and showed signs of irritability. He stated that he was the one who treated the patient at the first instance at Bondo Hospital on the 7<sup>th</sup> day of October 2016. He stated that at the time he received the patient, he checked her private parts and he noted that the hymen was torn, the vagina was torn on both sides, the rectal mucosa was torn, her whole perineum was torn and the vagina had bruises which was an indication of forced entry. He also stated that there was active bleeding.

13. The doctor observed that the injuries were severe and so the patient was referred to Moi Teaching and Referral Hospital for specialized treatment. He produced the P3 form as exhibit 1.

14. Placed on his defence, the appellant gave sworn testimony and stated that on the 6<sup>th</sup> day of October 2016, his wife, that is, PW2 went to the hospital to deliver and left the complainant in his custody. He stated that on the 7<sup>th</sup> day of October 2016 at 2.00pm, he went to the Lake to take a bath and he left the child with other children. That when he returned to the house, he realized that the other children had gone away and he found the complainant child behind the house. He maintained that he realized that the child had soiled herself when he removed her clothes to wash her.

15. He further stated that when he asked the other children as to what had happened, they told him that they did not know. He stated that he went to look for a boda boda rider to take the child to the hospital and that when he returned to the house, he found when his wife had returned. That when his wife asked him what had happened, he explained that he did not know how the child sustained injuries.

16. The trial court found the appellant guilty of the offence of defilement and sentenced him to serve mandatory life imprisonment.

17. Dissatisfied with the judgment, conviction and sentence imposed, the appellant filed this appeal in person and later he instructed an advocate Mr. Ochanyo who represented him and filed supplementary grounds of appeal and written submissions.

18. The appellant complained that:

1. That the learned trial magistrate erred in law and fact by misevaluating the evidence brought before him hence came up with a wrong decision.
2. That I cannot recall all that transversed[sic] during the trial hence pray for the trial proceedings to adduce more grounds.

19. In the amended grounds of appeal filed on his behalf by Wakla & Company Advocate, the appellant lamented that there was no prove of the age of the complainant, that the trial court failed to consider the mitigations by the appellant, that the offence of defilement was not proved beyond reasonable doubt as required by law, and that the mandatory sentence of life imprisonment imposed on the appellant was harsh excessive and illegal.

## SUBMISSIONS

19. In his oral submissions highlighting the written submissions and canvassing the amended grounds of appeal, Mr. Ochanyo Advocate submitted, consolidating ground 2 as amended alone and grounds 3 and 4 together. He acknowledged that the victim was allegedly aged 1 year and 4 months but argued that PW3 Peres did not produce any prove of the age of the complainant by way of documentary evidence. He relied on the decision in **Cardon Wogwen Vs [2010] e KLR**.

20. On ground No's 3 and 4, which relate to sentence imposed, counsel invited the court to look at line 18-20 of the judgment of the trial court where the trial court held that the life sentence is mandatory. He argued that that position has since changed vide the Supreme Court case of **Francis Muruatetu v Republic [2019] e KLR, Jared Koita Injiri v Republic [2019] e KLR and William Okungu v Republic [2018] e KLR and Evans Wanjala Wanyonyi v Republic [2017] e KLR** where the superior courts held that the mandatory nature of sentences was unconstitutional as it deprived the trial court of the judicial discretion to mete out appropriate sentence. In addition, the superior courts found and held that the mandatory minimum sentences deprived the convicted persons of the opportunity to mitigate so as to give the trial courts an opportunity to mete out appropriate sentences having regard to the circumstances of each case.

21. According to Mr. Ochanyo, the appellant mitigated that he has two wives and children. That he pleaded for leniency, but that despite the court taking into account the above mitigations, it stated in its sentencing remarks that the sentence available in law was mandatory hence the court did not have direction.

22. Counsel for the appellant urged the court not to uphold the conviction of the appellant and urged this court to interfere with sentence by giving him a determinate prison term.

23. However, counsel reiterated that for want of proof of age of the victim, the appeal against conviction should be allowed and sentence set aside.

24. In response, the Respondent through Senior Principal Prosecution Counsel Mr. Okachi opposed the appeal and submitted that the prosecution proved its case beyond reasonable doubt. He relied on evidence on record. On the issue of age, the prosecution Counsel submitted that it is not just documentary evidence that can be relied on to prove age. He submitted that PW3 knew the date of birth of the victim and that she gave the victim's exact age being 1 year and 4 months. Further, that PW1's evidence was not contradicted. In addition, Counsel for the Respondent submitted that the court observed that the child was of tender age and relied on appearance of the victim in court and evidence of PW3. Further, it was submitted that PW4 the medical expert also testified that she attended to a child aged 1 year and 4 months. Counsel maintained that this was an expert witness who had dealt with persons of different ages hence the issue of age cannot be a ground for allowing the appeal and quashing a conviction for such a serious offence that was proven.

25. The Prosecution Counsel submitted that the offence was heinous and that the appellant knew the child to be a toddler of tender age. Therefore, in his view, given the age of the child and the offence committed, it called for deterrent sentence. He submitted that the sentence was legal to meet the letter and spirit of the Act. He submitted that the appellant having perpetuated a beastly act against the child, this court should take into account the circumstances and the impact of the offence to the victim and the society and make the sentence punitive enough.

26. In a rejoinder, Mr. Ochanyo submitted that the prosecution should have availed documentary evidence to prove age of the complainant.

### **DETERMINATION**

27. I have carefully considered the evidence on record, the grounds of appeal and submissions for and against the appeal and in my humble view, the main issues that flow for determination are:

***1. Whether the offence of defilement was proved against the appellant beyond reasonable doubt.***

***2. Whether sentence meted out was appropriate.***

28. To resolve the above issues, I will deal with undisputed facts first. These are that the complainant herein is PW3's child and a step child to the appellant. It is also not in dispute that PW3 left the complainant in the custody of the appellant when she went to the hospital to deliver. It is also not in dispute that the complainant sustained severe injuries in her vagina. It is also not in dispute that the complainant did not testify on what exactly happened to her for reasons that she was unable to talk due to her tender age as observed by the trial court. However, there are some issues in dispute namely:-

***1. Whether the incident occurred on the 7<sup>th</sup> day of October 2016 or on the 5<sup>th</sup> day of October 2016.***

***2. Whether the prosecution proved all the essential elements of defilement as stipulated in section 2 and 8(1) and 8(2) of the Sexual Offences Act and therefore whether the appellant's conviction was sound.***

29. On whether the incident occurred on the 7<sup>th</sup> day of October 2016 or on the 5<sup>th</sup> day of October 2016, according to the particulars in the charge sheet, the incident occurred on the 6<sup>th</sup> day of October 2016. According to PW1, PW3 and PW4, the incident occurred on the 7<sup>th</sup> day of October 2016. According to PW3, the incident occurred on the 5<sup>th</sup> day of October 2016. The appellant also stated that it was on 7<sup>th</sup> October 2016 when he left the child in the company of other children and on returning he found her injured and that that was the date when his wife returned from hospital.

30. The trial court considered the above discrepancies in the dates and concluded that the incident occurred on 7<sup>th</sup> October, 2016 because this was well corroborated, as opposed to the evidence of PW3 the complainant's mother. I have considered the inconsistency in the dates as given in the charge sheet and the evidence of PW3. I am equally persuaded that the incident took place on 7<sup>th</sup> October 2016 because even the appellant himself testified that his wife went to Hospital to deliver on 6<sup>th</sup> October 2016 and returned on 7<sup>th</sup> October 2016 that is the day when the complainant child is said to have been found to be injured in her vagina. The appellant conceded that the child was injured but denied being responsible because, according to him, he had left the child at home with other children on that day and when he returned, he found her injured. He asked the other children as to what had happened to the child but they denied knowing anything. He stated that he went to look for a motorcycle to take her to hospital but on his return he found that his wife, PW3 had returned from Hospital.

31. Even the P3 form is clear that the child was taken to hospital for treatment on 7<sup>th</sup> October 2016 the same day that PW1 says PW3 went to her and told her that she had just returned from Hospital to deliver and found her child injured in her private parts but that the appellant who was her husband was nowhere to be found.

32. In my view, PW3 who had just returned from Hospital delivering a child may have been so confused that she lost it out on the dates. The discrepancy in my view is curable.

33. Therefore, on whether the prosecution proved the essential elements of the offence of defilement, there are three (3) essential elements of the offence of defilement. These are:

1. ***Proof of the age of the complainant***
2. ***Proof of penetration of the complainant's genitalia***
3. ***Positive Identification of the accused person as the perpetrator.***

34. On whether the prosecution proved the age of the complainant, according to the charge sheet, the complainant was about one year and four months old at the time of the alleged incident. PW 3 testified that the complainant was aged one year and four months old as at the time of the incident although she did not have the certificate of birth. According to the doctor who examined the complainant, the child was aged about one year and four months as at the time of the examination.

35. From the above evidence, it is clear that the prosecution did not produce any documentary evidence to prove the age of the complainant. The appellant's counsel attacked this failure on the part of the prosecution and submitted that without proof of the age of the complainant in defilement cases, the charge and therefore the conviction cannot be sustained. However, the trial magistrate found and held that he was able to see and hear PW3 as she testified and that he formed the opinion that the complainant was actually a child below five (5) years old. He observed the complainant and stated:

***“She could not stand well without the support and or the assistance of her mother. Further it is now well settled that failure to produce documentary evidence to prove the age of the complainant is not fatal to the prosecution as the issue of age only becomes crucial at the time of sentencing and further that age can be ascertained from the evidence available other than documentary evidence.***

***Based on the foregoing, I am of the finding that the prosecution has successfully demonstrated that the complaint was about one year and four months as at the time of the incident.”***

36. The above finding and holding is valid for reasons that whereas proof of age of a complainant in defilement cases is a duty of the prosecution, to establish the age of the victim of defilement, it is equally trite law that proof of age or apparent age can be done by other means other than documentary evidence in the form of birth certificate, birth notification, baptismal card or the child Health or Immunization Card. In addition, proof of age can be by observation by the court, or testimony by the parent or guardian as long as the court believes that they are saying the truth and makes such observations on the apparent age of a victim. This position finds support in several cases: In **P M M vs Republic [2018] eKLR**, Mwongo J stated as follows and I concur:

***“Whilst it is true that the onus of proving the age of the victim resides with the prosecution and a simple statement by the complainant as to her age does not constitute such proof, the Court may in certain circumstances rely on evidence other than an age assessment report or birth certificate. In the case of in Musyoki Mwakavi v Republic [2014] eKLR held that: \_***

***“...apart from medical evidence, the age of the complainant may also be proved by birth certificate, the victim's parents or guardian and observation or common sense...”***

***In the case of Francis Omuroni v Uganda Court of Appeal; Criminal Appeal No. 2 of 2000, it was held that:***

***“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense...”***

37. As correctly observed by the learned Judges in the above cited case, whereas the best evidence of age is the birth certificate followed by age assessment, the mother's evidence of the complainant's age together with the combination of all other evidence available including the trial court's own observation of the complainant in court can be relied on to determine the age of the complainant. Here, the medical evidence adduced by the clinical officer, which was not discredited by the appellant, estimated the age of the victim as one year and four months old. In addition, the appellant did not raise any issue on the question of age during cross examination. In fact, he testified using the term child and that the child was left in his custody and that he left her with others as he went to the Lake to bath only to return and find her injured. In the circumstances, I do not find it prudent to disturb the finding of the trial magistrate. I uphold it and hold that the prosecution proved beyond reasonable doubt that the complainant was aged 1 year and 4 months old.

38. On whether there was proof of penetration of the complainant's genitalia, according to PW 1, when she saw the complainant, she was bleeding from the vagina. According to PW3, when she checked the complainant's private parts, she noted that there was active bleeding and injuries were visible. According to PW4, when he received the complainant at Bondo hospital on the 7<sup>th</sup> day of October 2016, she was bleeding from the vagina, she was irritable and he noted that the entire perineum was torn. He noted that there was clear evidence of forced entry into her vagina and spermatozoa was also seen upon laboratory investigation. The child was also found to have sustained serious injuries which the local hospital could not manage to treat hence they referred her to **Moi Teaching and Referral Hospital, Eldoret** for treatment and she was admitted in the said hospital for one month with a mother who had just delivered a new born.

39. The above evidence on penetration of the complainant was not challenged by any other contrary evidence. I have no reason to discard the findings of the trial court. I uphold them and find and hold that the element of penetration was established beyond reasonable doubt.

40. On whether the appellant was positively identified as the perpetrator, it is not in doubt that the complainant was a very young child aged 1 year and four months and therefore she was not able to talk or give evidence to say what happened to her and who caused her the serious genital injuries. In the premises, just like the trial court, this court has to rely on the evidence of other witnesses who did not find the appellant in the act of defiling the complainant. PW3 testified that when she went to the hospital to deliver a new baby, she left the complainant in the custody of the appellant and that upon her return the following day, which this court has found to be 7<sup>th</sup> October, 2016, she realized that the complainant had sustained injuries in her genitals, and when she asked the appellant what had happened, the appellant told her that the child fell down on the basin when he was bathing her.

41. On the part of the appellant, he testified that he did not know what happened to the child since he left her with other children when he went to take a bath at the Lake at about 2.00pm and he only took about 30minutes but on his return he did not find other children. He found the complainant behind the house. He asked the other children but they told him that they did not know what had happened to the complainant. He realized that the child had soiled herself. He went out to bring a bodaboda to take her to hospital but on his return he found that PW3 had returned. He however did not say whether he came with the said bodaboda.

42. From the above evidence, it is clear that the only evidence available is the evidence of PW 3as against the evidence of the appellant. The appellant as putative parent or guardian of the child remained at home with the toddler when her mother went to hospital to deliver another child. The appellant claims that he left the child in the company of other children when he went to the Lake to bath, but he does not mention who those other children are and neither does he claim that those other children could have defiled the child.

43. The appellant owed a greater duty of care to the toddler, that of protecting and caring for her as she was too young to know anything. If at all he found the child having merely soiled herself, there was no need of going out to bring a motorcyclist to take her to hospital as children who soil themselves do not require medical attention but cleaning. Further, if it is true that he wanted to take the child to hospital that is why he left her alone in the house, one wonders why he could not have carried the child to go get the bodaboda and proceed to hospital for treatment which treatment as I have stated, is a made up case since a child who has merely soiled herself was not one to be treated, the appellant avoided stating that he found the child defiled and that he did not know who did it, he covered up the story with **'soiling'**.

44. In my humble view, the circumstantial evidence available irresistibly points to the appellant as the person who having the care of the minor defiled her and not any other person. The trial court which had the advantage of seeing and hearing PW3 the victim's mother testify believed that she was telling the truth and there is nothing on record to suggest that she could have framed the case against the appellant husband as she had returned home from delivering his child in hospital.

45. I am therefore in agreement with the finding of the trial court that the appellant was the perpetrator of the offence of defilement. The trial court observed as follows, the evidence of PW3 a single witness who did not see the child being defiled but who found the child in a pathetic state upon her return from hospital to deliver another child:

***"I am aware that there is no specific number of witnesses required to prove a given fact and the evidence of a single witness can be relied upon to prove a fact. I have considered the evidence of PW2 and I am satisfied that the accused told her that the child had fallen in a basin when he was washing her and sustained the injuries. This is for reasons that she was firm on cross-examination that, that was what the accused told her. I have also considered the evidence of the accused in his defence. I have noted that the appellant stated that he went to the lake to bath at about 2.00pm and returned after about 30 minutes and went to look for boda boda rider at about 2.30 pm, how comes he had not returned to the house at about 7.00 pm? my considered opinion is that the defence staged by the appellant is untenable. The true and or correct position is that the appellant defiled the girl but left her in the house and went away simply to cause confusion.***

46. The trial court also noted that the investigating officer was not called as a witness but held that it is now well settled that it is always desirable to call the investigating officer but failure to call the investigating officer is not fatal to the prosecution's case unless the investigating officer has been adversely mentioned by a witness. In this case, the investigating officer was not mentioned adversely by any of the witnesses hence failure to call him was not prejudicial to the appellant or to the prosecution's case.

47. I am fortified on this point by the case of ***Kiriungi v Republic[2009]KLR 638 cited in Kenneth Kipngetich Soi v Republic [2014]e KLR Wendo J and Cr Appeal No 127 of 2017 Lucas Onyango Odinga v Republic [2018]e KLR.***

48. In the end, I find and hold that the prosecution proved its case against the appellant beyond reasonable doubt that he and no other person defiled the minor. All the elements of defilement were proved to the required standard. I dismiss the appeal against conviction and uphold the conviction of the appellant by the trial court.

49. On sentence, the appellant's counsel submitted that the trial court meted out mandatory minimum sentence of life imprisonment which, according to counsel, is no longer applicable following the jurisprudence in the Supreme Court case of ***Francis Karioko Muruatetu v Republic [2017]e KLR*** as applied by the Court of Appeal in the ***Jared Koita Injri v Republic [2019]e KLR.*** He faulted the trial magistrate for failing to exercise discretion in sentencing the appellant.

50. I have considered the submission on sentence by the appellant's counsel and the circumstances under which the offence was committed. I also take note of the fact that the appellant was handed a mandatory minimum sentence which is lawful but problematic in view of the principles laid out in the Francis Muruatetu (supra) case. I observe that nonetheless, the appellant was given an opportunity to mitigate before the sentence was meted out and the trial court took those mitigations into account when sentencing him to serve life imprisonment but he stated that he had no discretion to sentence him otherwise.

51. Going by the recent jurisprudence, there is discretion in sentencing even where the sentence prescribed is minimum mandatory. The question is whether in the circumstances of this case of an accused who was a first offender, a father defiling his one and a half -year-old

step child and mitigating saying he had two wives and children deserves any leniency from a court of law exercising discretion in sentencing. I am afraid not. A husband of two wives and a father of children has absolutely no excuse or reason to defile a one year old child. In my view, the harshness of the penalties in the Sexual Offences Act were informed by the seriousness of sexual offences and the effect of the offences to the victims. The victim in this case was a one year and four months' baby. She sustained serious tears of her vagina following defilement by her step father. She had to be referred to Moi Teaching and Referral Hospital for surgical intervention and repair. Her vaginal walls were torn. Her external anal sphincter and rectal mucosa were torn. The P3 Form describes the injuries as 4<sup>th</sup> degree tear.

52. A one year old child is so innocent that defiling her is as good as killing her. The appellant is to say the least a wild animal and a beast with no human instincts. He deserved a harsher punishment as prescribed by law. But what does life in prison mean, it means that one must spend his entire natural life in prison and that no matter how distant, there is no prospect of release while still alive.

53. Accordingly, this appeal against conviction is dismissed.

54. The appeal against sentence is allowed to the extent that the life imprisonment imposed on the appellant is hereby set aside and substituted with a prison term of seventy five (75) years to be calculated from the date of his conviction by the lower court.

**Dated, Signed and Delivered at Siaya this 2<sup>nd</sup> Day of December, 2019**

**R.E. ABURILI**

**JUDGE**

**In the presence of:**

The appellant and his counsel Mr. Ochanyo

Mr. Okachi Senior Principal Prosecution Counsel

CA: Brenda and Modestar