REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 32 OF 2017

CORAM: R.E.ABURILI

LAURENCE OWINO RANDIGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against judgment, conviction and sentence by Ukwala SRM Criminal Case No. 453 of 2015 on 16/6/2016 Hon C.N. Wanyama, R.M)

JUDGMENT

1. This Appeal is against conviction and sentence of 10 years, in respect of Ukwala Senior Resident Magistrate's Court Criminal case number 453 of 2016, R. vs. **LAURENCE OWINO RANDIGA** delivered on 16/6/2016.

2. The Appellant - **LAURENCE OWINO RANDIGA** was charged under **Count 1:** with the offence of Defilement contrary to ***Section 8 (1) (3) of the Sexual Offences Act No. 3 of 2006***, **Count 2:** Deliberate Transmission of HIV contrary to ***Section 26(1) (a) of the Sexual Offences Act No. 3 of 2006*** and an **Alternative count:** of Committing an Indecent Act with a child contrary to ***Section 11 (1) of the Sexual Offences Act No. 3 of 2006.***

3. The facts as per the charge sheet respectively are that, **LAURENCE OWINO RANDIGA**: on 16th day of August, 2015 at [particulars withheld] Sub-location in Ugenya Sub-county within Siaya County, intentionally caused his penis to penetrate the vagina of **J.A** a child aged **8** years.

AND

4. LAURENCE OWINO RANDIGA: on 16th day of August, 2015 at [particulars withheld] Sub-location in Ugenya Sub-county within Siaya County having actual knowledge that he was infected with HIV intentionally had unprotected sexual intercourse with **J.A** which infected the said **J.A** with HIV.

AND

5. LAURENCE OWINO RANDIGA: on 16th day of August, 2015 at [particulars withheld] Sub-location in Ugenya Sub-county within Siaya County, intentionally touched the vagina of **J.A** a child aged **8** years.

6. After full trial the Appellant - **LAURENCE OWINO RANDIGA** was found not guilty of Count 1 and 2 and acquitted but was found guilty of the Alternative charge and sentenced to 10 years imprisonment.

7. Aggrieved with the judgment, conviction and sentence of 10 years, **LAURENCE OWINO RANDIGA** – the Appellant filed a Petition of Appeal raising the following grounds as at 30/6/2016.

1. ***That: The learned trial magistrate erred in law and fact by convicting him despite the glaring lack of evidence.***

2. ***That: The learned trial magistrate erred in law and fact by denying him the right to fair hearing. (Article 50 (2) (J) of the Constitution.***

3. That, the Learned Trial Magistrate failed to appreciate the appellant's innocence hence did not give chance for trial submission.

4. That: the Trial Magistrate erred in law and fact failure of the prosecution to prosecute on the previous charge hence defaulted the charge sheet.

5. That: he cannot recall all that transverse during the trial hence prays for trial court record to adduce more grounds.

8. And further **Grounds of Appeal** filed on 4/4/2017, which are;-

1. That: the learned trial magistrate erred in law and fact by failing to observe that the offence the appellant was charged with was not sufficient to warrant a sound conviction.

2. That: he cannot recall all that transverse during the trial hence prays for trial proceedings to adduce sufficient grounds.

9. In determining this Appeal, the court must fully understand its duty as the first Appellate court as stated in the case of **Okeno v. R** which is to subject "*the evidence as a whole to a fresh and exhaustive examination* and for this court to arrive at its own decision on the evidence, it must weigh evidence and draw its own conclusions and its own findings while making allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses.

10. On what transpired before the trial court, the prosecution case was commenced by the testimony of **PW1: J.A(full name withheld for legal reasons) who gave unsworn evidence** after a voire dire examination by the trial court that she is Age: 8 years and goes to school at S. (name withheld) Primary, in Class 2. **She a**ttends church at R. (name withheld) Anglican Church where she attends Sunday school and are told things of God. She stated that she knew why she had come to court, that it was because she was sick and said that she will tell the Court the truth.

11. The court then made an observation that the child was shy and of average intelligence unable to understand the nature of magnitude of an Oath.

12. PW1 continued to testify that she was in Class 2, stayed with her mother and her siblings. It was her testimony that she had gone to play with their small child T.(full name withheld) when the accused asked her to call Danny to which she responded that Danny was at the market. He then held her hand and took her with him and made her lie down, removed her panty and removed his partially and he did her, he took his thing and put in her then told her to go.

13. She stated that they were in another damaged house that was not inhabited and that after the incident, she wore her pant and went to their house and slept. She narrated that when her mother saw white things coming out of her in the morning, she took her to hospital where she was injected. Afterwards the mother told her that when she sees the man she says. That she saw him in the video place when she had been sent to buy soap and she also stated that she did not know him before but that she would know him when she saw him. That he defiled her during the day when the sun was out and that she saw him.

14. PW2: V O D testified that on 17/8/2015 at about 8 pm he was at home with 3 children and he asked them to bath but when J. A the complainant removed her clothes he saw mucus on her panty and decided to take her to Ratado hospital although he said she did not feel pain for he had never seen that kind of disease with a child and so he suspected that a grown-up must have slept with her. That when he asked PW1 what had happened, PW1 told him that she knew the person's face and not the name and they only suspected the accused after the description given by the child PW1.

15. PW2 further testified that he, the complainant and their Mother waited for the Accused at Ratado and saw him heading to the video and they decided to send someone to talk to the accused and when he came out, the complainant identified him and they called the police. He then stated that PW1 described the accused as someone of PW2's height, a bit built and usually walks with a small brown child and walks in Siganga and that they had never had any family dispute.

16. *On being Cross Examined by the accused person, PW2* stated that they suspected the accused because of the description given by the complainant and that he the accused moved around with a light skinned child. He also stated that there was no one else in the area who walked with a light skinned child. He stated that the complainant had never said that anything bad had happened to her before and that he never washed her but instead took her immediately to hospital and stated that PW1 also stated that the incident was done to her. Further, that he did not know when the complainant was defiled and would not have known if he had not taken her to hospital.

17. PW3 E.A testified that PW1 was her my daughter and that on 17/8/2015 in the morning at 6.00 am, she went for Sunday School Teachers Training at Ndere and had switched off her phone and opened it at 4.00 pm and got a message from her son telling her she was required at home as the complainant was unwell and that he had taken her to hospital and the doctor said she had syphilis from a grown-up.

18. That on Friday the doctor asked if the child knew the defiler and she said that she sees him in a home nearby when she goes to school and knew the home. That on Saturday morning, she asked the complainant again and she said she knew the house and on Sunday, they went to the home where the complainant stated the suspect lived but did not find the accused.

19. It was her evidence that she saw Laurence going to the video place to watch football when she decided to ask Owino to call him and see if the child could identify him which the complainant did.

20. On being cross-examined by the accused person, PW3 stated that she did not know about Jeff hiding a school child. That she was Jeff's neighbor but never entered the Barber shop and did not see the girl or know anything. She stated that the accused came out of the video and the child saw him and that they did not know he was the one until the child identified him. She further stated that she went to Ndere on 27/8/2015 on Monday and that the doctor stated that the complainant had Syphilis or Gonorrhea and that the accused was tested and found

HIV+ and PW3 was told to take PW1 for further tests after 3 months.

21. PW4: DR. WILLIS OCHIENG testified that the P3 was filled by Dr. Fanuel Ojwang whom he was familiar with his handwriting and signature. That the P3 was filled on 24.8.2015 when the complainant J.A was examined with a history of defilement which occurred on the 16.8.2015 in a bush near Luhano Shopping Centre. That PW1 was given antibiotics and had been grievously harmed.

22. The examination revealed that the Left side of the inside of her vagina was painful to touch and cut, the urethra was swollen and painful though the ring was intact, there was whitish discharge and lab tests were done for HIV and urine and he asked that the child goes for retesting after 3months.

23. He testified further that another P3 was filled on 24.8.2015 on Laurence Owino Randika, 20 years old and that he had normal genitalia and anal region. He was also confirmed to be HIV positive.

24. On being cross-examined by the accused person the witness stated that there were signs that she had lost her virginity. ***He c***onfirmed that PW1 was 8 years old and that in defilement cases, they rely more on examination not the history. That she had injuries in the genitals which he did not know the cause, they were physical and were a sign of forceful penetration due to the swellings and lacerations.

25. PW5 NO. 46920 PC JOHN TOWETT testified that he took over the file from PC Machasio who was on training at Kiganjo. That on 23/8/2015, the parents of the complainant went to the police station and reported a case of defilement. That PW1 on being asked said that she knew the accused. He also testified that PW1 had a health card showing she was born on 24/11/2006 and produced a copy of the clinic card produced as Ex P2. He also averred that PW1 did not know the accused before.

26. In Cross Examination**,** he stated that the investigating Officer did not know the family.

27. ***PW1 was then recalled by the Accused*** and she stated that it is he the accused who did tabia mbaya to her and that no one had told her to say that to Court and she also stated that she knew him as Owino and that he used to pass by their home.

28. ***On being placed on his defence, the accused testified as*** **DW1 on oath that he was Laur**ence Owino Randika. He recalled that on 19.8.2015, he left home to go and watch football at Ratado when he heard someone calling him, he then went out since the hall was full and found the Ratado Police officers who arrested him and took him to Ratado Police Station and did not inform him of the charge.

29. He stated that on reaching there, he found the complainant whom he called by name as J.A and her brother V.O PW2. That V. said that he the accused had infected PW1 with Syphilis which he had never had and that the charges were read out to him but he did not know about them.

30. On ***Cross examination,*** he stated that he could not recall where he was on 16.8.2015, and that there were people he was with who saw him watching football and that what the complainant J. said was not true as he did not know who Juliet was.

31. He stated that before 19.8.2015, he had gone to Aboke to build a house for his sister and he only returned when he was told someone was looking for him to help that person do some work and that he was to go see Nyakisumu who is the woman that arrested him and that he felt that they had a grudge with him, adding that he was examined and it was found that he had no disease.

JUDGMENT OF THE LOWER COURT

32. The trial court summarized the above charges and the evidence adduced before it and raised the following issues for determination:

1. ***The age of the victim***
2. ***Whether there was penetration of accused penis into victim's vagina***
3. ***Whether the accused person had knowledge of his HIV status.***
4. ***Whether he deliberately infected the victim.***
5. ***Whether the Accused person inappropriately touched the victim's vagina using his penis.***

33. The court stated that the evidence by the minor was that she was 8 years old. The estimated age on ***P3 form Section C*** showed that she was 8 years old and that the same was also supported by the age assessment report of 13.6.2016.

34. On the issue of penetration, the court adopted the definition in the ***Sexual Offences Act at Section 2*** and stated that from the evidence of J.A., Laurence removed his pants partially and completely put his penis in her and that in cross examination, she said the accused did to her ***"tabia mbaya"*** in a spoilt uninhabited house. The court further observed that the examination done during the P3 filling showed that her hymen was intact and the laboratory tests were carried out to rule out infection.

35. The court further stated that Laurence Owino was aware of his HIV status and was on medication as recorded on his P3 form and his request to the Court during the hearing to be taken to collect his drugs.

36. The trial court also stated that on the issue of infecting the minor with HIV, it was not proved since the first test turned negative and she was to be re-tested after 3 months. That however, being aware of his HIV status, the Accused person went ahead and tried to defile the minor.

37. The court then stated that there was no evidence adduced to shake the evidence of the minor and found that she had been truthful on the occurrence of the fateful day as she was able to identify her assailant whom she knew. The court relied on the case of ***Mohamed Vs. Republic (2006) 2KLR 138*** where it was stated:

> ***"It is now settled that the courts shall no longer be hamstring by 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"*** And on the **provisions of 124 of the Evidence Act** in respect to evidence of a child in sexual offences.

38. Further, the trial court observed that in his defence, Laurence the accused person did not shake the evidence by the prosecution but denied having committed the offence. The trial Court stated that from the evidence the case of defilement was not proved but one of committing an indecent act with a child contrary **to Section 11(1) of the Sexual Offences Act**. Further, that there was no evidence of attempted penetration.

39. For the offence of defilement contrary to ***Section 8(1) (2) of the Sexual Offences Act*** and deliberate transmission of HIV contrary to ***Section 26 (1) (a) of the said Act*** the court found the accused person not guilty and acquitted him, while for the offence of committing an indecent act with the child contrary to **Section 11(1) of the Sexual Offences Act**, the court found the Accused person guilty and convicted him as provided under **Section 215 of the Criminal Procedure Code**.

APPELLATE SUBMISSIONS

40. The Appellant submitted that PW1 stated that the incident occurred at a spoilt house that was inhabited which contradicts PW4's testimony who stated that it was in a bush near Luhano Shopping Centre.

41. He contends that the evidence by PW1 that she saw him in the video when she had been sent to buy soap is not viable as one cannot see someone who is inside the video as the door was normally shut/ closed.

42. He submitted further that PW2 stated that PW1 said she knew the person's face but not the name yet when PW1 was recalled, she stated that she knew the accused/ appellant as Owino, adding that it was the first time she was allowed to answer any questions from the accused person and wondered why.

43. He also submitted that the investigations were shoddy in that PW2 told the court that PW1 described the accused person as one who usually walks with a small brown child and walks at Sigana. His question is why was the child he purportedly walks with not brought in to shed more light.

44. The appellant further submitted in a question format that the averment by PW3 that she asked someone to call Owino so that PW1 could identify him, whether such is an apt method for identification.

45. He submitted further that he was not told the circumstance and nature of all kinds of defending himself and that there was need for corroborated evidence of key witness, failure of which would be to allow him an acquittal. He relied on a Kisumu case of 1989 whose citation was not given in full.

46. The Prosecution counsel Mr Okachi, on the other hand submitted opposing the appeal and urging the court to dismiss the appellant's appeal and to uphold the conviction and sentence as the evidence adduced before the trial court proved the guilt opf the appellant beyond reasonable doubt. That the victim clearly identified the appellant and the expert witness confirmed that the victim was sexually assaulted-defiled. It was submitted that the appellant's mitigations were considered before he was sentences and that the trial court carefully analyzed the evidence on record as adduced hence the conviction was sound and sentence lawful.

DETERMINATION

47. I have considered the appeal herein as a whole .The issues that flow for determination are:

1. **Whether there was penetration;**
2. **Whether there were any material contradictions in the prosecution case;**
3. **Whether there was proper identification of the Accused/Appellant;**
4. **Whether the prosecution proved its case against the appellant beyond reasonable doubt.**

48. Onto issue 1, PW1 testified that he accused held her hand and took her with him and made her lie down, removed her panty and removed his partially and he did her, he took his thing and put on her then later told her to go; that he defiled her during the day. When she was recalled, she reiterated that it is he the accused who did '**tabia mbaya' meaning** bad manners to her.

49. This evidence of the complainant was corroborated by **PW4** - the doctor who stated that examination revealed that the Left side of the inside of her vagina was painful to touch and cut, the urethra was swollen and painful though the ring was intact and there was also whitish

discharge and on ***Cross Examination*** he stated that there were signs that she had lost her virginity, adding that in defilement cases, they rely more on examination not the history. He concluded by saying that though PW1 had injuries in the genitals which he did not know the cause, they were physical and were a sign of forceful penetration due to the swellings and lacerations. The trial magistrate relied on the case of ***Mohamed Vs. Republic (2006) 2KLR 138***, where it was stated:

> ***"It is now settled that the courts shall no longer be hamstring by 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. Further reliance was placed on the **provisions of section 124 of the Evidence Act** in respect to evidence of a child in sexual offences and the trial court believed that the child was telling the truth.

51. My assessment of the evidence as adduced in the trial court is that if the child was telling the truth, then from the evidence of PW1 backed up by that of PW4, I find that penetration did occur, considering the definition of Penetration under ***Section 2*** of the Sexual Offences Act being- ***"the partial or complete insertion of the genital organs of a person into the genital organs of another person".***

52. Thus, penetration need not be completed. Partial penetration as was established by the doctor who examined PW1 is sufficient. In this case I am satisfied that there was evidence of partial penetration.

53. On the second issue of whether there were material contradictions in the prosecution's case, the appellant claimed that whereas PW1 stated in her evidence that she was defiled in an old spoilt uninhabited house, PW2 stated that the complainant told him that she had been taken to the bush near Luhano Shopping Centre where she was defiled. Further, that albeit PW1 told PW2 that she knew the accused by face and not name but that when PW1 was recalled and cross examined she stated that she knew the accused as Owino.

54. According to the appellant, the above evidence was contradictory. My view is that albeit there were discrepancies in the evidence of PW1 and PW2 as stated above, those discrepancies could not have dislodged the evidence of PW1 that she knew her defiler by face and that she had been seeing him walk around with a light skinned child. Further, though she was found to be shy, she was emphatic that his physique was like that of the PW2 and the court having believed her on that account as it saw both the appellant and PW2, this court has no reason to differ with the trial court's findings. Furthermore, the findings by the trial court were not based on dock identification but on recognition of the appellant by the complainant child. In addition, the evidence by the doctor clearly show that the child was defiled and therefore the minor discrepancies noted were not material. They did not shake the prosecution's case.

55. Onto issue 3, PW1 testified that she had gone to play with their small child T. when the accused asked her to call Danny to which she responded that Danny was at the market. He then held her hand and took her with him and made her lie down, removed her panty and removed his partially and he did her, he took his thing and put on her then told her to go.

56. She further testified that she saw him at the video place when she had been sent to buy soap. She stated that she did not know the accused before but that she would know him if she saw him, which statement was reiterated by **PW5** who testified that PW1 said she knew the accused although she stated that she did not know the accused before the incident. It was her evidence that the accused defiled her during the day when the sun was out and she saw him. **PW2** stated that PW1 said she knew the person's face and not the name and they only suspected the accused after the description given by PW1. The description was that the accused was someone of PW2's height, a bit built and usually walked with a small brown child and walks in Siganga which he averred while being ***Cross Examined*** that there was no one else who walked with a light skinned child adding that while he, the complainant and their Mother were at Ratado, they send someone to call and talk to the accused and when he came out, the complainant identified him and it is then that they called the police.

57. In my humble view, the knowledge of PW1 of the Accused/ Appellant herein was that of recognition for it is clear that she had seen the accused from time to time walking by in the company of the small child but she did not put much thought to what his name was as he was just a frequent passerby and even if that was not the case, as the offence was committed in day light, PW1 got ample time to master the face of the perpetrator from the time the Accused/ Appellant took to inquire about Danny and her whereabouts to the time he removed her pant and made her lie down until he finished the heinous act.

58. PW1 also knew the physique of her assailant, an indication that the environment was conducive enough for PW1 to identify the accused. In the case of **PAUL ETOLE and ANOTHER vs. REPUBLIC C.A 24 of 2000 UR** Pg. 2 and 3 it was held:

> ***"The prosecution's case against the 2nd appellant was presented as one of recognition or visual identification….such evidence can bring about miscarriage of justice. But such miscarriage of justice occurring can be much reduced if whenever the case against the accused depends wholly or substantially on the correctness of one or more identification of the accused, the court shall warn itself of the special need for caution before convicting the accused. Secondly it ought to examine closely the circumstances in which the identification by each witness came to be made".[emphasis added]***

59. It is on the above premises that this court believes that PW1 properly identified the accused and that her identification was by recognition and was free from any mistake owing to the circumstances as described by the trial magistrate.

60. The appellant also claimed that he was not informed of all the nature of all the kinds of defending himself. The record shows that the appellant gave sworn evidence after the court complied with section 211 of the Criminal Procedure Code on 29th April 2016. He even stated that he had no witnesses to call and stated that he was ready. That is when the court gave him a hearing date for 4/5/2016. That being the case, I find the complaint herein unwarranted, no prejudice was occasioned to the appellant giving his testimony on oath, and he has not alleged that by giving his testimony on oath he was in any way prejudiced.

61. In conclusion, I find that there was partial penetration of the complainant's genitalia/vagina which would qualify for defilement of the

child. However, the trial magistrate must have considered the age and the health situation of the Accused/Appellant in making its determination i.e. rather than to allow a young man of 20 years with a precarious health condition to have his whole life wasted away, the trial court in the face of humanity opted to cast a blind eye to the fact that penetration did occur and went for the minor alternative count in lieu of the main count to sentence the accused. As the prosecution did not seek for enhancement of sentence I would not interfere with the discretion of the trial court as there is a thin line between the offence of defilement and committing an indecent act with a child.

62. The upshot is that I find that the Trial Magistrate exercised utmost leniency in favour of the Appellant herein, as there was overwhelming evidence adduced by the prosecution beyond reasonable doubt which evidence was not upset or shaken by the defence in any way.

63. Accordingly, I find the appeal herein not merited. I uphold the conviction and sentence meted out on the appellant and dismiss the appeal. The appellant to serve sentence meted out.

Dated, Signed and Delivered in open court at Siaya this 19th Day of November, 2018.

R.E.ABURILI

JUDGE

In the presence of:

Appellant in person

Mr Okachi Senior Principal Prosecution Counsel

CA: Brenda and Modestar