



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 113 OF 2017**

**CHARLES ODHIAMBO OKUMU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(An Appeal from the Judgment of the Principal Magistrate Honourable H.O Barasa in Eldoret S.O Criminal Case No. 183 of 2016 dated 14<sup>th</sup> November, 2017)***

**JUDGMENT**

*CHARLES ODHIAMBO OKUMU* was charged in the main count with the offence of defilement, contrary to *Section 8(1)* as read with *Section 8(2)* of the *Sexual Offences Act No. 3 of 2006*.

The particulars of this offence are that on the 25<sup>th</sup> day of July 2016 at [particulars withheld] area, in Wareng district within Uasin Gishu County, the appellant herein intentionally and unlawfully caused his genital organ (penis) to penetrate genital organ (vagina) of *JN*, a child aged 9 years.

In the alternative, the appellant herein faced a charge of indecent act to a child, contrary to *Section 11(1)* of the *Sexual Offences Act of 2006*.

The particulars of this offence being that on the 25<sup>th</sup> day of July 2016 at [particulars withheld] area, Langas, in Wareng district, within Uasin Gishu County, the appellant intentionally and unlawfully caused his genital organ (penis) to come into contact with the genital organ (vagina) of *JN*, a child aged 9 years.

The prosecution called 4 witnesses and their case is that the complainant herein (PW-1) was born on 10<sup>th</sup> June, 2009 and on 25<sup>th</sup> July, 2016 the day the alleged offence was committed, she was aged 9 years. Her baptismal card was availed to establish the age. She was living with PW-2 who is her aunt at Langas, [particulars withheld] area, within Uasin Gishu County. She was in primary school then, in class one.

On 25<sup>th</sup> July, 2016 in the morning the aunt prepared her for school. She then left for school. At lunch hour she never showed up at home. PW-2 asked her younger sister where she was and was told a certain man called her. The complainant's evidence is that she was called by the appellant while on her way to the school. She was called into his house where he removed her clothes and laid on her. He put his "dudu" in her "susu" and when he was through dressed her back. She didn't cry but went home. She did not tell anyone.

Meanwhile PW-2 had been looking for her and seeking information about her whereabouts from her friends, but it was all in vain. At about 10.00 p.m she gave up and went back home. She resorted to prayers. At around midnight she was called by a woman called Judith. The said woman was in company of the complainant. The complainant's uniform was torn and had blood stains. Complainant had marks on the neck indicating an attempt to strangle her. There was also a whitish substance on the clothes of which she made out could have been spermatozoa. The complainant was asked where she was and indicated she could lead her aunt there. They went and reported the case at Langas police station.

PW-3, the Investigation officer received the report on 26<sup>th</sup> July, 2016. He recorded the report and took the complainant to Moi Teaching and Referral Hospital for examination and treatment. A P-3 form was also issued. *Dr. Yatich* examined the complainant on 26<sup>th</sup> July, 2016. His finding is that she had an old healed hymenal tear at position 1 O'clock. There was erythematous labia minora. PW-4 produced the said P-3 form.

PW-3 recorded the statement of the complainant and that of her aunt, the PW-2. The complainant said she knew where the suspect lived. She led the police officers there. They were shown the house but the suspect was not in. At midnight the police went back there. They knocked on the door. The appellant opened and he was arrested. He was taken to Langas police station. The complainant was taken there and identified the suspect as the culprit. He was then charged. The Baptismal card, the girl's uniform and the P-3 form were produced in court as exhibits.

The appellant gave unsworn testimony in his defence which is that he lived in Langas and was a casual labourer. The complainant's mother was hawking vegetables. The appellant used to buy vegetables from her. One day she approached the appellant with a request to be loaned 4,000/- to boost her business. The appellant had saved 6,000/-. He gave her the 4,000/-. The transaction was based on mutual trust. She was to pay in one month. On 5<sup>th</sup> July, 2016 when she was to pay she called him. She said she had a concoction she could sell to him for the 4,000/- which will enable him live peacefully with his wife. The appellant had a problem with his marriage and the complainant's mother was aware of it. He got the concoction. The wife discovered of it and became very furious. She eventually left him. The appellant claimed back his money as the concoction did not work. The mother of the complainant refused to refund the cash and threatened to fix him. She threw to him only 1,000/-. The appellant said he'll escalate the matter. She harassed him and hauled insults at him. The appellant went to his rural home. He returned on 30<sup>th</sup> July 2016 at 9.00 p.m. After he had supper, the police went for him and he was arrested. He was taken to police cells. The following day at 10.00 a.m he was got out of the cells. Complainant and her mother were there. The mother told the complainant to mark his face as he'll be taken to court. He was then charged. He denied having committed the alleged offence.

The trial court evaluated the evidence and found the appellant guilty of the offence in the main count. He was sentenced to serve life imprisonment.

Dissatisfied with the said conviction and sentence, he appealed to this court on the grounds that:-

- (1) The case against him was purely fabricated.
- (2) Important exhibits were not availed, like clothes
- (3) Forensic evidence was not availed so as to link him to the complainant. He says he is HIV positive.
- (4) P-3 form used was fatally unreliable, poor, null and void.
- (5) Witnesses were incompetent, full of mischief and incredible.
- (6) The complainant's mother had a grudge against him.

The appellant however filed some other grounds with his written submissions and addressed the new grounds in the submissions.

The state opposed the appeal on the grounds that all the ingredients of the offence were proved by the prosecution beyond reasonable doubt and their 4 witnesses were credible, reliable and consistent.

As required of the first appellate court, I have evaluated the evidence adduced, the judgment and sentence passed, grounds of the appeal and submissions by both parties.

In an offence of defilement, there are usually mainly three issues to be determined which are the age of the victim who must be a child below the age of 18 years; penetration which must be of a sexual organ by a sexual organ and that the appellant is the one who penetrated the victim.

On the first issue the victim who gave brief evidence as PW-1 said in voir dire that she did not know her age. However in her evidence she said she was 9 years old. She was in class 1. The guardian who is her aunt, the PW-2 in the case, stated she was aged 9 years having been born on 10<sup>th</sup> June, 2009. She produced a Baptismal card from African Divine church, dated 15<sup>th</sup> August, 2009. Which is the date the victim was allegedly baptized, which shows her date of birth as 10<sup>th</sup> June 2009. The evidence on age was not challenged. However, if the incident took place as alleged on 25<sup>th</sup> July, 2016, by the time of the said offence if the date of birth is right she was 7 years old. She gave her evidence on 28<sup>th</sup> June 2016 and PW-2 on 1<sup>st</sup> February, 2017. Her birthday is on 10<sup>th</sup> June and both dates did not affect her age as her 8<sup>th</sup> year birthday was not yet. Actual age assessment was not done by the doctor. What is indicated in the P-3 form is the estimated age which is given as 9 years. Though the trial magistrate who had the opportunity of seeing the victim did not properly evaluate this issue as he simply said it's established the victim was in the age of minority. I wish to take Judicial notice that many children are in class 1 at the age of 7 years and the date of birth given in her Baptismal card, of which was recorded slightly over 2 months after her birth, is correct. By the time of the alleged incident she was below 11 years old.

On the issue of penetration the girl stated,

***“That man called me to his house and removed my clothes. He lay on me. He put his dudu in my susu. When he was through, he put back my clothes. I didn't cry I went home. I didn't tell anyone.”***

The offence of defilement as defined under Section 8(1) of the Sexual Offences Act, is committed by a person who penetrates a child. Where there is no dispute that the victim was a child as it is in this case, of paramount consideration for the offence is whether there was “penetration.” “Penetration” under Section 2(1) (d) of the Sexual Offences Act, means the partial or complete insertion of the genital organs of a person into the genital organs of another person. “Genital organs” under Section 2(1) of the said Act, include the whole or part of male or female genital organs and for the purpose of the Act also anus. The use of the words “genital organs” in definition of the very same phrase “genital organs” does not offer clarity on the other organs referred to, save for anus. Oxford Concise Dictionary defines “genital” as relating to human and animal reproductive organs. Explicitly, they can be internal or external and I am certain the law refers to only the external genital organs of which is a male penis and a female vagina as is well expressed in the particulars of the offence in the charge sheet. For an offence of defilement, the prosecution must establish beyond reasonable doubt that a male penis partially or wholly penetrated the victim's vagina and or anus. The complainant in this case said the appellant removed her clothes, laid on her and put his dudu

in her susu. When he was through he put back her clothes. Assuming what she told the court is true, she did not say that the appellant undressed. Even after he was allegedly through it is not said that he dressed back. The words dudu and susu are not in the Sexual Offences Act. The victim never explained them. The guardian as well did not. Saying they mean “dudu” Penis, and “susu” vagina, is subjective rather than objective, and is drawn from an assumption. The facts as they are do not distinguish between the offence of defilement and of sexual assault, which is committed by a person who unlawfully:

(a) Penetrates the genital organs of another person with: -

(i) Any part of the body of another or that person; or

(ii) An object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes.

(b) Manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person’s body.

If the complainant’s sexual organ (vagina) was penetrated, it is not clear that it was by the appellant’s sexual organ, a penis. The evidence by PW-2 that her clothes were blood stained and had whitish substance which she made to be sperms, is not supported by any other evidence. The said clothes were not subjected to laboratory examination of the alleged stains. Judith who allegedly led the complainant home on the material night and most likely would have corroborated the evidence or otherwise, was not called as a witness. The said stains were either not visible or were not shown to court during the hearing of the case. The investigating officer did not investigate the scene for evidence of involvement of a penis in the act. Presence of spermatozoa at the scene, girl’s clothes or in the suspect clothes would have given a positive indication. Penetration in relation to the offence of

defilement was not therefore established by the prosecution beyond reasonable doubt. This means that other logical explanations can be deprived from the facts other than that the appellant committed the offence convicted and sentenced of.

On identification the complainant stated that she had not known the appellant before then. According to PW-2 she knew the house she was taken to as she had told her that she could lead them to where she was. According to PW-3 she led them to the house of the alleged assailant but he was not in. Police went back there at midnight and found the appellant. They arrested him. The girl identified him at the police station and in court. The foregoing evidence shows that it is not the appellant who was identified as a person by the victim but the house. Apart from the victim being arrested in that house and the victim having led police to it there is no other evidence showing that the incident took place therein and that the said house was for the appellant.

The police messed by not conducting an identification parade after they had arrested the suspect to confirm the victim’s ability to identify him. PW-2 talked of a younger sister who said the victim was called by a certain man. This suggest she was with PW-1 and saw as she was called. This sister was not called as a witness. The alleged identification at the police station and at the dock are worthless. It is easy for a victim to mistakenly rest on the only suspect presented to her by the police as the culprit. The P-3 form indicates where history is recorded that:-

***“Survivor reports that the perpetrator defiled her yesterday 25<sup>th</sup> July, 2016 after calling her to his place. He had also defiled her before this year.”***

The complainant in her evidence said she had not known the appellant before 25<sup>th</sup> July 2016 when the alleged offence was committed. This suggests she was confused and probably made a mistake of him. The doctor who examined her found old healed hymenal tear at position 1 O’clock of which suggests it was not torn on 25<sup>th</sup> July, 2016 as she was examined on 26<sup>th</sup> July, 2016. Erythematous labia minora observed by the doctor is by itself not enough evidence of penetration. Other factors or activities could have caused it other than penetration.

The appellant was consistent in his defence. During cross examination of PW-2 he alleged that she owed him some money of which made her fix him. He reiterated it in his lengthy defence of which the trial magistrate did not well evaluate. He summarized it in one sentence that the appellant alleged he was framed up by the complainant’s mother. Given the shortfalls in the prosecution evidence there is a possibility that he was fixed. He deserved the benefit of doubt of which this court accords him. The appeal is merited and is allowed. Conviction and sentence are quashed. The appellant is set free unless otherwise lawfully held.

**S. M GITHINJI**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 6<sup>th</sup> day of December, 2018**

In the presence of: -

(1) The appellant

(2) Ms Kegehi for State

(3) Mr. Mwelem - Court clerk