THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 23 OF 2015

(CORAM: J.A. MAKAU – J.)

REPUBLIC……..……...……RESPONDENT

VS

G A O……..…..……..……APPELLANT

(Being an Appeal against both the conviction and the sentence dated 4.6.2015 in Criminal Case No. 195 of 2014 in Siaya Law Court before Hon. C.A. Okore-SRM)

JUDGMENT

1. The appellant **G A O** is charged with the offence of defilement contrary to **Section 8(1)(2) of the Sexual Offences Act No. 3 of 2006.** The particulars of the charge are that on the 4th Day of March 2014 at [particulars withhheld], in Siaya Sub-County within Siaya County intentionally caused his penis to penetrate the vagina of one MAM a child aged 5 years. The appellant faced an alternative charge of committing an indecent act with a child contrary to **Section 11(1) of the Sexual Offences Act. No. 3 of 2006**. The particulars of the alternative charge are that on the same day, same place, the appellant intentionally touched the vagina of MAM a child aged 5 years.

2. After full trial the appellant was found guilty of main count, convicted and sentenced serve life imprisonment.

3. Aggrieved by the conviction and sentence the appellant lodged this appeal setting out the following grounds of appeal:-

> ***(a) That the Learned Trial Magistrate erred in law and facts by failing to observe that a police investigation was insufficient and shoddy.***
>
> ***(b) That the Learned Trial Magistrate erred in law and facts by failing to observe that some of the key witnesses were not summoned to shed light on both the Prosecution and Defence case.***
>
> ***(c) That the Learned Trial Magistrate further failed in law by failing to give the petitioner a chance to deliver his defence as the law provides.***
>
> ***(d) That the trial court failed to notice that P3 form presented was merely forged hence lacked office rubber stamp and the official signature.***

4. I am first appellate court and I have subjected the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I had no opportunity to see and hear the

witnesses and so I cannot comment on their demeanour. I have drawn my conclusions after due allowance. I am guided by the case of **Kiilu and Another V. R (2005) 1 KLR 174** where the court of Appeal held thus:

> ***"an appellant in a 1st appeal is entitled to expect the whole evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision in the evidence. The 1st appellate Court must itself weigh conflicting evidence and draw its own conclusions."***
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> ***It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; only then can it decide whether the magistrates finding should be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."***

5. At the hearing of the appeal, the appellant appeared in person whereas M/S M. Odumba, Learned State Counsel, represented the state.

6. The appellant relied on his written submissions and added that he was framed because he had a grudge with PW2, W T A who used neighbour's child because of their land dispute. He urged that he did not penetrate the child, as had he done so he would have passed to her AIDS to her as he is HIV+. He urged that the child was coached by her mother on what to say.

7. M/S M. Odumba opposed the appeal and urged that both conviction and sentence are proper. That the ingredients of offence of defilement was proved. On issue of the grudge, she urged the appellant on being put on his defence he opted to be silent and lost the opportunity to put forward the issue of the alleged grudge before the trial court. That the grudge is an afterthought and urged the court not to consider the same. On appellant being HIV+, she submitted no evidence was availed to the court. She concluded by stating that the sentence given was proper and prayed the appeal to be dismissed.

8. The facts of the prosecution's case form part of the record of the appeal and I need not reproduce the whole of it but shall summarize the prosecution's case and defence.

9. The prosecution's case is as follows; the complainant PW1, MAM was at the shopping centre with her three friends; where they found the appellant who bought for her a chapati, a ball gum and gave PW1, MAM, Kshs. 4/= requesting her to accompany him to his house. That at his house, he removed her petticoat, biker put her on his mattress and defiled her. PW1, MAM's cries attracted attention of one Rogers. PW2, aunt to the appellant went to the appellant's house and found the appellant on top of PW1, he moved aside and PW2 took a stick, hit the appellant and took PW1, MAM out and locked the appellant inside the house. PW2 saw PW1's father who came to the scene of incident and arrested the appellant. PW3 who went to the scene heard people demanding the appellant produce PW1's clothes, which he did being underpant, biker, petticoat and shoes from under his mattress. PW4, father to PW1, was informed by R O, his child had been taken away. PW4 went to the appellant's house and found many people in the homestead. That after recovering his child's biker, underpant and shoes, petticoat from beneath the appellant's mattress, the appellant was arrested and taken to Siaya Police Station. PW1 was taken to Siaya Hospital, treated and issued with P3 form which was filled and the appellant was subsequently charged with this offence.

10. The appellant on being put on his defence he elected to say nothing in his defence and opted to call no witnesses.

11. The trial of this case commenced before J.N. Sani (Ag. Senior Resident Magistrate) who heard four witness before he was interdicted, and the matter was taken over by C.A. Okore (Senior Resident Magistrate) who upon explaining the appellant of his rights under **Section 200 Criminal Procedure Code**, he opted to have the case proceed from where it had reached. C.A. Okore (Senior Resident Magistrate) then heard evidence from PW5, the Clinical Officer and PW6, the Investigating Officer.

12. The appellant in his written submission he relied on fresh grounds of appeal rather than the ground set

out in his petition of appeal and that notwithstanding, for the interest of doing substantive justice as per **Article 159(2)(d) of the Constitution of Kenya,** which obligates courts to administer justice without undue regard to procedural technicalities. I shall consider the new grounds and also the grounds in the petition of the appeal.

13. Whether the Prosecution proved the case of defilement against the appellant? To prove defilement, the prosecution has a duty to establish the following ingredients: -

(a) Penetration

(b) Recognition and/or identification of the assailant.

(c) The victim is a minor by proving age of the victim is below 18 years.

In the instant case, PW1 stated that the appellant removed her petticoat, biker and defiled her. PW2 found the appellant on top of PW1, MAM, hit him and snatched PW1, MAM from the appellant's house. PW5 examined PW1 MAM on 5/3/2014 and on examination of her genitalia, he noted she had a torn hymen and her vagina was parenic; she had virginal discharge which was blood stained. He noted the age of injury was one day. He formed his opinion of weapon used to be a penis. PW5 produced P3 form as exhibit P6. I have perused the P3 form and have found that it clearly indicates penetration coitus was achieved. I therefore, find that penetration was proved. On recognition of the assailant, PW1 stated that the appellant asked her to accompany him to his house after he had bought a chapati, ball gum and gave her Kshs. 4. PW2, aunt to the appellant and who knew him very well, got inside the appellant's house and found appellant on top of PW1, MAM. She took the child outside. PW3 found the crowd after getting a report that PW1 was being defiled. PW4, father to the complainant PW1, MAM, went to the scene and found appellant locked in his house from outside. The house was opened and from inside they produced from underneath the mattress black petticoat, navy blue pant, biker which PW6 produced as exhibit 3, 4 and 2 respectively. PW6 also produced Ksh. 4/= which the appellant had given PW1 and which PW1 identified as MFI-P1 exhibit 1. The recovery of PW1's clothes under the appellant's mattress which PW6 produced connected the appellant with this offence. The appellant did not give any explanation on how the same came to be put underneath his mattress. He was well known by PW1, PW2, PW3 and PW4. I find the appellant was recognized as the perpetrator in this case. On the issue of the age of the victim, PW1, MAM, PW1 stated she was a nursery school student. PW2 did not give the age of the complainant but said she is a child. PW3, an ECD teacher stated PW1 was a minor student at her nursery school. PW4, father to PW1, MAM, did not state the age of his daughter. PW5, the Clinical Officer gave the victim's age as 5 years. PW5 testified that PW1, MAM, was taken for age assessment and she later received the age assessment report which she produced as exhibit 8. I have perused the age assessment report from Siaya District Hospital dated 5/3/2014, on PW1, MAM, indicating at that time, MAM was 5 years old. I am therefore satisfied the prosecution has established all the ingredients of an offence of defilement.

14. The appellant contends the police investigation was insufficient and shoddy. The appellant has not made any submissions to show why the investigation was insufficient and shoddy. I have nevertheless perused the evidence from PW1, PW2, PW3, PW4 and PW5 and I have found that the police recorded statements from the relevant witnesses and availed before the trial court all the relevant evidence and produced exhibits in support of the charge of defilement. I therefore did not find any merits in this ground of appeal and I shall proceed to dismiss the same.

15. The appellant contends the trial court erred in law and facts by failing to observe that some of the key witnesses were not summoned to shed light on the prosecution and defence case. Section 143 of the Evidence Act, states a fact can be proved by the testimony of one witness. It therefore, follows in criminal cases it is not the number of witnesses that is relevant but the relevance of the evidence being adduced. In this case the appellant did not state who were key witnesses for the prosecution who were not summoned and what if they were summoned were supposed to come and shed light on to the court. The appellant did not give the particulars of the witnesses he wished to call and was denied to call them. On being put on his defence he opted to keep quiet and opted to call no witnesses. I

therefore find no merits on this ground of appeal and proceed to dismiss the same.

16. The appellant contends the trial court failed in law to give him a chance to deliver his defence as the law provides. The trial court upon putting the appellant on his defence he opted to keep quiet and call no witnesses. I have perused the court record and I have found that the trial court acted as provided by law and it is the appellant who exercised this constitutional right to keep quiet giving court no option but to proceed to make its judgment based on evidence on record. I find no merits in this ground of appeal and I dismiss the same.

17. The appellant contends the P3 forms presented to court are merely forged and they lacked office rubber stamp and the official signature. In this case, the Prosecution produced complainant's P3 form as exhibit 6, appellant's P3 form as exhibit 7 through PW5 respectively. PW5 testified that he was the maker of the two P3 forms. The appellant did not challenge the production of P3 forms on the basis of their being forged or on any ground. I have examined exhibit P6 and P7. Each of them bears police stamp; hospital stamp and are duly signed. The appellant has not demonstrated that the stamps and signatures are forged and if so by who. He has failed to demonstrate the P3 forms are forged. I therefore dismiss the ground as baseless.

18. The appellant contends that the trial court erred in accepting the evidence of PW2 as it was not credible. The appellant contends PW2 was forced by an arrest warrant to come to court and give incriminating evidence against the appellant. He urged further if she was an eye witness, she must have seen the person who undressed the child since she saw the appellant and the child putting on clothes. He claimed PW2 framed him. He urged the child evidence needed to be corroborated. The court record show that the court made an order for summon to issue to PW2, W O O for hearing on 28/5/2015 and on 21/7/2014 warrant of her arrest. However, the court record do not show why warrants of arrests were issued against PW2 and whether the same were even executed when PW2 gave evidence on 10/9/2014 and whether she came to give evidence on her own volution. There is no evidence that PW2 was forced to give incriminating evidence against the appellant as the appellant did put to the witness that she was forced to give incriminating evidence against him nor did he give his defence in support of his assertion. Furthermore, the Prosecution has a duty to summon and even seek warrant of arrest for any witness if situation so demands and in doing so the Prosecution is motivated by having justice done to both the prosecution and defence. PW2 in her evidence, she did not state, she witnessed the person who removed the child's clothes but that she found the appellant on top of the child on a mattress. She was therefore an eye witness as she found the appellant and the child in his house while sleeping on top of the child. The child's other clothes were recovered from appellant's house when the crowd demanded that he produce the inner wear of the child which the appellant produced from underneath his mattress. On corroboration of the evidence of PW1, under **Section 124 of the Evidence Act** it is provided: -

> ***"Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.***
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> ***Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."***

In the instant case, PW5, the Clinical Officer who examined PW1, MAM, found that MAM, was defiled and produced P3 form exhibit 6. There is therefore corroboration of evidence of PW1 MAM, a minor from the evidence of PW5 and the exhibit P1. PW2 and PW4 evidence also corroborated the evidence of PW1. I find no evidence to suggest that PW2 was not a credible witness and as such I find that this ground of appeal lacks merits and I dismiss the same.

19. The appellant contends he was not accorded fair trial. He urges that he was not informed of his

right to be represented by an Advocate and he was not given facilities to prepare his defence as enshrined by the Constitution. Article 50(2)(c),(h) of the Constitution of Kenya 2010 provides.

> ***"(2) Every accused person has the right to a fair trial, which includes the right: -***
>
> ***(c) to have adequate time and facilities to prepare a defence;***
>
> ***(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly."***

The appellant appeared before the trial court on 6th March 2014 and his trial did not commence till 24/4/2014, a period of almost a month and a half. The court's order is clear that statements were ordered to be supplied to the appellant on 6/3/2014. On the hearing day, the appellant stated to the court he was ready for trial. It is therefore not correct that the appellant was not accorded adequate time and facilities to prepare for his defence. The appellant once again on being put on his defence, he did not ask for time to prepare his defence but told the court he wished to keep quiet. On the issue of rights to be represented by an Advocate the appellant did not demonstrate to the court that substantial injustice would have resulted if an advocate had not be assigned to him The appellant did not at any time apply for an advocate to be appointed to represent him and his request denied by the court. The last two grounds of appeal did not form part of the appellant's grounds of appeal as per his petition of appeal and I have in the interest of justice dealt with the same. I find that these grounds therefore do not have merits and I dismiss the same.

20. The upshot is that the appellant's appeal is without merits and I dismiss the same. I uphold the conviction and confirm the sentence.

DATED AT SIAYA THIS 16TH DAY OF FEBRUARY 2017.

J.A. MAKAU

JUDGE

DELIVERED IN OPEN COURT THIS 16TH DAY OF FEBRUARY 2017.

In the presence of:

Appellant: Present

M/S Odumba: for State

Court Assistants:

1. George Ngayo

2. Patience B. Ochieng

3. Sarah Ooro

J.A. MAKAU

JUDGE