REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

HCCRA NO. 34 OF 2016

(CORAM: J.A. MAKAU – J.)

FREDRICK OYOO ODHIAMBO……..……APPELLANT

VS

REPUBLIC…….……...……...…….……RESPONDENT

(Being an Appeal against both the conviction and the sentence dated 6.4.2016 in Criminal

Case No. 490 of 2014 in Bondo Law Court before Hon. M.Obiero-PM)

J U D G M E N T

1. The accused **FREDRICK OYOO ODHIAMBO** was charged with an 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 between the 18th day of May 2014 at midnight and 19th day of May 2014 at 2000hrs at [particulars withheld], in Rarieda Sub-County within Siaya County intentionally caused his penis to penetrate the vagina of one **MMA,** a child aged 3½ 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 charge are that on the same day, same place, the Appellant touched the vagina of **MMA,** a child aged 3½ years with his penis.

2. After full trial, the Appellant was found guilty, convicted of the main charge and sentenced to life imprisonment.

3. Aggrieved by both the conviction and sentence, the appellant preferred this appeal setting out five(5) grounds of appeal as follows: -

a) That the appellant pleaded not guilty to the charge.

b) That the appellant was not supplied with witness statements during the whole trial.

c) That PW2, A O O who was listed as eye witness never testified and his place was taken over by the Investigating Officer.

d) That the Doctor who testified in this case was not the one who examined the complainant and as such the appellant could not cross examine him and verify his evidence accordingly.

e) ***The investigation of this case was shoddily done to the extent that the appellant was not taken***

to hospital and as well his finger prints not taken as required by law

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."***
>
> ***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 Maurine Odumba, Learned State Counsel, represented the state.

6. The appellant in support of his appeal submitted orally and urged that according to the charge sheet, the victim was alleged to be 3½years, however, PW1 stated the victim was 4years; that if the child was defiled, she ought to have sustained serious injuries to attract admission in the hospital; that PW3's evidence was a statement produced as the said witness was already dead; that the maker of P3 form was not called and as such he could not ask questions to the doctor who gave evidence as he was not the maker of the P3 form; that the prosecution did not call all the witnesses listed in the charge sheet and that prejudiced the appellant; that the evidence of prosecution witnesses did not support the charge and the victim's documents were not produced by the Investigating Officer. He further urged penetration was not proved urging it is impossible for a child of such tender age to be penetrated. He urged his constitutional rights were violated as he was taken to court after 24hours had lapsed since his arrest.

7. M/S Odumba, Learned State Counsel, appearing for the state opposed the appeal against the conviction and sentence. She urged the ingredients of the offence of defilement thus penetration; age and identification/recognition were proved beyond any reasonable doubt; that the prosecution proved their case beyond reasonable doubt; that the evidence of the prosecution witnesses placed the appellant at the scene of crime. That the prosecution relied on circumstantial evidence; and medical documents; and that no inference can be drawn from failure to be call the two witnesses listed in the charge sheet and that failure did not prejudice the appellant.

8. The facts of the Prosecution's case form part of the record of appeal and I need not reproduce the same, however, I shall summarize the Prosecution's case and the defence.

9. The prosecution case is that, between the night of 18th May 2014 and morning of 19th May 2014 at 2000hrs at [particulars withheld] in Rarieda Sub-county within Siaya county, PW1, A A O, was at his house with four (4) children who included the victim MMA when on 18th May 2014 at 11.00 hrs, Fredrick, the appellant knocked the door, PW1 opened the door, found the appellant sitting near the door, welcomed him in the house, PW1 lit lamp and both the appellant and PW1 sat down. The appellant had five sachets of alcoholic drinks out of which he gave PW1 two who consumed them, became drunk and asked the appellant to allow him to go and sleep. PW1 proceeded to his bedroom leaving the appellant sitting on a chair. PW1 slept on the bed with the victim MMA while the other three (3) children slept on the ground. When PW1 woke up at 6.00am, he did not find the child MMA on the bed and when he enquired of her whereabouts from the other three children they told him he had slept with MMA on the same bed. PW1 searched for MMA from the neighbouring homestead upto 7.00am without success forcing him to rush to the appellant's home but he did not find the appellant as the house was locked. He then made a report at Wangarot Police Post and was referred to Lwala Kotiende Police Station. He made the report, returned home and found police officers from Wangarot at his home searching for the child

MMA. That on proceeding to the bush near the home of the appellant's home, they found the child, took the child to [particulars withheld] then Bondo District Hospital where the child was treated. The appellant was arrested at 3.00am at his home when he emerged from the plantation as he was not at his home when the child was being searched for. That when PW1 woke up he did not find the appellant who he had left seated in his house as he did not tell PW1 when he left. That when the child was found she was alone, was walking with difficulty, her clothes were wet and had no pant. That the doctor at Bondo District Hospital examined the victim "MMA" and filled the P3 form confirming MMA was defiled. Subsequently, police from Lwala Kotiende Police Station received information that the appellant had been found and public wanted to lynch him. Police proceeded to the scene, found the appellant lying down and covered with firewood and rescued him but he had been severely injured. He was rushed to the hospital. The police issued the victim MMA with P3 form, escorted her to the hospital and P3 form was filled. Police recorded witnesses statements and later charged the appellant with this offence.

10. The appellant on being put on his defence, he gave a sworn defence and called no witness. He denied committing the offence and stated that on 18th May 2014 at around 10.00am he heard noises from PW1's home as he was quarreling with his wife and on going there, he met PW1's wife running away and told him her husband wanted to cut her with a panga. On asking PW1 what was happening, he turned against him, the two quarreled, he left and at around 8.00pm, PW1 went to appellant's home in company of neighbours asking for whereabouts of J, after telling them he did not know of her whereabouts they started beating him, he was rescued by the neighbours, that he was shocked to find himself at the hospital from where he was taken to Bondo Police Station and was later charged with this offence.

11. The appellant in ground no. 2 of the appeal contends that he was not supplied with the witnesses statements during the time of the trial. **Article 50(2)(j) of the Constitution of Kenya 2010** provides: -

> ***"50. (2) Every accused person has the right to a fair trial, which includes the right: -***
>
> > ***(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence."***

12. I have very carefully perused the Lower Court proceedings as regards the appellant's contention that he was not supplied with witnesses statements and I have found that on 23rd July 2014, the court ordered the accused to be supplied with witnesses statements at his cost. That when the case came for hearing on 10th October 2014, the appellant did not raise the issue of not having been supplied with the witnesses statements nor did he object to the case proceeding to hearing. He was able to cross-examine the father of the minor at length without difficulties. That after PW1 gave evidence, the Prosecution case was mentioned severally, thereafter before next witnesses, PW2, PW3 and PW4 were called, however on 29th April 2014, the court on its own mention made another order that the appellant be given the witnesses statements and P3 form. On 22nd May 2015, the appellant requested for witnesses statements with P3 form and prayed for the case to start *de novo*. The court ordered the accused be supplied with the witnesses statements before hearing. On 7th August 2015, the appellant told the court he was ready with hearing without raising the issue of not having the witnesses statements. That on 2nd September 2015, when the Prosecution applied for adjournment, the appellant objected to the same urging the Prosecution has had sufficient time to prepare for the hearing. He did not raise the issue of not having been supplied with witnesses statements. The same proceeded to hearing and prosecution called PW1 who the appellant cross-examined without any difficulties. That on 14th October 2015 when PW2 gave evidence, the appellant was ready and also cross-examined PW2 without any complaint that he did not have witnesses statements. The position was repeated when PW3 gave evidence and PW2 was recalled. I therefore find that **Article 50(2)(j) of the Constitution of Kenya 2010** was not violated as the appellant had witnesses statements as he was able to cross-examine prosecution witnesses without difficulties hence I find he was not prejudiced in any way and his constitutional rights to fair hearing was not violated and/or breached in any way. This ground of appeal is without merits and I dismiss the same.

13. Whether the appellant was prejudiced by failure of the Prosecution to call all witness listed in the charge sheet? The prosecution listed five (5) potential witnesses in the charge sheet, however, the

prosecution called three witnesses out of the list of five witnesses. The witnesses who the appellant claims were not called are J A, mother to the minor victim and Dr. Atieno, the doctor who examined the victim. The appellant did not state what prejudiced him by the prosecution's failure to call J A . PW1 A A O, father to the victim in his evidence he was categorical when the appellant visited him at his home he was sitting with his children and that J A was not present. There was no evidence from the prosecution witnesses that J A played any role in this case. PW3, a Clinical Officer gave evidence and produced the P3 form signed by Dr. Jane Atieno, after complying with the provisions of **Section 33 of the Evidence Act** and to which the appellant did not raise any objection. **Section 143 of the Evidence Act** provides: -

> ***"143. No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."***

Further in the case of **Tetu Ole Sepha V Republic, CRA No. 15 of 2008**, the Court of Appeal stated: -

> ***"Although the evidence of the Administration Police would have buttressed the prosecution case, there was sufficient evidence which placed the appellant at the scene of the crime and therefore, the omission could not have been the basis for any adverse inference."***

14. I therefore find and hold that the Prosecution is not obliged to call a certain number of witnesses to prove a fact and has the sole discretion to decide on the relevant witnesses to call in a criminal case and where the Prosecution has called sufficient evidence to prove its case failure to call all witnesses who recorded statements or who are listed in a charge sheet as potential witnesses, that failure cannot be a basis to draw an inference that the witnesses were not called because the witnesses would have given adverse evidence against the prosecution. I find in this case, failure to call the two witnesses mentioned by the Appellant did not prejudice him as he alleges nor was it because they would have given unfavourable evidence against the prosecution as there were other witnesses who gave sufficient evidence in support of the charge.

15. The Appellant contends the doctor who testified in this case was not the one who examined the complainant and as such he could not cross-examine him and verify his evidence accordingly. PW3, Maruti Lawrence, a Clinical Officer produced P3 form made by Dr. Jane Atieno in respect of the complainant, MMA, aged 3½years; on the basis that he had worked with the same doctor for several years, was conversant with her handwriting, signature and as she was out of hospital for further studies. He testified on her behalf and did so in accordance with the provisions of **Section 33 of the Evidence Act** which provides as: -

> ***"33. Statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible."***

The appellant when the witness was giving evidence, he stated he had no objection to PW3 giving evidence on behalf of Dr. Jane Atieno contrary to his submission on appeal that he did not cross-examine PW3 as he did so. I therefore find failure to avail Dr. Jane Atieno was fully explained and PW3 allowed to testify after complying with the legal requirements. I find the appellant was not prejudiced by the Prosecution invoking the provisions of **Section 33 of the Evidence Act**. I find no merits in this ground of appeal.

16. I now turn to examine whether the prosecution proved their case beyond any reasonable doubt? The appellant faced the charge of defilement contrary to **Section 8(1)(2) of the Sexual Offences Act**. The ingredients of an offence of defilement are: -

> ***(a) Penetration***
>
> ***(b) Identification / recognition***

(c) Proof of age of the victim is below 18 years

17. The victim in this case was a minor said to be 3½years old and due to her age, the court ordered that she testifies through an intermediary. PW1, A A O, father to the minor, testified that on 18th May 2014 he was at his home with his children who included MMA, aged 3½years, when Fredrick, the Appellant, knocked his door and he received him. PW1 lit the lamp and the appellant gave PW1 1(one) sachet of alcoholic drink which PW1 took. PW1 then asked the appellant to allow him to go and sleep leaving the appellant on a chair. In the morning, he did not find MMA, who he was in bed with nor did he find the Appellant, the children told PW1 he had gone to sleep with MMA at the bed. That PW1 went to Appellant's home and found it locked and did not find the appellant around, provoking him to report to the police. The child was later found in the bush and taken to the hospital. The appellant was arrested from a maize plantation at 3.00am. From the above, I find the prosecution proved that the appellant was a neighbour and well known to PW1, who recognized him, who PW1 stated he welcomed into his house at the material night because he knows him very well. PW1 stated MMA was his daughter and was aged 3years and identified her health card MFI-1. PW2 testified he received a child health card for MMA which revealed she was born on 10th November 2009 and produced it as exhibit 1 and also identified P3 form which he had issued as MFI-3. I have perused exhibit 1, a child's health card in respect of MMA showing the date of her birth as 10th November 2009. I therefore find that at the time of the commission of the offence, MMA, was aged below 11years and the charge preferred against the accused was proper. The prosecution proved the age of the minor, MMA was at the time of commission of the offence 4½ years.

18. I now turn to the issue of whether the Prosecution proved penetration? Section 2 of the **Sexual Offences Act** defines "penetration" as follows: -

> ***"Penetration" means the partial or complete insertion of the genital*** **organs of a person into the genital organs of another person;"**

19. In the instant case, the victim MMA, could not talk properly due to her age and the only evidence as regard the penetration is that of the medical officer. PW1 stated that when the child MMA was found in the bush, she was walking with difficulties and her clothes were wet, she did not have pant and the child was injured. He stated the doctor examined the child and confirmed she was defiled. PW3 produced P3 form filled by Dr. Jane Atieno who had formed an opinion that the child had tears on labia minora, which were fresh wounds; that the hymen was broken and there were bruises on her genitalia with whitish vaginal discharge, That she was bleeding and had infection. The doctor indicated there were genital lacerations. The P3 form was produced as exhibit2. I have carefully perused P3 form exhibit 2 and I have noted the doctor indicated she found laceration bilaterally of labia minora, fresh wounds 1.5cm, hymen broken; pusy discharge as stated in the P3 form. I therefore find that penetration was achieved and Prosecution has proved penetration. The three ingredients of defilement, thus the age of a minor; recognition and/or identification and penetration has been proved beyond any reasonable doubt.

20. I now turn to examine who committed the defilement on the minor MMA, in this case? The prosecution's case is purely based on circumstantial evidence as no one found the appellant defiling the victim herein and secondly, the victim is a minor of tender years who could not give testimony and express herself to the court as to who actually had defiled her.

21. There was no eye witness in this case, the prosecution is mainly relying on circumstantial evidence in **Sawe V Republic (2003) KLR 354**, the Court of Appeal considered when circumstantial evidence can form the basis of a conviction and held as follows: -

> ***1. In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.***
>
> ***2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.***

3. The burden of proving facts which justify the drawing of the inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the Prosecution. This burden always remains with the Prosecution and never shifts to the accused.

4.…….

5.…….

6.…….

7. ***Suspicion, however strong cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable."***

22. Further in the case of **Abanga Ali Onyango V Republic CRA No. 32 of 1990 (UR)** at *page 5* the Learned Judges of Court of Appeal stated: -

"It is settled law that when a case rests entirely on circumstantial evidence such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly be established, (ii) the circumstances should be of a definite tendency unerringly pointing towards the guilt .of the accused, (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

23. I have very carefully considered the evidence of PW1 and statement of W O O produced by PW2, which evidence show that the appellant went to the home of PW1 awoke him up at around 11.00pm gave him two sachets of alcoholic drinks. PW1 was at his home with his four children who included MMA, the victim herein. Thereafter, PW1 took the sachets of alcoholic drinks, got drunk and told the appellant to let him go to bed leaving the appellant seated on a chair inside PW1's house. The three children slept on the ground while the fourth child MMA slept with PW1 on his bed. That when PW1 woke up at 6.00am, he realized the child was not there. The other three children told him he had slept with MMA on his bed. That during the night when the appellant decided to leave he did not inform PW1 and in the morning PW1 did not find the child and the appellant. There was no other adult during the material night save the appellant and PW1. PW1 went to Appellant's home at around 7.00am and found his house locked as he was not around. PW1 reported to the police and on returning home they continued searching for the child, proceeded to the bush next to the appellant's home and found the child in the bush walking with difficulties with wet clothes and without a pant. PW2 produced exhibits.5 being statement made by W O O who had initially given evidence as PW3 before an order for the case to be heard *de novo* was made and during which time he was deceased. In his statement, he had stated that on 19th May 2014 at 4.00pm he had received information of disappearance of PW1's child MMA and also disappearance of Fredrick Oyoo "Gak", the appellant herein. That at 7.00pm at Bar Aluru he saw PW1's daughter MMA coming from a bush heading towards her grandmother's home. He asked her where she was from and she told him she was with "Gak" who had taken her to the bush. He then went and informed PW1. That they went to where Fredrick was hiding, he took off but he was surrounded and arrested by members of public who wanted to lynch him but police came and rescued him.

24. It is clear from the evidence of PW1 that the last person to have visited the complainant's father and who was left seated in PW1's house, when PW1 was drunk and went to sleep in his bedroom with the child MMA; was the appellant before the child disappeared during the night. I find as PW1 was drunk when he went to sleep he could not understand what was happening during the night till 6.00am when he woke up. I also find for a child MMA then aged 3½years, it was impossible for her to walk out of the house to the bush next to the home of the appellant where she was found the following day on her own. I find that the circumstances from which the inference of guilt is sought to be drawn is cogently and firmly established. The circumstances relied upon establishes that the appellant was the last person left awake before the complainant was abducted from the house and taken out into a bush next to the appellant's house. The appellant left the home of the complainant's father without alerting anyone and I find he is the only person who knows how the complainant was removed from the bed when PW1 was deep asleep

after being fed with alcoholic drink by the appellant. The appellant had planned and schemed how to make PW1 drank at the material night and that is why he had to go to PW1's home at night, gave him two sachets of alcoholic drink so as to take the child away when PW1 was deep asleep so as to commit the offence he did. He did not leave PW1's house when PWI told him he was proceeding to bed but remained in the house for unexplained reason. The circumstances the prosecution relied on in this case where definite and unerringly pointing towards the guilt of the appellant.

25. I have considered the entire evidence and I find that there are no co-existing circumstances which would destroy the inference of guilt on the basis of evidence before court. I find therefore that the circumstances taken cumulatively form a chain so complete that there is no escape from the conclusion that with all human probability, the crime was committed by the appellant and none else.

26. Whether the investigation of this case was shoddy as the appellant was not taken to the hospital and his finger prints were not taken? PW2 testified that the Appellant was rescued from the members of public who wanted to lynch him and he was taken to the hospital at Bondo. PW2 issued the appellant with P3 form and escorted him to the hospital, however, the appellant's P3 form was not produced as an exhibit. The appellant do not state how he is prejudiced by the failure to have his P3 form produced nor did he during the hearing of the case call for the same, I therefore find failure to have medical report on appellant produced did not prejudice his case nor the failure to take finger prints, as a perpetrator. He is a step-brother to PW1, who knew him very well. Medical report and finger prints are not ingredients for an offence of defilement. His finger prints and his P3 form were not required to prove the offence of defilement.

27. Whether Appellants defence was considered? The appellant in his brief defence, he stated that on 18th May 2014 at 10.00am he went to rescue PW1's wife who was being threatened to be cut by the PW1, after which he quarreled with PW1. That at about 8.00pm, PW1 went to his place with members of public and arrested him. The appellant's defence was considered and court found that from the evidence of PW1 and PW2 he was arrested on 19th May 2014 and not on 18th May 2014 as he had alleged. I have considered the evidence of PW1 and PW2 and I find that the Appellant was arrested on 19th May 2014 and he was not arrested at 11.00pm of 18th May 2014. The appellant in his evidence stated that he does not have a grudge with his brother PW1. I therefore, from the evidence of PW1 and that of the appellant find no reason for PW1 to state that his brother, the appellant visited him at 11.00pm of 18th May 2015 and gave him two sachets of alcoholic drinks. I find the appellant's defence was considered and being a defence of alibi, I find the same was not raised early enough for the Prosecution to check out on it. The defence of alibi was raised too late in the day and I find the same to be an afterthought and unsustainable. PW1 placed him at the scene of crime at the material night. The same is rejected.

28. The upshot is the appellant's appeal is without merits. I reject the same. Accordingly the conviction is upheld and sentence confirmed.

DATED AND SIGNED AT SIAYA THIS 9TH DAY OF MARCH 2017.

J.A. MAKAU

JUDGE

DELIVERED IN OPEN COURT THIS 9TH DAY OF MARCH 2017.

In the presence of:

Appellant In person - Present

M/S Maurine Odumba: for State

Court Assistants:

1. George Ngayo

2. Patience B. Ochieng

3. Sarah Ooro

J.A. MAKAU

JUDGE