REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL APPEAL NO.29 OF 2016

BETWEEN

EMMANUEL ONYANGO OMANYA ..... APPELLANT

AND

STATE ..... RESPONDENT

(An appeal from original conviction and sentence of the SRM's

Court at Oyugis in criminal Case No.316 of 2014 dated 16.11.2015 – Hon. J. Wesonga,)

JUDGMENT

1. **EMMANUEL ONYANGO OMANYA** (the appellant) was convicted on a charge of defilement of a child contrary to **Section 8(1)** as read with **8(2)** of the **Sexual Offences act No.3 of 2006**.

2.The prosecution's case was that on 5th August 2014, at **[particulars withheld]** sub location in **RACHUONYO**, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of **J.A. (**full name withheld) a child aged 9 years.

3.The appellant denied the charge, and after a hearing in which nine (9) witnesses testified, the appellant was convicted and sentenced to serve life imprisonment.

4. The evidence presented at the trial was that on 5th August 2014, J.A (PW1) was sent by her mother to take charcoal to **MAMA B**'s home. She forgot the way and ended up in **EMMANUEL**'s home. She entered the house and found him with his child named **B A** who was about the same age as PW1. The appellant sent his daughter outside to check whether it was raining. The moment his daughter left, the appellant locked the door and removed PW1's clothes, then carried her to a bed. He then used a lesso to muzzle her mouth before removing his long trouser and inner wear then inserting his penis into her vagina. She stated:-

"I cried because the penetration was painful. When he finished, he warned me not to tell with dire consequences."

5. He then gave her Kshs.5/= and chased her out of the house. J.A was scared of telling her mother what she had gone through, but the following day she informed her teacher named **D A** who called her father and told him about the matter.

6. PW1 explained to the court that she knew the appellant as her neighbour, and before the incident, he had called her to go to his house but she declined. Apparently his daughter was PW1's classmate at **[particulars withheld]** primary school.

7. On cross examination PW1 explained that Mama **B**'s home (which was her destination) neighboured that of the appellant and she got mixed up and ended up at the appellant's house.

8. Incidentally the appellant took away the charcoal, then when PW1 got home her parent sent her away to go back and collect it and deliver it to **MAMA B**.

9. PW1 also stated that when the appellant's daughter **B** entered and knocked the door to the house, he sent her away to go and watch the rain.

She also did not tell her parents about the ordeal as she feared being beaten. She eventually disclosed her ordeal to her teacher because she was in pain and the appellant's daughter was making fun of her.

10. J.A.'s teacher **D A O** (PW2) confirmed that while at school she heard one of the students tell PW1 that she would not play with her because she had been laid. She then called PW1 and inquired what had happened, and that is how PW1 narrated her ordeal. PW2 informed the headmaster who in turn informed the father and eventually the appellant was arrested.

11. PW2 explained that the incident happened during a holiday and she only got to learn about it later.

J.A.'s father **A O** (PW3) narrated to the trial court how he was called to **[particulars withheld]** primary school by the head teacher and briefed about the incident. PW3 confirmed that JA had been sent to deliver charcoal to her aunt known by the clan name **N** but she heard it as **J** and went to the appellant's home.

12. PW1 delayed in coming back and upon her return her parents demanded to know why she had taken the charcoal to the appellant. She never disclosed her ordeal then, and her parents only learnt later that she refrained for fear of being beaten by them.

13.The appellant's daughter **B A A O** told the trial court that on 05/08/2014 JA arrived at their home with some charcoal and found her and the appellant inside the house. It was drizzling and the appellant sent her out to watch the rain. She obliged leaving the appellant and PW1 in the house. She returned shortly but found the door locked, so she sat at the verandah. She eventually got tired and decided to peep through and saw her father defiling PW1. He later opened the door and PW1 walked away. Later PW1 returned to collect the charcoal she had left in the house.

14. On being cross examined by the appellant as to who had told her about a defilement she responded:-

> **"I was not told, I saw you. Our windows are made of glass. After sitting on the verandah for a while I stood up, peeped through the window then I saw you undress her before you undressed yourself then proceeded to defile her."**

15. **B A** (PW5) JA's mother confirmed that she had sent JA to deliver charcoal to **MAMA B** but she only got to learn about the incident after being summoned to school by her daughter's teacher. She told the trial court that PW1 was born on 13th December 2006 and relied on the child's baptismal certificate in support of this.

16. **M A** (PW6) the head teacher at **[particulars withheld]** primary school narrated how he received information from PW2 that PW1 alleged to have been defiled by **BABA ADUNDO** (the appellant)..

17. **SAMWEL KOECH** (PW8) who examined JA on 24/09/2014 found that she had an old wound on the lower third of the clitoris. The appellant was also examined and found to have wounds on his external genitalia. PW8 concluded that JA had been defiled and he produced the P3 form in that regard.

18. In his sworn defence the appellant stated that he left for Homa Bay Hospital from **[particulars withheld]** village on 05/08/2014 in the morning to see his sick wife who had been admitted there. He was joined by his mother-in-law and his brother. Since she was in a coma, she remained in hospital until 18/08/14 when she was discharged. The appellant then travelled back to his place of work.

19. On 19/08/2014, the Assistant Chief summoned him to school where he was accused of defiling children. He denied, saying he had never done such a thing in his life and was utterly shocked at the allegation. He insisted that on 05/08/2015 he was at Homa Bay hospital, taking care of his sick wife, and he slept in the female ward.

20.On cross examination he admitted that **B A O** is his daughter but says he left her at home on 04/08/2015, when he travelled to Homa Bay Hospital and was not at home on 05/08/15. He also confirmed that JA knew him very well as she was his daughter's classmate at **[particulars withheld]**.

21. In her judgment the trial magistrate pointed out that from the documents presented in court, JA was actually 8 years old at the time the incident took place. Further that the medical records produced confirmed that there had been penetration, clarifying that bleeding is not what proves whether one has engaged in sex, but penetration, which as defined under **Section 2** of the **Sexual Offences Act** and can be partial or complete insertion of the genital organs of a person into the genital organs of another.

22. The trial magistrate held that the evidence clearly showed the act of penetration was caused by the appellant not only from the testimony of JA, but also the evidence of the appellant's own daughter who saw him in the act. The appellant's alibi defence was considered and rejected on grounds that it was not credible.

23. The trial magistrate also took into account his claims that the whole matter was engineered by PW1's father due to a long standing grudge. This line of defence was rejected on grounds that both the appellant and PW3 confirmed they were on friendly terms and infact appellant is the one who assisted PW3 to secure a job. JA's evidence was described as consistent and positive.

24. These findings have been challenged by the appellant in the main and supplementary grounds, saying there was no proof of the complainant's age and the trial magistrate simply relied on a baptismal card to accept that she was under 11 years. He also faulted the trial court for relying on treatment notes from **KABONDO RAMULA** Sub District hospital yet the maker never testified.

25. The appellant claimed that he was never given an opportunity by the trial court to digest the evidence presented in court and stated that the trial magistrate relied on hearsay evidence to convict him; and made assumptions.

26. In arguing the appeal, the appellant relied on written submissions wherein he argues that the trial magistrate shifted the burden of proof

on him and questioned why the trial magistrate failed to pay regard to the fact that the offence took place on 05/08/2014 yet **JA** only informed her parents almost two months later.

27. He also claimed there was contradiction in **JA**'s evidence as she initially stated that she reported the matter to her teacher the next day (which would be on 06/08/2014) yet her teacher said the report was made to her on 18/09/2014.

28. The appellant described the evidence tendered by prosecution as conflicting and contradictory saying that witnesses were coached to link him to the offence.

29. The appellant also complained that he was held in police cells for 11 days before being arraigned in court, thereby violating his constitutional rights.

30. The appellant sought to cast doubts on the credibility of JA, saying it was not logical for a 9 year old girl to undergo such pain without the parent's knowledge. Further that if at all there was penetration and the hymen was broken then why wasn't the underpants she wore that day produced as exhibit.

31.The appellant also made oral submissions where he now argued that PW4 who testified and claimed to be his daughter wasn't his daughter. He also said there were two defilement cases preferred against him yet only one report was booked in the OB. Also that prosecution did not call all the witnesses listed.

32. In opposing the appeal, Mr. Oluoch on behalf of the state pointed out that this was one of those very rare instances with an eye witness to the offence and drew to the court's attention the evidence of **B**.

33. Counsel argued that there would be no reason for the appellant's own biological daughter to frame him up, and that in any event the appellant offered no suggestion as to why his own child would make up stories against him. He submitted that **B**'s evidence corroborated that of PW1 (which in any event did not require corroboration).

34. **MR. OLUOCH** further argued that the Doctor who treated PW1 and filled the P3 form found that she had been defiled within the meaning of **Section 2** of the **Sexual Offences Act**.

35. As regards his prolonged stay in the cells before being taken to court, he submitted that the appellant was at liberty to file a civil suit seeking compensation.

He also maintained that **Section 143** of the **Evidence Act** is clear regarding the number of prosecution witnesses who can be called to prove a fact and the ones who testified in the matter supported the prosecution's case.

36. As regards the matter concerning age, counsel submitted that the baptismal card produced, plus the fact that PW1 was in pre-unit was sufficient and the trial magistrate could not be said to have been groping in the dark.

37. Whereas PW1 initially stated in evidence in chief that she reported the matter to her teacher the next day, upon cross examination she clarified and explained as follows:-

"It true (sic) I told my teacher but I don't remember when."

38. I think that resolved the issue as to when the matter was made known to the teacher. It then synchronizes with the subsequent evidence that it was in September when her father was thereafter called to school and as was the appellant.

39. The incident was reported in September and I think from the hand written notes the reference to 18/07/2014 was a typing error by the person typing probably due to the manner in which the figure appeared like 7 and not 9; - so that line holds no water.

40. The appellant also wondered why and how PW1 could keep silent while in pain for so long – her explanation was simple. She feared getting a beating from her parents and in any event the appellant had warned that if she told her mother about the incident he would kill her. That is a reasonable explanation, bearing in mind that when she got home and disclosed where she'd taken the charcoal, her parents did not wait for further explanation but immediately turned her back to go collect it from the appellant's home and take it to the proper destination.

41. As regards the under pant PW1 wore not being produced in court – surely almost two months after the event – would she have kept it unwashed – when she already expressed fear of her parents reaction. Infact the incident came to light by default when the appellant's daughter insulted her saying she'd had sex with an adult and was not welcome to play with them.

42. Was PW1 making up the whole incident? No because the version she gave to her teacher (PW2) was the same version she gave the police and also narrated in court. It is also the same version given by the appellant's daughter (PW4). Little wonder that the trial magistrate described her evidence as consistent and credible. The appellant had at the hearing of the case referred to BELVINE as his daughter on cross examination when he stated:-

"B A O is my daughter."

43. At appeal he now suddenly got a brainwave and realized that actually she was not his child. His act of now disowning his own child only

goes to portray him as a desperate person who is willing to disown his child so as to save his skin. In my view that disclaimer is an afterthought.

44. Indeed as **MR. OLUOCH** pointed out, this was one of those very rare instances where one has an eye witness to defilement. B was very clear and categorical about the appellant's conduct – the prelude to the act. He first wanted her out of the way and told her to go out and watch the rain. When she got enough of sitting outside she tried to get back into the house only to find the door locked. Further exposure outside led her to get up and peep through the window only to see his father defiling PW1. She too was very categorical and unshaken in cross examination and stated when asked who told her the appellant had defiled JA thus:-

> **"I was not told, I saw you. Our windows are made of glasses. After sitting on the verandah for a while I stood up, peeped through the window then I saw you undress her before you undressed yourself then proceeded to defile her."**

45. Indeed the appellant made no suggestion as to why his own daughter would make such hideous claims about him.

46. As regards calling all the witnesses listed on the charge sheet, I agree with Mr. Oluoch that prosecution does not have to call a superfluity of witness to prove a fact. **Section 143** of the **Evidence Act** provides:-

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

47. In any event he has not pointed out which witness was left and how the witnesses could have dented the prosecution witnesses if called to testify.

48. Yes it is true the appellant had two cases, the other one involved defilement of a minor and upon his insistence the court called for and confirmed the other file was **OYUGIS SOA NO.17 OF 2014** involving a minor named **RA** aged 11 years. If only one report was entered in the OB – that does not negate the fact that this current matter was reported to police and the investigating officer testified.

49. Was JA defiled? Yes the medical evidence proved as much. Whereas the clinical officer and **JA** had been treated initially at **OTHORO** sub district hospital, those treatment notes were not produced in court and the appellant's lament that the maker was not called to present them has no leg on which to stand. The clinical officer examined **JA** and produced the P3 form – so yes **JA** was defiled. Yes the evidence clearly and consistently pointed to the appellant as the culprit and I cannot fault the trial magistrate's findings.

50. The minor's mother testified as to the year she was born – this was confirmed by the baptismal certificate. The clinical officer indicated in the P3 form the estimated age as 9 years – no I find no reason to suggest that JA could have been older than 11 years old.

51. Consequently the conviction was safe and I uphold it. The sentence was as provided by law and I confirm it.

52. As regards the prolonged stay in police custody before being presented to court for plea, I confirm that under **Article 49 (1):-**

> **"(1) An arrested person has the right to brought before a court as soon as reasonably possible, but not later than –**
>
> **i. Twenty four hours after being arrested; or**
>
> **ii. If the twenty-four hour's ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day."**

53. The appellant claims to have spent 11 days in police custody – if that be the case then he is at liberty to file a constitutional matter seeking a declaration as regards such violation and he can pursue compensation by way of civil redress.

54. The upshot is that this appeal lacks merit and is dismissed.

Delivered and dated this 15th day of May, 2017 at Homa bay

H. A. OMONDI

JUDGE