REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 91 OF 2016

(DEFILEMENT)

(CORAM: J.A. MAKAU – J.)

SOLOMON OLUMBA OTIENO ……..…… APPELLANT

VERSUS

REPUBLIC ….....……..…… RESPONDENT

(Being an appeal against both the conviction and the sentence

dated 25.8.2015 in Criminal Case No. 432 of 2014 in

Siaya Law Court before Hon. C.A.OKORE - SRM)

JUDGEMENT

1. The Appellant **SOLOMON OLUMBA OTIENO** was charged with an offence of **Defilement contrary to Section 8 (2) of the Sexual Offences Act No. 3 of 2006**. The particulars of the charge are that between 14th day May 2014, at [particulars withheld] Sub-Location in Siaya Sub-County within Siaya County, Intentionally caused his penis to penetrate the vagina of VAO a child aged 11 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 between the same day, time, same place the Appellant intentionally touched the vagina of VAO, a child aged 11 years with his penis.

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

3. Aggrieved by the conviction and sentence the Appellant preferred this appeal setting out six (6) main grounds of appeal being as follows:-

> ***1. That the learned trial Magistrate erred in law and in fact by convicting in a case that was not conclusively proved beyond any reasonable doubt.***
>
> ***2. That the learned trial Magistrate erred in law and fact in allowing conviction in a case where age was not proven.***
>
> ***3. That the learned trial Magistrate erred in law and fact by convicting and sentencing in a case***

that was not thoroughly investigated.

4. That the learned Prosecution did not contradict in its findings while examining witnesses.

5. That the Appellant cannot recall all that transverse hence pray for trial records to adduce sufficient grounds.

6. That the Appellant prays for order of habeas corpus.

4. As the first appellate court, I have subjected the entire evidence adduced before the trial court to a fresh evaluation and analysis and I will draw my own conclusions. I am alive to the fact I neither saw nor heard any of the witnesses and so cannot comment on their demeanor. I am guided on the duties of a first appellate court by the Court of Appeal decision of **Kiilu & Another V. R (2005) 1 KLR 174** where the 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. The record of appeal contains the facts of the Prosecution's case and I need not reproduce the same, save to summarize the Prosecution case and the defence.

6. The Prosecution's case is that, the complainant VAO was on 14.5.2014 in the afternoon, going back to school with others, when the Appellant saw VAO. VAO who was in company of R, J and Y ran away as the Appellant chased them, he caught up with VAO and pulled her into some nearby forest, undressed her, removed his trouser and inserted his penis into VAO's vagina. VAO bled and Appellant used leaves to clean the blood which was oozing from VAO's vagina. The Appellant ran away, promising VAO some money in the evening but did not fulfill the promise. VAO proceeded to school and informed her teacher of the incident, who released her to go home and inform her mother to take her to the hospital, who took her to the hospital, whereby she was examined and treated before she reported the matter to Police Officers. The Appellant was subsequently arrested and charged with this offence.

7. The Appellant denied the offence and gave unsworn defence. He stated that on 14.5.2014, he was going to a Posho Mill to grind maize, at 2.00 p.m. as VAO was following him from behind, as she was going back to school. That VAO caught up with the Appellant and asked him to buy her sugarcane and on telling her he did not have, money she refused to go back to school and started following him upto the Posho Mill, where after grinding his maize, he left VAO there. DW2, testified on the date of alleged commission of the offence, he saw the Appellant heading to a Posho Mill and the Appellant was on the following day arrested by Village Elder and a neighbor on an allegation of defilement.

8. At the hearing the Appellant appeared in person, whereas Mr. Ombati, the learned State Counsel, appeared for the State. The Appellant relied on his written submissions, which he handed over to the Court. Mr. Ombati, learned State Counsel, opposed the appeal against both the conviction and sentence.

9. Whether the charge was defective? The Appellant was charged with **Defilement contrary to section 8(2) of the Sexual Offences Act No. 3 of 2006. Section 8(2) of the Sexual Offences Act** Provides:-

"8. (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.'

10. The Appellant urges the charge was therefore defective as the particulars of the charge and evidence

did not support the charge. The Appellant further urged the complainant is his relative and he ought to have been charged with an offence of "**incest**" contrary to **Section 20(1) of the Sexual offences Act No. 3 of 2006**.

11. I have carefully perused the charge sheet and indeed it is correct that the Section under which the Appellant ought to have been charged under is **Section 8(1) of the Sexual Offences** Act as read with **Section 8(2) of the Sexual Offences Act**. The particulars of the charge supports the charge under **Section 8(1) of the Sexual Offences Act** but the charge was based on the sentencing Section. The particulars of the charge were duly explained and the Appellant who participated in the proceedings knew the nature of the offence he was facing. The Appellant knew the offence was of defilement. The trial Court captured the Prosecution evidence and defence in its judgment. I have perused the judgment of the trial Court and I find, inspite of the omission of **Section 8(1) of the Sexual Offences Act**, in the charge sheet, the Appellant was not prejudiced in anyway as from the evidence and the charge, the offence which the Appellant faced was under **Section 8(1) of the Sexual Offences Act.**

12. Section 134 of Criminal Procedure Code provides:-

> ***"134. Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."***

I find from the particulars of the charge, the charge which the Appellant faced contained statement of the specific offence and particulars for giving reasonable information as to the nature of offence charged. I find failure to state **Section 8(1) of the Sexual Offences Act** and stating the sentencing Section did not prejudice the Appellant. I find the charge was sufficient as it contained a statement of the specific offence with which the Appellant was charged, together with particulars giving reasonable information as to the nature of the offence charged. Appellant never complained to the trial Court he did not understand the nature of the charge.

13. On the charge not being under **Section 20 (1) of the Sexual Offences Act**. The Appellant did not at the trial Court adduce evidence on his relationship to the complainant warranting the charge to be brought under **Section 20(1) of the Sexual Offences Act**. I have gone through the evidence and I am satisfied, that the same supports the charge of defilement under **Section 8(1) and (2) of the Sexual Offences Act No. 3 of 2006.** I find the Appellant's contention that he ought to have been charged with an offence of incest to be misplaced and not supported by any evidence. DW1 testified the complainant is a distance relative. He did not elaborate on his relationship with the complainant. I therefore find the charge of defilement was and is proper.

14. Whether the Prosecution proved the ingredients of defilement? The ingredients of defilement are as follows:-

> ***(a) Penetration.***
>
> ***(b) Identification of the assailant and***
>
> ***(c) Age of the victim***.

On penetration, PW1 stated the Appellant inserted his penis inside her vagina and she bled from her vagina. PW5 the Clinical Officer, who examined the complaint noted that she had bruises and lack of the hymen. The P3 form exhibit 2 confirmed PW5's findings. On identification PW1 testified she knew the accused and gave his name as Olumba. She gave the name of her assailant to her teacher. PW1 also gave the name of her assailant as Solomon Olumba, to the Assistant Chief of Olwa Sub-Location, PW3. PW1 also gave the name of her Assailant as Olumba, to PW4. PW4 told the Head teacher. DW1 stated the complainant knew him very well. I therefore find the Appellant was recognized by the complainant as her assailant.

15. On the complainant's age, PW2, mother to PW1, stated the victim was 9 years having been born on 10.9.2003 and identified her baptismal card MFI – P1. Exhibit II. PW6, produced, PW1's Birth Certificate exhibit 5 showing she was born on 10.09.2003. I therefore find the Prosecution proved the complainant's age as of the time of commission of the offence to have been almost 11 years.

16. Whether the Appellant's constitutional rights were breached under **Article 49 (1)(f) (i), (ii) of the Constitution of Kenya 2010.** Which section provides :-

> ***"49. (1) An arrested person has the right—***
>
> ***(f) to be 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 hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;***

17. The Appellant avers that he was arrested on 17.5.2014 as per the charge sheet. The Court record reveal that the Appellant was arraigned in Court on 20.5.2014. I have checked from the calendar of 2014 and indeed 17.5.2014 was on a Saturday and the earliest time the Appellant ought to have been taken to Court would have been on 19.5.2014. The State did not explain the 1 days delay in taking the Accused to Court. That delay contravened **Article 49(1) (f) (i) (ii) of the Constitution of Kenya 2010**. I therefore find the Appellant's Constitutional rights as an arrested person were violated, however, that violation did not breach the Appellant's Constitutional rights to fair hearing as enshrined under **Article 50 of the Constitution of Kenya 2010.** I find the Appellant should in view of such violation seek redress as clearly stated under **Article 23 of the Constitution of Kenya 2010.** That as his trial at the lower court was not violated inspite of non-compliance by Police with **Article 49 (1) (f), (i) and (ii) of the Constitution of Kenya 2010**. I find no basis to interfere with trial Court's judgment.

18. The upshot is that the Appeal has no merits. The conviction is upheld and sentence confirmed.

DATED AND SIGNED AT SIAYA THIS 13TH DAY OF JULY, 2017.

J. A. MAKAU

JUDGE

DELIVERED THIS 13TH DAY OF JULY, 2017

IN THE PRESENCE OF:

APPELLANT IN PERSON PRESENT

M/S. M. ODUMBA FOR STATE

C.C.

1. LABAN ODHIAMBO

2. PATIENCE OCHIENG

3. LEONIDA ATIKA

J. A. MAKAU

JUDGE