REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

H.C.CR.A NO. 26 OF 2015

(J.A. MAKAU – J.)

FREDRICK OMONDI OTIENO ..... APPELLANT

VERSES

REPUBLIC ….....RESPONDENT

(An Appeal from the Original Conviction and Sentence dated 6.5.2015 in Criminal Case No. 315 of 2014 of P.M'S Court at Siaya By Hazel Wandere (P.M.)

JUDGMENT

1. **FREDRICK OMONDI OTIENO** was 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 offence are that on the 19th day of April 2014 in Siaya District within Siaya County, intentionally caused his penis to penetrate the vagina of R.A.A, a child aged 6 years.
2. The facts of the case are found in the lower court proceedings and I am not going to reproduce them as they can easily be referred to, however I am going to give brief summary of the prosecution and defence case.
3. The prosecution case is that on 19.9.2014 at around 4 p.m. the appellant Omondi went to the home of PW1, F.A, mother to the complainant R.A.A., and called R.A.A. who is also known as I.A who accompanied him to the home of Kanyongo. PW1 later decided to go and call R.A.A as she wanted to go to the farm and R.A.A. remain at home with her younger brother J.M. That at Kanyongo's home she enquired from R.A.A. Grandmother where R.A.A. was who told her, she had not seen the two, however, PW1 saw the appellant emerge from a house and who told her I and R.A.A. had gone to fetch firewood. Omondi then took a knife and returned to the house that belonged to a youngman in the home of Kanyongo. PW1 walked away and stood at the fence as she suspected the appellant had not told her the truth as suspected her daughter was in that house. That after a while R.A.A. came out of the house crying running towards PW1. She told PW1 that Omondi had pulled off her underparts and lay on top of her, then she felt pain showing PW1 her private parts. PW1 realized Omondi had done bad things to R.A.A. PW1 called the grandmother and told her what R.A.A. had told her, they asked appellant who denied as R.A.A. insisted that the appellant had inserted his penis into her vagina. PW1 called young men to assist arrest the appellant as he had locked himself in a room. PW1 took R.A.A. to Siaya District Hospital and opted to go to Ngiya Police Station who accompanied her back to the scene of crime. The following day PW1 was given P.3. form. That after examination of R.A.A. PW1 was told by the doctor that her daughter R.A.A. had been defiled. The Appellant was subsequently arrested by young men PW1 then went to police station and confirmed appellant was the person she had seen emerge from the house where her daughter R.A.A. Was locked
4. The trial court heard evidence from PW1 F A, mothers to R.A.A., PW2 R.A.A., PW3 Sila Omondi

Abach, Clinical Officer who testified upon his examination of her genitalia he noted she had a slightly injured ***labia majora*** and inflammation which was caused due to contact and was swelling reddening with a slightly open hymen and that there was penetration which caused the opening. PW3 produced P.3. for R.A.A. as exhibit 2 and patient card as exhibit 3, Post Rape Care form exhibit 4, P3 form of appellant exhibit 5, outpatient card for appellant as exhibit 6, PW4 who received first reports recorded complainant's statement and arrested the appellant, ruled the, accused had a case to answer.

5. The appellant when put on his defence opted to give unsworn testimony.
6. The Sumary of the appellant's unsworn defence is that on the date in issue he was at Konyamu village planting maize in the farm, when a crowd in company of complainant's mother came and told him he was wanted person. That they took him to the complainant's mother, started assaulting him alleging they were revenging the death of the son of the complainant's mother yet he was not involved in that death, that on intervention of the chief he was escorted to Ngiya Police Post, then dispensary where his urine specimen were taken and later he was put in cells form where he was later escorted to Siaya Police Station, then to Siaya Referral Hospital where urine and blood samples were taken. He was eventually charged with the offence of defilement which the appellant denied.
7. The learned trial magistrate evaluated the prosecution's evidence and the appellant's defence, convicted the appellant for the offence of defilement contrary to **section 8 (1) (2) of the Sexual Offences Act** and sentenced the appellant to serve life imprisonment.
8. Aggrieved by the trial courts decision the appellant preferred this appeal raising three (3) major grounds of appeal thus:
    1. ***The learned trial magistrate erred in law and in fact when relying and basing his conviction while putting much reliance on the sole evidence of PW1 under difficult and conducive circumstances.***

b. ***The learned trial magistrate more marked erred in law and in facts when he failed to consider that there was a need of forensic evidence examination report to be part of the evidence in this case.***

c. ***The Learned trial magistrate more marked erred in law and in facts by not evaluating that there was a need of primary evidence to be proved as stated under section 65 (1) of the evidence Act.***

9. At the hearing of the appeal the appellant appeared in person while the state was represented by prosecution counsel M/s. Maurine Odumba.
10. The appellant in his submission contends that he was opposed to both conviction and sentence, that he was arrested on the day the offence was said to have been committed, that he was not taken to the hospital on the same day with the victim, that he was not supplied with witnesses statements that the clothes of the complainant were not produced before court, that was age was known and he was wrongfully convicted and sentenced to serve life imprisonment and that the P.3. form did not state the cause of opening of the complainant's hymen.
11. The state in opposing the appeal submitted that the conviction was proper though there is nowhere where it was noted the application was issued with witnesses statement, that burden of proof lies with the prosecution to prove the appellant was supplied with witnesses statements, that the ingredients of the offence of defilement were satisfactorily proved thus, penetration, that the appellant was well known therefore was recognized and the complainant's age was proved, and on sentence, the appellant being a minor, the sentence to life imprisonment was legal referring to **Section 191 (1) (g) of the Children Act.** The State prayed the sentence be substituted with the proper sentence as of the time of commission of the offence the appellant was aged 16 years.
12. Being the first appellate court I have the duty and obligation to re-evaluate and re-analyze the evidence that was adduced in the lower court to enable me reach my own independent conclusions. However, while doing so, I have to bear in mind that I never had the opportunity to observe or hear the witnesses give evidence (Refer to the case of **Odhiambo V Republic (2005) KLR 565)** where the above principles were enunciated.
13. The appellant in his first grounds of appeal contends that the trial magistrate in convicting him put a lot of reliance of the sole evidence of PW1 which was under difficult and inconducive

conditions. PW1 on the age of R.A.A. stated that she is mother to R.A.A. who was born on 30.8.2008. She identified and produced Birth certificate of R.A.A. showing that at the time of commission of the offence, thus 19.4.2004 R.A.A. was 6 years old. PW3 testified that when he examined R.A.A. on 20.4.2014 she was 6 years old. He produced R.A.A.'s P3 form as exhibit 2 which indicted she was 6 years old. That from the evidence of PW1 and PW3 and production of R.A.A.'s Birth Certificate the prosecution proved the age of the victim, R.A.A. was as of 19.4.2014 aged 6 years. I therefore find the preferring of the charge under **Section 8 (1) (2) of the Sexual Offences** was proper and the trial court in convicting the appellant did not solely rely on evidence of PW1 as there was other evidence and more so documentary evidence. I have found no merits in ground No. 1 of the appeal and the same is dismissed.

14. Was penetration proved to the required standard? PW1 testified that on 19.4.2014 (***see handwritten proceedings as opposed to typed proceedings which appear as 19.9.2014***) she was at home when appellant called her and that later she followed him to Kanyongo's home from where she saw R.A.A. come out of the house from where the Appellant had come out crying. PW1 placed the appellant at the scene of the crime. PW1 was told by PW2 that Omondi, thus the appellant pulled off her underpants, lay on top of her and she felt pain showing her, her private parts thus when PW1 realized that Omondi had done bad things to R.A.A. and R.A.A. told PW1 that Omondi had inserted his penis into her vagina. PW1 took R.A.A. to the hospital and was told R.A.A. had been defiled. PW2 testified how Omondi pulled her to the floor, came on top of her pressing her down and she felt a lot of pain. PW2 told police Omondi had done bad things to her. PW3 a Clinical Officer on examination of R.A.A.'s genitalia found a slightly injured ***labia majora***, inflammation due to contact, with swelling reddening and the hymen slightly opened. He testified the opening was not normal as R.A.A. was a child and at her age it should have closed. He concluded the penetration did occur causing the opening. The P.3 form exhibit 2 confirm PW3's finding. In view of evidence of PW1, PW2 and PW3. I find that there was penetration and it matters not that it not complete, as under **Sexual Offences Act** any slight penetration in respect of the insertion of not being deep enough to cause rapture of hymen is defined as penetration and is enough proof of Penetration. In the instant case I am satisfied penetration was proved notwithstanding there was only slight opening of the hymen of R.A.A.'s hymen.

15. On recognition of the appellant, PW1 testified that he saw Omondi at her home at 4.00 p.m. when he called R.A.A., that she laster followed him at Kanyango's home an found him caming out of a house, she asked him about R.A.A. and he told PW1 the two children had gone to fetch firewood. She saw him renter the house he had come from which R.A.A. came out crying. The appellant was known to PW1 by name and appearance. She saw him during the day time and recognized him. Similarly PW2 testified that she knew the appellant and even called him by his name. She gave his name to police as her assailant. The offence took place during day time. The P.3. exhibit 2 under paragraph 2 reveal that the victim was defiled by person well known to her. That at the time of commission of the offence PW2 testified she was lying on her back and her eyes were looking at her assailant, Omondi. From the evidence of PW1 and PW2 I am satisfied that at the material time of commission of the offence the conditions were favourable for positive recognition of the assailant by R.A.A. That PW1 and PW2 knew the appellant before and even by name, that immediately after the incident his name was given to police. In the case of **Lasarah V. R (1988) KLR 783, the Court** emphasized that where identification is based on recognition by the reason of long acquaintance, there is no better mode of identification than by name. I am therefore satisfied that PW1 and PW2 demonstrated that they recognized the appellant as the assailant and even gave his name, that in addition to that he was found red handed by PW1 there is no mistaken identification of the appellant.

16. The appellant contest under ground No. 2 of the appeal that the trial magistrate erred in law and fact when he failed to consider that there was need of forensic evidence examination report to be part of evidence in the case. The appellant in this appeal did not state the forensic evidence report that he was talking about in his submission. The trial court considered the oral evidence and documentary evidence produced which was relevant, thus the P.3. form, Birth Certificates and other documents and could not be blamed for failing to consider undisclosed forensic report by the appellant.

17. The appellant under ground No. 3 of the appeal faulted the trial court, urging that the court erred by failing to find that there was a need of primary evidence to be proved as stated under **Section**

65 (1), of Evidence Act.

Section 65 (1) of the Evidence Act Provides:

"Proving Evidence means the document itself produced from inspection of the Court."

The appellant did not in arguing his appeal state what primary document was needed and was not produced for inspection of the Court. The necessary primary documents to prove the charge of defilement includes Births Certificate, P.3. form, amongst others were produced and appellant afforded an opportunity to inspect them and cross-examine the witnesses. I find that the ground is speculative and as the same was not urged I find no. merits in it and I dismiss.

18. The appellant in his oral submissions argued that he was not supplied with witness statements. **Article 50 (1) (j) of the Constitution of Kenya** Provides

"(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

(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;

19. The prosecution in every criminal case is required to supply an accused person with all witnesses statements and documents to be relied upon. This is a constitutional requirement and failure to do so amounts to violation or infringing or breaching the constitutional rights of an accused person. I have perused the appellant's ground of appeal and noted this is not one of his grounds of appeal and that he did not apply to file supplementary grounds of appeal. The proceedings at the trial court do not showing whether the appellant applied for the witnesses to or not nor does it show whether the same were supplied to him. The purpose of supplying witnesses statements is for informing in advance the accused the evidence that prosecution intend to rely on so that the accused is not ambushed and have sufficient time to prepare for trial. I have perused the proceedings and note that the appellant was able to exhaustively cross-examine the prosecution witness shows that he was aware of the prosecution witnesses evidence in advance. In view of the foregoing and nothing that the ground was not raised in the petition of appeal I find that the appellant was nothing prejudiced but had I found so I would nevertheless have considered to what extend the appellant was prejudiced before I could make any orders. I therefore find no merits in this ground and the same is dismissed.
20. I have carefully considered the appellants defence. The appellant's defence is that he was framed up because of grudge with PW1 mother to R.A.A. the complainant he did not during cross-examination of PW1 bring-up the source of grudge to show the basis of being framed. I have considered the defence and though the trial court did not consider the same. I find it be a mere denial and/or an afterthought. I reject the same as there was sufficient evidence that placed the appellat at the scene of the crime. PW2 had no reason to frame the appellant.
21. On the ground of sentencing the trial court called for probation officer Report which report showed the appellant was aged 16 years. However that notwithstanding the trial court on 6.5.2014 recorded:

"Court:

The contents of the Report are noted and considering the age of the offender, I direct that he be remanded at Siaya Children Probation Unit."

The appellant' who appeared in person did not disclose his age to the court, but had the court keenly observed the appellant at the time of trial it could have asked for Age assessment Report. That

the court must have despite the Probation Officer's Report, have noted, that the appellant was a minor when it made its order of 6.5.2014. This Court in view of the discrepancies directed that that the appellant be taken to Siaya Referral Hospital for age assessment. The Report received from the Hospital stated:

"The above patient is about 19 years old. This is evident due to incomplete eruption of the last molars in the mouth. The lower right last molar and the upper last molars are not yet erupted."

22. The Age assessment Report show that a of 31.3.2016 the appellant was aged 19 years which therefore means as of 19.4.2014 when the offence was committed the appellant was aged 16 years hence a minor a fact the trial court failed to take into account when sentencing the appellant a minor.
23. **Section 191 of Children Act provides**:

"(1) In spite of the provisions of any other law and subject to this Act, where a child is tried for an offence, and the court is satisfied as to his guilt, the court may deal with the case in one or more of the following ways -

1. ***by discharging the offender under section 35(1) of the Penal Code***
2. ***by discharging the offender on his entering into a recognizance, with or without sureties;***
3. ***by making a probation order against the offender under the provisions of the Probation of Offenders Act;***
4. ***by committing the offender to the care of a fit person, whether a relative or not, or a charitable children's institution willing to undertake his care;***
5. ***if the offender is above ten years and under fifteen years of age, by ordering him to be sent to a rehabilitation school suitable to his needs and attainments;***
6. ***by ordering the offender to pay a fine, compensation or costs, or any or all of them;***
7. ***in the case of ad child who has attained the age of sixteen years dealing with him, in accordance with any Act which provides for the establishment and regulation of borstal institution;***
8. ***by placing the offender under the care of a qualified counsellor;***
9. ***by ordering him to be placed in an educational institution or a vocational training programme;***
10. ***by ordering him to be placed in a probation hostel under provisions of the Probation of Offenders Act;***
11. ***by making a community service or; or***
12. ***in any other lawful manner."***

24 Section 8 (7) of The Sexual Offence Act Provides:

"Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institution Act and the Children's Act."

25 **In view of the provisions of Section 191 (1) of the Children Act and Section 8 (7) of the Sexual Offence Act I find the life imprisonment meted against the appellant, who at time of the commission of the offence was a minor and who ought to have been dealt with in accordance with the provisions of the Borstal institutional Act, and the Children's Act to be illegal and the same ought to be set aside and substituted with the appropriate sentence as provided by law.**

26 The upshot is that conviction is upheld, the appeal against sentence is allowed, the sentence of life imprisonment is set aside and substituted with probation, the appellant is placed under probation for a period of 3 years under the supervision and direction of the Probation Officer Siaya County.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 12TH DAY OF MAY, 2016.

J. A. MAKAU

JUDGE.

DELIVERED IN THE OPEN COURT

IN THE PRESENCE OF:-

Appellant in person: Present

M/s Odumba for State: Present.

Court Clerk: 1. Kevin Odhiambo

2. Mohammed Akide:

J. A. MAKAU

JUDGE