



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CRIMINAL APPEAL NO. 23 OF 2016**

**(CORAM: J.A. MAKAU – J.)**

**SAMUEL AYAA OKETCH ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal against both the conviction and the sentence dated 7.7.2015, in Criminal Case No. 23 of 2014 in Bondo Law Court Before Hon. M. Obiero – P.M.)***

**JUDGMENT**

1. The Appellant **SAMUEL AYAA OKETCH** was charged with an offence of defilement contrary to **Section 8 (1) (3) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence are that on the 20<sup>th</sup> day of November 2013 at **[particulars withheld]**, Rarieda District, within Siaya County, intentionally caused his penis to penetrate the vagina of MAO a girl aged 13 years. The Appellant also faced an alternative charge of **indecent Act with a Child Contrary to Section II (1) of the Sexual Offences Act No. 3 of 2006**. The particulars of the alternative charge are that on the 20<sup>th</sup> day of November 2013, at **[particulars withheld]**, in Rarieda District, within Siaya County, indecently touched the vagina of MAO a child aged 13 years with his penis.

2. After full trial the Appellant was acquitted of the main count, but found guilty, convicted and sentenced on the alternative charge of **Indecent Act with a Child Contrary to Section II (I) of the Sexual Offence Act No. 3 of 2006** and sentenced to serve 10 years imprisonment.

3. The conviction and sentence provoked this appeal in which the appellant has set out six (6) grounds of appeal being as follows:-

***a. That the Learned trial Magistrate erred in law and fact in convicting the appellant on uncorroborated evidence.***

***b. That the Learned trial Magistrate erred in law and fact in convicting the Appellant by shifting the burden of proof which entirely was for the prosecution.***

***c. That the Learned trial Magistrate erred in law and fact in convicting in a single evidence case which needed corroboration.***

***d. That the prosecution failed to raise sufficient evidence to prosecute the case.***

***e. That the Appellant cannot recall all that transverse during trial and pray for trial proceedings and judgment to adduce more grounds at the hearing of this appeal.***

***f. That I pray for order of habeas corpus.***

4. During the hearing of the appeal the appellant appeared in person whereas the State was represented by M/s. Maurine Odumba Learned State Counsel.

5. At the hearing the Appellant relied on his written submission which he presented to the Court. He urged that in his written submissions that PW1 lied to the court, that she was defiled, that the trial court convicted the Appellant with Indecent Act with a Child when the Appellant was not charged with the alternative charge and which was not proved beyond any reasonable doubt, the appellant further orally stated that he was not accorded fair trial as he was not convicted on the offence he was charged with.

6. M/s Maurine Odumba Learned State Counsel opposed the appeal submitting that the Appellant faced an offence of defilement and an alternative charge of Indecent Act with a Child, that the offence of Defilement was not proved but that the alternative charge of indecent act with a child, was proved because all ingredients of an offence of indecent act with a child were proved. She submitted the sentence meted against the appellant was within the law and proper urging the court to dismiss the appeal.

7. I am the first appellate court and as expected of me have to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I neither saw nor heard any of the witnesses and have to give due allowance. I am guided by the Court of Appeal case which sets out the principles that apply on a first appeal. These are set out in the case of **ISAAC NG'ANGA ALIAS PETER NG'ANG'A KAHIGA V REPUBLIC CRIMINAL APPEAL NO. 272 OF 2005** as follows:-

***“in the same way, a court hearing a first appeal (i.e. a first appellate court) also has duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same. There are now a myriad of case law on this but the well-known case of OKENO -VS- REPUBLIC (1972) EA 32 will suffice. In this case, the predecessor of this court stated:-***

***The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings 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 (See Peters Vs. Sunday Post, (1958) EA 424)'***

8. The facts of the prosecution case are that PW1 MA a minor aged 13 years was on 20.11.2013 on her way home from Nyakongo followed by motorcycle and on reaching near PW1, the rider called PW1, telling her he wanted to send her. PW1 went near the rider, who grabbed her, pulled her into bushes, leaving his motorcycle near the road. PW1 was then dressed in brown trouser MFI P1, produced as exhibit 1, light blue top T-shirt, MFI P2, produced as exhibit 2 and black pant MFI P3, produced as P exhibit 3. That in the bush the rider removed PW1's trouser and pants, unzipped his trouser and slept on PW1. The rider inserted his penis into PW1's vagina, she felt pain and screamed. That after defiling PW1 he threatened her and told her to use another route. PW1 went home where she was found by her mother PW2 crying. PW1 told L M, PW2, that S, the Appellant had defiled her Samuel was known to PW2. PW2 then took Pw1 to M Hospital where she was treated and discharged. PW2 identified treatment chits as MFI4, produced as P exhibit 4. The matter was subsequently reported at Aram Police Station, P3 form issued and later filled, MFI P5, produced as P exhibit 5. PW2 identified PW1's Birth Certificate, MFI P6, produced as P exhibit 6, which indicates that the complainant was a minor aged 13 years. The Appellant disappeared after the incident for one (1) month but in December 2013 he was

apprehended and charged with the offence.

9. The Appellant gave unsworn statement stating that on 20.11.2013 he was at Yimbo fishing and on finding there were no fish there he went to Uganda returning on 2.12.2013 at *[particulars withheld]*. That on the way home he was arrested and told he had defiled a girl at Uyoma. The Appellant denied the offence but he was escorted to Man'ywanda Police Station and was later charged with this offence.

10. Whether the appellant was given a fair trial and whether he was convicted on an offence for which he was not charged with? The Appellant urge that he was not given a fair trial because he was convicted on an offence for which he was not charged with. The Appellant was charged with an offence of defilement **Contrary to Section 8 (1) (4) of the Sexual Offences Act No. 3 of 2006 and also faced an alternative charge of Indecent Act with a Child Contrary to Section II (i) of the Sexual Offences Act No. 3 of 2006.** The Court's record reveal that on 14.12.2013 the main charge and Alternative charge were read and explained to the Appellant in Luo language to which he pleaded not guilty. Prosecution called five (5) witnesses in support of the charge and/or alternative charge and exhibits were duly produced. The Appellant was offered an opportunity to cross-examine prosecution witnesses. The court had ordered the Appellant to be supplied with witnesses statements. The Appellant was aware of the charges he was facing. The trial Court found that the offence of defilement was not proved as there was no penetration but there was evidence to support the alternative charge. I therefore find that contrary to the Appellant's assertion he was tried and convicted with an offence of committing and Indecent act with a Child and rightly convicted. I am not satisfied that the Appellant has demonstrated that he did have a fair trial. I am satisfied that he Appellant had a fair trial and was found guilty on alternative charge which was part of the offences he was facing. I find no merit in this ground of appeal.

11. Whether the alternative charge was proved beyond reasonable doubt? The alternative charge was that of committing **an indecent Act with a Child Contrary to Section II (I) of the Sexual Offences Act.** The particulars of the alternative charge were that on 20th November 2013 at Nyakongo, Kokwiri Sub-Location in Rarieda District within Siaya County, the Appellant indecently touched the vagina of MA a Child aged 13 years with his penis. For the Prosecution to prove an offence of Defilement it is incumbent upon the prosecution to prove the following three ingredients:-

*a. Identification or recognition of the perpetrator.*

*c. Penetration as is defined under Section 2 of the Sexual Offences Act No. 3 of 2006.*

*d. The age of the victim.*

12. In the instant case the prosecution through evidence of PW1, PW2 and PW3, and PW5 produced evidence of the age of PW1. PW1 testified that she was a minor. PW2 her mother testified PW1 was aged 13 years and identified her Birth Certificate MFI P6. PW3, Clinical Officer who examined PW1 testified PW1 was a minor aged 13 years. PW5 the investigation Officer produced PW1's Birth Certificate exhibit 4 which reveals that PW1 was born on 8.12.2000 hence at the material time of the commission of this offence she was 13 years old. On identification PW1 gave the appellant's name to her mother as she had seen him, talked to him and she knew him as she used to see him with his motorcycle. PW1 gave the name of her assailant to PW2 her mother. PW4 testified he saw the Appellant coming from a bushy area within (PW4) shamba and saw a girl walking from the same area. PW4 later informed PW1's mother and PW1 told PW4 and PW2 that she had been dragged into the bush by the Appellant. The evidence of PW1 and PW4 placed the appellant at the scene of the crime. I am satisfied that the prosecution witnesses identified the assailant as the Appellant. On penetration, PW1 testified that the appellant inserted his penis into her private parts (vagina) and defiled her. PW3 the Clinical Officer testified on examination of PW1 he noted her vagina had bruises but the hymen was intact. He testified there was no penetration but there was contact. The P3 form P exhibit 5 reveal that PW1 had bruises to perineum and that the hymen was intact.

**13. Section 2 (1) of the Sexual Offences Act No. 3 of 2006** 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;***

From the definition of the penetration it means penetration need not be complete and deep, so long as there is either partial or complete penetrate. From PW3’s evidence there was no partial penetration or any penetration and PW3 being a medical officer and the one who examined PW1, I have no doubt in finding that there was no penetration of the genital organs of the appellant into the genital organs of PW1. Consequently the offence of defilement was not proved. I find the trial Magistrate upon evaluation and analysis of the whole evidence rightly found the offence of defilement was not proved.

14. Whether the Prosecution proved the alternative charge of **Indecent act with a Child? Section 2 (1) (a) of the Sexual Offences Act No. 3 of 2006** defines indecent Act as follows:-

***“indecent act” means an unlawful intentional act which causes-***

***(a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.***

15. In the instant case PW1 testified that the appellant forcefully dragged PW1 into the bush, forcefully removed her clothes, unzipped his trouser and inserted his penis into her private parts (vagina). She felt pain and screamed due to the contact of her genital organs with that of the appellant. PW3 on examining PW1’s genitalia he found her vagina had bruises. P3 form indicate the probable type of weapon causing injury to be blunt object, that though PW1 was not lead to state what would have been likely weapon, this being a sexual offence, the likely weapon would have been no other than a penis. PW1 testified the appellant inserted his penis into her private part (vagina). The offence was committed during day time and PW1 was able to see the type of blunt object inserted into her private parts and named it as penis. I have no doubt that the object inserted into complainant’s genitalia organs was appellant’s genitalia organs, thus penis. The appellant’s penis therefore had contact with the genitalia of PW1. The act was unlawful and intentional. The part which the appellant’s genitalia had contact with was PW1’s genital organs (vagina). I therefore find that the appellant committed the offence of indecent act with PW1, a child aged 13 years by unlawfully and intentionally causing his penis to be in contact with PW1’s vagina as he attempted to defile her, fortunately for PW1 the appellant did not succeed in defiling her but succeeded on indecently assaulting her. I find the trial court came to the correct conclusion and rightly sentenced the appellant in accordance with the law.

16. Whether appellant’s defence was considered? The appellant gave unsworn statement raising a defence of alibi. The appellant’s statements was not on oaths and could not be tested through cross-examination. Unsworn statement is not evidence, however in the instant case the appellant’s unsworn statement was considered and rejected by the court. I have considered the prosecution witnesses evidence especially evidence of PW1 and PW4 both of whom placed the appellant at the scene of the incident at the material date of the commission of the offence. I find that the appellant’s unsworn statement has been dislodged by the prosecution witnesses evidence and that it was properly rejected. I find no merits in the appellant’s statements of defence which could not be tested as it was unsworn statement. I find the same would not have shaken the prosecution witnesses evidence

**17. The upshot is that the appeal has no merits, the same is therefore dismissed. The convictions on the alternative charge of indecent act with a child is upheld and sentence confirmed.**

**DATED AND SIGNED AT SIAYA THIS 3<sup>RD</sup> DAY OF NOVEMBER, 2016.**

**J.A. MAKAU**

**JUDGE**

**Delivered in Open Court in the Presence of:**

**Appellant present in person.**

**M/s. M. Odumba for State.**

**C.A.1. K. Odhiambo**

**2. L. Atika**

**J. A. MAKAU**

**JUDGE**