REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL APPEAL NO. 5 OF 2013

J O K……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

JUDGMENT

(Appeal from the Judgment and sentence of B.O. Omwansa, Senior Resident Magistrate Ndhiwa in Criminal Case No. 266 of 2011 dated 19th February, 2013)

1. The appellant, J O K was at all material times the headmaster of [particulars withheld], in Ndhiwa District, Homa Bay County. [particulars withheld] is a public mixed day primary school. On 3rd November, 2011, the appellant was charged at the Principal Magistrate's Court at Ndhiwa (hereinafter referred to as "**the trial court**")with the offence of, defilement contrary to section 8 (1) and as read with section 8 (4) of the Sexual Offences Act, No. 3 of 2006 and with 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 principalcharge were that, on the 1st day of November, 2011 at [particulars withheld]primary school, the appellant intentionally and unlawfully committed an act which caused penetration with his genital organ namely penis into the vagina of L A a child aged 15 years. The particulars of the alternative charge were that,on the 1st of November, 2011 at [particulars withheld] primary school, the appellant intentionally and unlawfully touched the buttocks and breasts using hands and rubbed his penis on the vagina of L A a child aged 15 years. L A (who is hereinafter referred to as "**the complainant or PW1**") was a pupil at [particulars withheld] Primary School (hereinafter referred to only as "**the school"**).
2. The appellant pleaded not guilty to both the main and the alternative charge, was tried, convicted and sentenced by the trial court to serve 18 years in prison. This appeal is against both conviction and sentence. Briefly, the prosecution's case against the appellant in the trial court was that, PW1,a child aged 15 years was on the 1stday of November, 2011 at about 6.00a.m. in school togetherwith other pupils for remedial classes. The remedial classes were for pupils in classes VI, VII and VIII. PW1 was in class VI. The appellant went to teach the pupils in those classes who included PW1 English. They were all taught together in one classroom for about an hour before they left for their respective classes. After the pupils had dispersed to their respective classes, the appellant went to PW1's class and asked her to go and meet him in his office. PW1 went to the appellant's office pursuant to that invitation and was defiled therein by the appellant.
3. The prosecution called eight witnesses. The prosecution's first witness was the complainant (PW1). PW1 told the trial court that she was together with B O , J O O (PW5) and B O (PW4) who were her classmates as they proceeded together to their class. The appellantwho was

heading to his office found the four pupils in their class and asked PW1 to meet him in his office. PW1 hesitated at first but decided to go after about 3 or so minutes. She did not find the appellant in his office. She waited for him until he came.Inside the staffroom, the appellant held PW1's hand, pulled her to his inner office and without telling her anything, got hold of her skirt,and removed her biker and pant. The appellant then unzipped his trouser, drew his penis and inserted it into her from behind. PW1 told the trial court that although she was feeling pain, she could not scream because the appellant was so close to her and she feared that the appellant would beat her if she dared to raise alarm. The appellant had sex with her for about 10 minutes and asked her to go back to class. She went to class, picked her jacket, prepared a list of the names of some girls who were to cook for the teachers as she had been requested to do and took the list to one M A in her house. PW1 did not tell M A of what had happened to her. She went straight home and told her father of the incident. PW1's father shared the information with PW1's uncle, one, J N ("PW2") on the same day. PW2 took PW1 to Ndhiwa District Hospital where she was examined and treated. Thereafter, PW1 in the company of PW2 went to the police station and recorded a statement. PW1 was issued with a P3 form which was filled and taken back to the police station. On cross examination by the appellant, PW1 reiterated her above statement.

4. The prosecution's second witness was, J N (PW2). In his testimony,he told the court of what he was told by PW1 on 1st November, 2011 at about 8.30a.m. He stated that he was called by his brother, R O N who is PW1's father to come and listen to PW1. PW1 told him that in the morning of that day, she had gone to school for remedial classes and that her head teacher had grabbed her and had sex with her. PW2 informed the area chief (PW6) of the incident. PW2 and PW1 went together to the chief's office. They were joined at the chief's office by the chairman of the school (PW3) and PW1 was interrogated. PW2 then proceeded to Ndhiwa Police Station with PW1 and thereafter to the hospital where PW1 was examined and a P3 form filled and returned to the police station. At the police station, they recorded their statements. On cross-examination by the appellant, it transpired that PW2 was the treasurer of the school. His statement however remained the same.
5. The prosecution third witness was, G O K(PW3). He was the chairman of [particulars withheld] primary school. He told the court that he received a call from PW2. PW2informed him that PW1 had been defiled by the appellant. PW3, PW2 and PW1 went together to the chief's office and thereafter to Ndhiwa Police Station where they reported the matter. PW3 and PW2 then took PW1 to hospital where she was examined and a P3 form filled and returned to the police station where they recorded their statements. PW3 identified the appellant. The prosecution's fourth witness was, B O (PW4). PW4 who was, a 14 year old boy told the court that, on 1st November, 2011 he was at school together with B O , J O (PW5) and PW1 in Std. VI classroom when they were asked to join the rest of the pupils in Std. VIII classroom where they were taught by the appellant. After they had been taught, the appellant came to their class and asked PW1 to go to his office (appellant's office) where she, PW1 stayed for about 30 minutes. PW4 stated that he saw PW1 come out of the appellant's office and leavethe school compound. After she left, the appellant came out of the office. He did not see PW1 again that day until the following day.
6. The prosecution's fifth witness was, J O O (PW5). He was a child of 12 years. He confirmed what had been said by PW4 that after the English class, they were together with PW1, PW4, and B O when the appellant called PW1 to his office. He was not sure whether PW1 went to the appellant's office or not. He only saw her (PW1) leave the school compound through the gate.
7. The chief of the area, DANIEL ODONGO OPANDE(PW6)was the prosecution's sixth witness. He reiterated what had been said by PW2 and PW3. He told the court that he accompanied PW1, PW2 and PW3 to Ndhiwa Police Station to report the incident and to record statements. He told the trial court that it was alleged that the appellant had sexually assaulted PW1.
8. The prosecution's seventh witness was, ROSE CHEPTOO (PW7) was a police officer attached

to Ndhiwa Police Station crime office. She narrated to the court what transpired on 1st November, 2011 at about 12.30p.m. when PW1 in the company of PW2 and PW3 reported that she (PW1) had been defiled at school by her head teacher, the appellant. She (PW7) escorted PW1 to Ndhiwa District Hospital where she (PW1) was examined and a P3 form filled. PW1's age was also assessed and found to be 15 years. She (PW7) visited the scene of crime after the appellant had been arrested. She told the court that while carrying her investigations she did interview some pupils who were together with PW1. She did not find any eye witness. She also accompanied the appellant to hospital. She (PW7) told the court that PW1 had informed her that she had been with PW1 for about 25 minutes. PW7 stated thatthe appellant was arrested on 2nd November, 2011 after she (PW7) was satisfied with the evidence that she had gathered. She added that she was accompanied by corporal lowery to the scene of crime and to the hospital.

9. STEPHEN KERARIO (PW8) a clinical officer at Ndhiwa District Hospital was the prosecution's last witness. He told the trial court that on 1st November, 2011 he examined PW1 who claimed to have been defiled by a person known to her. On general examination she was found to be in fair condition. P3 form was filled on the same day when the incident happened. Examination of PW1's genitalia revealed bruises and red vaginal walls. There was no bleeding and no infection noted. HIV test was negative, Syphilis test was negative and pregnancy test was negative. No spermatozoa were noted but there were numerous epithelia cells noted. Based on the examination, he concluded that penetrative coitus had been achieved. He further added that when filling the P3 form he did rely on the treatment notes. He produced the P3 form as P-Exhibit 3 and treatment notes as P-Exhibit4. He also told the trial court that he did the age assessment on PW1 on the same day which revealed that she was about 15 years and he produced the age assessment report as P-Exhibit.1. On 2nd November, 2011, PW8 also examined the appellant, J O aged 47 years who was alleged to have defiled a minor on 1st November, 2011 at about 6.50a.m. General examination showed he was in fair condition. The P3 form was filled 2 days after the incident. Examination of the genitalia of the appellant showed that; no injuries at the penis, HIV test reacted positive, Syphilis test was negative and the examination of the urine showed numerous epithelial cells. He concluded that the appellant was linked with the offence that he was suspected of owing to the epithelia cells found both in PW1 and the appellant.
10. Having considered the prosecution's case and the evidence adduced, the trial court found that the prosecution had established a prima facie case against the appellant. The appellant wasaccordingly put to his defence. In his defence, the appellant told the court that on the particular day namely, 1st November, 2011 he was at the school and at 5.00a.m, he went to teach Std. VIII pupils. He did revision with them of English paper and at around 6.30a.m, other pupils from Std. VI and VII arrived. He invited them to join class VIII pupils and he taught them together. He taught them upto 7.15 a.m. when the morning assembly bell rang. He then took the pupils of Std. VIII class with whom he was to attend another function out of school and left the rest of the pupils to attend the school assembly. He was to go with Std. VIII pupils to a place called Nyangindo where the mock results were to be released. At 8.00a.m, he went to the parade and found the teacher on duty addressing the pupils on the issue of P.T.A. levies. He thereafter left school together with Std. VIII pupils leaving behind four (4) teachers in school to be in charge of the rest of the pupils. They arrived at Nyangindo at about 11.000a.m and stayed there upto around 5.0p.m. They came back to school and arrived at 6.00p.m. He went to his house as the pupils went for their evening studies. At about 7.00p.m, he was called by an anonymous person who sought to know whether he had gone back to school because the person wanted to see him. The caller was one, C O O a former chairman of the school management committee who told him that there was a problem at the school and that the same was being discussed at M R O home. C O O mentioned to him that those who were in attendance were G O , Chairman and J O, Treasurer and other villagers. He told him that they were discussing a case of defilement of a child and that they were claiming that it was him (appellant) who was involved

in the act. The following day at about 6.20a.m, two police officers, the chairman, the chief and the treasurer came to his house and told him that they had been directed to arrest him by the O.C.S. Ndhiwa Police Station. He was then handcuffed and taken to Kamata trading centre then to the police station at Ndhiwa for interrogation. From the police station, he was taken to hospital for medical examination. At the hospital, his urine and blood samples were taken for examination after which he was taken back to the police station. The following day, he was brought to court and charged. He contended that the charges that were preferred against him before the trial court were framed up because of the differences he had with the chairman of the school management committee.

11. In his judgment the learned trial magistrate found that the prosecution had proved its case as required by law. The appellant was convicted as charged under section 215 of the Criminal Procedure Code. With respect to the alternative charge, the court found it needless to analyze the evidence adduced as a conviction had been entered as regards the main charge. Having considered the nature of the offence, the submissions of the prosecution and that of the accused person, the court sentenced the accused to serve 18 years imprisonment.
12. Being dissatisfied with his conviction and sentence, the appellant decided to prefer this appeal against the same. The appellant set forth the following grounds of appeal against the judgment of the learned magistrate:-

    i. **The learned magistrate erred in law and fact in convicting the appellant and by failing to consider the appellant's evidence hence reaching a wrong conclusion.**
    ii. **The learned magistrate imposed manifestly excessive and harsh sentence in the circumstances of the case.**
    iii. **The learned magistrate wrongfully convicted the Appellant without noting down that the Respondent's evidence was not corroborated.**
    iv. **The learned magistrate erred in law and in fact by failing to consider that the exhibits produced contradicted evidence adduced by the Respondent.**
    v. **That there were contradictions in the evidence adduced by the prosecution witnesses which the learned magistrate failed to note down hence reaching a wrong conclusion.**
    vi. **The learned magistrate failed to consider the weight of evidence adduced by the appellant.**

13. In his submissions, Mr. Odero for the appellant argued that there was no corroboration of the evidence by the prosecution. He submitted that there was no eye witness and that the only evidence adduced was that the Appellant called the complainant to his office. He contended that no evidence was adduced to show that there was defilement. He submitted further that the complainant had testified that after leaving the appellants office she went to the house of Mrs. A which evidence was contrary to the evidence of PW4 who had stated that, there was no other teacher in the school other than the appellant. He submitted that PW4 and PW5 testified that the complainant walked straight out of the school gate after leaving the Appellant's office. PW4 testified further that the appellant had caned the complainant before calling her to his office.He submitted that the appellant suspected a frame up. He submitted further that PW8 on testing the appellant for HIV found him positive while the complainant was found negative even though the complainant had testified they had sex without protection. He submitted that PW8 had recommended that the complainant be tested again after 3 months which test was not carried out. He submitted that this omission on the part of the prosecution had led the magistrate to reach a wrong conclusion on the guilt of the appellant. The appellant's advocate submitted further that the clinical officer had detected no sperms in the vagina of the complainant and commented that it may have been as a result of the use of a condom while the complainant had testified that they had not used a condom. He submitted further that PW8 testified that there was

no injury to the vagina of the complainant which meant that the complainant had previous sex.On the P3 form, counsel submitted that the same was tampered with to insert the word "**both**" and that the word "**his**" was changed to both thus the authenticity of the form was doubtful. Counsel urged the court to set aside the appellant's conviction and the sentence.

14. Mr. Oluoch who appeared for the state opposed the appeal. On the issue of the alleged tampering with P3 form he urged the court to put back the words that were rubbed to see if that will alter the meaning and purport of the report. He submitted further that in sexual offences there are normally no eye witnesses. He referred the court to section 124 of the evidence Act, Cap. 80 Laws of Kenya on the issue of corroboration. He submitted that the complainant stated in her evidence how the defilement had occurred and on cross-examination she stated that they had had sex thrice with the appellant. He submitted that the appellant was the head teacher of the complainant and as such he had authority over the complainant. He submitted that if any corroboration was required, the evidence of PW2 on the state of the complainant and also the evidence of PW4 who testified how the appellant called the complainant to his office would suffice.
15. Mr. Oluoch submitted further that the charge facing the complainant was that of defilement and what the prosecution was required by law to prove was penetration which according to him was duly proved. He submitted further that it takes 3 months before symptoms of HIV can be detected in a person and that the fact that the complainant tested negative while the appellant tested positive was not a proof that penetration did not occur.
16. On sentencing, Mr. Oluoch submitted that the appellant should have been sentenced under section 8(1)(3) of the Sexual Offences Act, No. 3 of 2006 to a sentence of not less than 20 years imprisonment because the complainant was 15 years as at the date of the commission of the offence. He submitted that the appellant was erroneously convicted under section 8(1)(4) of the Sexual Offences Act, No. 3 of 2006 and got away with a lesser sentence. Mr. Oluoch urged the court to correct this error in sentencing by imposing the correct sentence. He urged the court to dismiss the appeal subject to the correction of the sentence as aforesaid.
17. As the first appellate court, this court is required to assess and evaluate the evidence a fresh and arrive at an independent conclusion and finding bearing in mind that the court did not have the opportunity to see the witnesses testify in order to assess their demeanor. See, **Okeno –vs-Republic [1972] E.A. 32.** The clinical officer, PW8 confirmed that he did the age assessment on the complainant which revealed that the complainant was about 15 years old. The complainant narrated in detail how she was defiled on 1st November, 2011 by the appellant who was her headmaster at that time. The complainant could do nothing much to resist the appellant who had authority over her and due to the fact that the two were alone in the appellant's office. The evidence of PW4 and PW5 are clear that PW1 was called by the appellant to his office and she obeyed. They however did not know what went on behind the appellant's office doors. The appellant did not deny having had sex with PW1 on three previous occasions. The evidence of PW1 that the appellant had defiled her was not shaken on cross examination. PW1's evidence was corroborated by the evidence of the medical officer, PW8. PW8 had concluded that theappellant was linked with the offence of defilement of PW1 owing to the epithelia cells that were found both in PW1, and on the appellant. PW8 also noted bruises and reddening on the wall of the vagina of PW1.
18. P3 form was issued to PW1 a few hours after the incident and was filled on the same day. The appellant was also examined a few hours later. There is overwhelming and irresistible evidence that the complainant herein was defiled which evidence points to the appellant as the one who committed the act. The prosecution proved that the appellant was on location, had the opportunity to commit the offence and did commit the offence. As submitted by the learned state counsel, in sexual offences such as this one, it is hard to find eye witnesses. The trial court believed the evidence given by PW1 even though she was the complainant and the only

singleeye witness. There is no requirement that a fact has to be proved by more than one witness. Section 124 of the Evidence Act, Cap. 80 Laws of Kenya allows the court to rely and to convict on the evidence of a minor in sexual offences if the court believes the said evidence and gives reasons for the belief. The trial court believed the evidence of the complainant. According to the trial court, the evidence of the complainant was never challenged or shaken during cross-examination. In the court's assessment, **"the ordeal was so vivid in her mind, and in fact, it came out that it was not the first time they had sex with the accused"**. I see no reason why the trial court should have doubted the evidence of the complainant.

19. The appellant complained that the trial court relied on contradictory evidence that was not corroborated. This assertion has no basis in light of the evidence on record. The appellant did not point out any material contradictions in the evidence adduced by the prosecution. The alleged contradictions mentioned by the appellant during his submissions were not significant in any material respect and in any event the same were explained by the state. It is not denied that the complainant was in school with others on that fateful day and that some pupilswitnessed the appellant summoning the complainant to his office and saw the complainant going to the appellant's office. The medical officer's report (PExh.4) and P3 forms (PExh. 2 and PExh. 3) have not been challenged by the appellant. The trial court considered the appellant's defence and did not believe it in light of the overwhelming evidence of the complainant and the prosecution's other witnesses.
20. It is my finding that the trial court carefully considered the evidence on record and correctly arrived at a finding that the charge against the appellant was proved beyond any reasonable doubt. On sentencing, I agree with Mr. Oluoch that the appellant should have been sentenced under Section 8(1) and (3) of the Sexual offence Act, No. 3 of 2006 to serve not less than 20 years imprisonment because the complainant was 15 years old as at the date of commission of the offence. I have noted however that the appellant was charged under Section 8 (1) and (4) of the Sexual Offences Act, No. 3 of 2006 and convicted under the same section although the evidence adduced in court disclosed an offence under Section 8 (1) and (3) of the sexual offences Act, No. 3 of 2006. The foregoing shows that the charge was defective. This defect did not however in my view prejudice the appellant as he was aware of the charge that he was facing whose particulars were correctly set out in the charge sheet. I would therefore in exercise of the powers conferred upon this court under Section 354 of the Criminal Procedure Code, Cap. 75 Laws of Kenya enhance the sentence that was imposed upon the appellant from 18 years to 20 years imprisonment. The upshot of the foregoing is that I have found no merit in the appellant's appeal. Save for the enhanced sentence, the appeal is dismissed on both conviction and sentence.

Signed and Dated at Kisii this 19th day of November, 2013.

S. OKONG'O

JUDGE

Delivered at Homabay this 19th day of November 2013

E. MAINA

JUDGE

In the presence of:-

……..……for the Appellant

……for the State.

……..Court Clerk.

E. MAINA

JUDGE