**REPUBLIC OF KENYA**

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

**HCCRA NO. 15 OF 2017**

**JACK MBEYA OYOMO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*[Being an appeal from the conviction and sentence of the Principal Magistrate's Court at Winam (Hon. B. Kasavuli SRM) dated the 28th February 2017 in Winam PMCCRC No. 1441 of 2014]*

**JUDGMENT**

The appellant was tried, found guilty and convicted on a charge of Defilement Contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act whose particulars were that on 19th June 2014 at [particulars withheld] area in Kisumu East District, Kisumu County, he intentionally caused his penis to penetrate the vagina of **J A** a child aged 15 years.

The prosecution's case was that on the material day at about 2000 hours J A (PW1) was roasting maize in their house when the appellant who she knew went to the house and pulled her to the back. After making her lie on the ground he pulled up her skirt and removed her under pant. He then unzipped his trouser, lay on her and inserted his penis into her vagina. When he was done he gave her Kshs.10/=, warned her not to tell anybody else and left. That same evening she informed her sister in-law I A (PW2) about what happened. When her brother one J heard what had happened he caused her to accompany him to the home of the appellant in the hope of confronting him.They did not find the appellant. The next day J took her first to Nyamasaria Police Station to lodge a complaint and then to hospital where she was examined and given drugs. George Mwita (PW4) the Clinical Officer who examined her testified that he came to the conclusion that sexual penetration had occurred.

The Complainant testified that earlier a man called Martin Okoth had also defiled her but that on this particular night she positively identified the appellant as her attacker even though it was dark. The accused was arrested when he returned to the area on 1st October 2014 and was subsequently charged with this offence. A birth certificate and a P3 form were produced in evidence (EXB P1 & P2).

In his defence the appellant testified that the police arrested him one evening without giving him a reason. He admitted that the complainant was his neighbour and stated that he knew her and her mother very well and there was no grudge between them. His wife Rebecca Awino (DW2) narrated how the Complainant and her brother went to their house and found her and her husband eating. The Complainant's brother accused the appellant of defiling the Complainant but he denied it. She testified there was no grudge between their family and that of the Complainant.

The appellant has raised four grounds of appeal -

> **"1. The trial Magistrate erred in Law and fact by failing to evaluate well the entire prosecution evidence manifest with numerous contradictions;**
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> **2. The Trial Magistrate erred in Law and fact by making a finding without considering the defence raised by the Appellant and that no reasons were tendered why the defence evidence was not considered;**
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> **3. The Trial Magistrate erred in Law and fact by handing down, in the circumstances of this case, a manifestly harsh and excessive sentence;**
>
> **4. The Trial Magistrate erred in Law and fact by not taking the mitigating factors apparent."**

Mr. Onyari, Learned Advocate for the appellant, referred to what he termed were inconsistencies and contradictions in the evidence of the Complainant and the other witnesses. He submitted that the P3 form could not stand as it indicates that the Complainant had not been defiled before yet the Complainant herself stated that she had been defiled by a man called Okoth. He submitted that despite an amendment

regarding the age of the Complainant to fifteen years in the judgment the trial magistrate still referred to her age as ten years. He contended that the appellant should have been charged under Section 8(4) of the Sexual Offences Act as the Complainant was over sixteen years. He urged the Court to quash the conviction and set aside the sentence.

The appeal was opposed. Mr. Muia, Prosecution Counsel, submitted that the charge was amended to reflect the real age of the victim as indicated in the Birth Certificate. Mr. Muia submitted that the victim described in detail how she was defiled and that her evidence was corroborated by PW2 (her sister in-law) and PW3 the Clinical Officer. He contended that the defence did not counter the accusations and that the defence was a mere denial which did not raise an alibi or other defence. He urged this Court to dismiss the appeal.

In reply Mr. Onyari, Advocate for the appellant, referring to the P3 form, submitted that the victim's hymen could not have been intact as she had been defiled before.

As the first appellate court it is my duty to reconsider and evaluate the evidence before the trial court so as to arrive at my own conclusion while bearing in mind that I did not have the advantage of observing the demeanour of the witnesses. I have also considered the rival submissions of Learned Counsel.

The appellant was initially charged with defiling a child aged 10 years Contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act. On 22nd April 2015 the charge was amended to reflect the victim's correct age as stated in the Certificate of Birth which was produced in evidence. The victim having been born on 13th July 1998 and this offence having been committed on 19th June 2014 the victim had just turned sixteen years (16). Although in the judgment the trial magistrate referred to the charge as initially framed his remarks at the time of sentencing the appellant show that he was very alive to the amended charge. Contrary to Mr. Onyari's submission the trial magistrate sentenced the appellant based on the amended charge. Moreover the mere fact that th trial court miscalculated the age of the victim is not by itself sufficient to quash the conviction.

In sexual offences the court is not enjoined to look for corroboration. The proviso to Section 124 of the Evidence Act does away with the need for corroboration and gives the court power to convict on the evidence of the victim alone provided it is satisfied the victim is telling the truth. The victim in this case gave a vivid description of what the appellant did to her. She knew him before the incident a fact that is confirmed by the visit with her brother to the appellant's home which the appellant's wife confirmed. The Complainant's sister in-law (PW2) narrated how she frantically searched for the Complainant who was missing from the house only to find her behind the house half dressed. She also recalled seeing somebody running away. She also testified that the Complainant told her that the appellant had defiled her. It is my finding that the evidence of PW2 goes go confirm the Complainant was a truthful witness. The inconsistencies and contradictions Mr. Onyari refers to do not go to the credibility of the witnesses. I am satisfied that both the Complainant and her sister in-law (PW2) told the truth. The appellant in his defence confirmed he was well known to the Complainant and that there was no grudge between them. This goes to show that these witnesses had no reason to frame the appellant or to fabricate evidence against him hence fortifying my finding that they were truthful, trustworthy and reliable witnesses.

The medical evidence of Clinical Officer George Mwita (PW4) confirmed penetration had taken place but given that it does not state how long the hymen was missing and given that the complainant had been defiled before I can only attach very little probative value to it. However as I stated earlier the evidence of the Complainant alone is sufficient to support the conviction. This Court as I have already stated believed her. In the upshot I find no merit in the appeal against conviction. However I notice that the trial court miscalculated the age of the Complainant. She had just turned sixteen when this offence was committed and the charge should have been brought under Section 8(1) as read with Section 8(4) of the Sexual Offences Act which provides for a minimum sentence of fifteen (15) years. The sentence of twenty years is therefore set aside and substituted with one for fifteen years. The appeal is otherwise dismissed. It is so ordered.

**Signed, dated and delivered at Kisumu this 27th day of July 2017**

**E. N. MAINA**

**JUDGE**