



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**CRIMINAL APPEAL NO. 20 OF 2017**

**BETWEEN**

**E O O .....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**(An appeal from sentence by J.P. NANDI (SRM) in Oyugis CM CrC No. 17 of 2015)**

**JUDGMENT.**

1. **E O O** (the appellant) was convicted on a Charge of defilement of a child C/Sec. 8(1) as read with Section 8(3) of the Sexual Offences Act and sentenced to life imprisonment.
2. The prosecution's case was that on 4<sup>th</sup> August, 2015 at **[particulars withheld]** in **RACHUONYO SOUTH** within **HOMA BAY** County, he did cause his penis to penetrate the vagina of SK\* (a child aged 1½ years). The appellant denied the charge. (initials used to protect her privacy).
3. **PW4 (J M)** testified that on 04/08/2015 at 6.00p.m., the appellant, who was her husband and step father to her daughter sent her to the market. When she returned she found him washing the child, and upon inquiring why he was bathing her, he told her to go and prepare food.
4. The child was crying incessantly yet the appellant did not want PW4 to take her and eventually they went to sleep. After the appellant left for work at 5.00a.m., PW4 woke up. The child (SK) also woke up and PW4 noticed she had problems sitting. PW4 removed SK's clothes and noticed injuries on her buttocks, bruises on the vagina, right hand, mouth and both cheeks.
5. PW4 reported the matter to **PW1 ERICK OTIENO** (the Assistant Chief of **[particulars withheld]** ) through her brother **L** requesting him to visit her home. On his way PW1 met PW4 who was carrying a child wrapped in a *leso*. The child had swollen buttocks. He also noticed bite marks on both arms. He apprehended the appellant who later escaped but was re-arrested.
6. The child was examined and **EVANS OMONDI OLOO** (PW2) a Clinical Officer at **RACHUONYO** Sub-county Hospital (who produced the P3 Form on behalf of **PHILLIP ODHIAMBO** who had examined the child) stated that the child had bruises on the head and the upper limbs were tender with mild bruises. There were lacerations on the vagina and a conclusion was made that the child had been defiled.
7. A report was made to **CPL EVERLYN SAMBULA** and the appellant was escorted to OYUGIS police station and charged.

8. The appellant in his sworn defence stated:-

***“I still deny the charges. I did not commit the offence.”***

9. The trial Magistrate in considering the evidence noted that the appellant’s conduct suggested that all was not well because:-

- a. *PW4 found him bathing the child which was not normal.*
- b. *He barred the child’s mother from accessing her child even as the child was crying.*
- c. *When the Assistant Chief called him to the office, the appellant fled.*

The appellant contested these findings on grounds that:-

- a. *He did not undergo any medical examination to confirm that he was the culprit*
- b. *There was no evidence linking him directly to the offence.*
- c. *He was not served with witnesses statements to enable him prepare his defence.*

10. The appellant filed written submissions in which he lamented that his constitutional right to a fair trial was violated as he was never served with witness statements.

11. In conceding the appeal **MR. OLUOCH** on behalf of the state submitted that the victim was a 1½ year old child and therefore incapable of giving evidence, so what the trial magistrate ought to have done was to:-

- a. *Declare the victim a vulnerable witness in terms of **Section 1(2) (a) of the Sexual Offences Act.***
- b. *Require that the child’s evidence be given through an intermediary pursuant to **Section 30(5) of the Sexual Offences Act.***

It is only then that the proviso to **Section 124** of the **Evidence Act** can be invoked.

12. However, **MR. OLUOCH** the court to order for the retrial saying;

- a. *There is a high chance of conviction.*
- b. *Witnesses are ready and willing to attend court to testify.*
- c. *The prosecution is not to blame for the anomaly.*
- d. *If a retrial is not ordered, the one year old victim will be foreclosed from any justice remedy.*
- e. *The appellant said nothing to the request for a re-trial. **Article 50 (2) of the Constitution** in addressing various aspects of what constitutes a fair trial includes the right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.*

13. This therefore means that before a Criminal trial begins, an accused person must be provided with witness statements to enable him prepare for the trial. When plea was taken on 10/08/2015, the court directed that the appellant be supplied with witness statements.

14. It is not clear from the trial Court’s record whether the witness statements were availed to the appellant as he never made any further reference to the subject on all other subsequent appearances where constantly informed the court that he was ready to proceed with the hearing. I am not therefore persuaded by this limb of his appeal.

15. The second issue regards the appointment of an intermediary. The victim was a child aged 1½ years old and the prosecutor duly informed the court thus:-

***“I wish to make application that mother to act as intermediary due to her age”***

16. I take judicial notice that under normal circumstances a 1½ years old child cannot adequately express themselves – worse still if the child is in a strange environment surrounded by strangers. Such is the situation that prevails in courts.

*a. How then should such a witness be treated?*

*b Section 31 of the Sexual Offences Act provides that-*

***“(1) A court, in Criminal proceedings involving alleged commission of a sexual offence, may declare a witness, other than the accused, who is to give evidence in these proceedings, vulnerable witness if such witness is –***

- The alleged victim in the proceedings before the Court a child*
- The court may make such declaration on its initiative or upon request by the prosecution if in its opinion he or she is likely to be vulnerable on account of inter alia age, trauma, the possibility of intimidation, the relationship of the witness to any party to the proceedings and the nature of the subject matter once that witness is declared a vulnerable witness then an intermediary shall be approved in respect of such a witness. Sec. 2(1) (d) defines a vulnerable to include a child.*

17. In this instance such application was made by the prosecution, and the trial magistrate had a duty to record his observation of the child, and then indicate that the mother is appointed to testify. This would then permit the mother to say whether perhaps the child made any communication to her about how she was feeling or what had happened. This aspect was missing. It is also important that the court specifically records why it deems it necessary to appoint the intermediary. I do not think the provision gives the court a magic wand to wave at every prompting by the prosecutor. If such a process had been followed it would have enriched the prosecution case. In the instance the trial magistrate simply said “application granted”.

18. The State has requested for a retrial saying the witnesses are readily available. The appellant was sentenced on 03/03/2016, so he has only served slightly over 1 year of the life sentence. Taking into account the nature of the offence, the age of the victim, the relationship between the victim and the accused child and the fact that the procedural omission was not caused by prosecution, as well as witnesses being readily available, then I find it prudent to allow the appeal and order that the appellant be subjected to a retrial. The conviction is quashed and sentence set aside. The matter shall be transmitted to the Chief Magistrate Oyugis Law Courts for Mention on 24/07/2017 for trial directions.

(2) the matter shall be heard before a magistrate at Oyugis other than the one who heard it.

**Delivered and dated this 21<sup>st</sup> day of July, 2017 at Homa Bay.**

**H.A. OMONDI**

**JUDGE**