



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT KAKAMEGA**  
**CRIMINAL APPEAL NO. 118 OF 2016**  
**BETWEEN**  
**PATRICK OSWANYI .....APPELLANT**  
**AND**  
**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the original conviction and sentence of Hon. G. A. Mmasi, Ag. SPM dated 14<sup>th</sup> October 2014 at Principal Magistrate's Court at Vihiga in Criminal Case No. 207 of 2011)*

**JUDGMENT**

1. The appellant **PATRICK OSWANYI** appeals against a conviction and sentence of life imprisonment imposed after he was found guilty of defilement contrary to **section 8(1) and (2)** of the ***Sexual Offences Act, 2006***. The particulars of the offence were that on the 27<sup>th</sup> February 2011 at [particulars withheld] Village, Vihiga District, he willfully and unlawfully defiled SM, a girl aged 3 ½ years old, by his genital organ namely his penis into her vagina.

2. Before I deal with the matter it is necessary to set out a brief history of the case before the trial court. The case commenced in 2011 when the appellant was arraigned before Hon. Bosibori, RM. After her transfer, Hon. Ileri, Ag SRM., took over the conduct of the matter and proceeded for hearing until he too was transferred. Hon. G. Mmasi Ag PM., commenced the hearing afresh after complying with **section 200** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)***. On the date of hearing, the child, who was now aged 5 years, was present. The trial magistrate noted that the child could not talk as she was severely distraught. The trial nevertheless proceeded with other witnesses and the accused was convicted.

3. The prosecution case was that the child's father, PW 1, had left home on the morning of 27<sup>th</sup> February 2011 to go to work. When he returned in the evening, his wife told him that the child had been defiled. He checked the child's private parts and noted that there was sperm and blood in the vagina. The child told her that it is the appellant who defiled her. He took the child to hospital and reported the matter to the police. He also reported the matter to PW 2, the Assistant Chief. PW 2 called a village elder and administration police officer and they went to look for the appellant in his homestead where he was arrested. PW 1 stated in cross-examination that he appellant was his neighbour and relative.

4. PW 3, the doctor who examined the child on 7<sup>th</sup> March 2011, testified the child had a torn pant. Her hymen was torn and a bruise was evident on the labia minora. The finger examination revealed a slimy fluid. He concluded that penetration had taken place. The investigating officer, PW 5, confirmed that PW 1 reported the incident at Vihiga Police Station on 28<sup>th</sup> February 2011. He recorded statements of the

child and other witnesses and decided to charge the appellant.

5. In his unsworn statement, the appellant denied that he defiled the child.

6. The raised in this appeal is whether there was sufficient evidence to support the conviction and whether the conviction could be sustained in absence of evidence of the child. As I outlined in paragraph 2 above, the trial magistrate did not consider whether the child should be given an opportunity to testify either directly or through an intermediary, in view of the fact that she was clearly a vulnerable witness. The role and place of an intermediary was explained by the Court of Appeal in **M. M. v Republic NRB Criminal Appeal No.41 of 2013 [2014]eKLR** as follows:

*Is an intermediary the mouth piece of the vulnerable witness or is he or she the witness? According to section 2 of the Sexual Offences Act, an intermediary is defined to mean among other things, a person who gives evidence on behalf of a vulnerable witness.*

*Section 31(1) provides inter alia that: -*

*A court shall not convict an accused person charged with an offence under this Act solely on the uncorroborated evidence of an intermediary.*

*We have seen that in Article 50(7) of the Constitution an intermediary is a medium through which the accused person or complainant communicates with the court. In our understanding, the evidence to be presented is not that of the intermediary himself or herself but that of the witness relayed to court through the intermediary. The intermediary's role is to communicate to the witness the questions put to the witness and to communicate to the court the answers from the victim to the person asking the questions, and to explain such questions or answers, so far as necessary for them to be understood by the witness or person asking questions in a manner understandable to the victim, while at the same time according the victim protection from unfamiliar environment and hostile cross-examination; to monitor the witness' emotional and psychological state and concentration, and to alert the trial court of any difficulties.*

*The key word in sub section 7 is emphasized as shown below to demonstrate the place of the intermediary's evidence.*

*If a court directs that a vulnerable witness be allowed to give evidence through an intermediary, such intermediary may;*

- a) convey the general purport of any question to the relevant witness.*
- b) inform the court at any time that the witness is fatigued or stressed; and*
- c) request the court for a recess. (Emphasis supplied)*

*The word through is used also in subsection 4(b) in describing the protection of the witness by providing an intermediary through whom his evidence is relayed. It is the witness who gives the evidence which is explained and communicated to the court and the reverse through an intermediary in the manner and style developed between the two.*

7. The trial magistrate clearly erred by failing to consider whether the child was a vulnerable witness under **section 31(1)** of the **Sexual Offences Act** and therefore make arrangements for the child to testify through an intermediary.

8. Although the child did not testify, it is established that this is not necessary particularly where the child is vulnerable and there exists sufficient independent evidence as proof of the fact of penetration by the accused. In other words, the proof of the offence of defilement may be direct or circumstantial. In **M. M. v Republic (Supra)**, the Court of Appeal observed that, "Any requirement that insists on a child victim of

*defilement, irrespective of his or her age to testify in order to found a conviction would occasion serious miscarriage of justice.”*

9. In this case there was no direct evidence implicating the appellant or putting him at the scene of the incident at the time the child was defiled. PW 1 was merely told what happened by the child and the appellant was arrested thereafter. As there was no evidence placing the appellant at the scene of the incident, the court cannot rely on circumstantial evidence. Although the evidence is clear that the child was defiled, the evidence pointing to the appellant was insufficient.

10. In light of the error by the trial court, the appellant was denied the opportunity to test the child's testimony, through cross-examination, on the key issue of identification. Likewise, in the absence of the child's testimony, the trial court denied itself the opportunity to hear and see the witness to determine the truth of the child's allegations. In these circumstances, I have no option but to allow the appeal.

11. The conviction and sentence are set aside. The appellant is set free unless otherwise lawfully held.

**DATED and DELIVERED at KAKAMEGA this 31<sup>st</sup> day of August 2017.**

**D.S. MAJANJA**

**JUDGE**

Appellant in person.

Mr Ng'etich, Senior Prosecutions Counsel, instructed by the Office of Director of Public Prosecutions for the respondent.