REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

HCCRA NO. 102 OF 2014

JAMES OUKO NYAMBETI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal from the conviction and sentence of the Senior Principal Magistrate's Court

at Nyando (Hon. P. Wechuli RM) dated the 18th June 2014 in Nyando SPMCCRC No. 1176 of 2014]

JUDGMENT

The appellant was charged with defilement of a child contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act. The particulars of the charge were that on 26th November 2013 at about 7PM at [particulars withheld] Ahero sub-location in Nyando District within Kisumu County he intentionally caused his penis to penetrate the vagina of VA a child aged 9 years.

After hearing the evidence of four prosecution witnesses and the appellant's testimony the trial magistrate convicted him and sentenced him to life imprisonment. This appeal is against the conviction and sentence. His grounds of Appeal are that:-

1. THAT the learned trial magistrate erred in law and in facts by failing to observe that he was never with witness statement when he appeared for plea.

2. THAT the learned trial magistrate misdirected herself by failing to note that he was not clinically examined according to the law.

3. THAT the learned trial magistrate erred in both law and in facts by not upholding provision of section 324 as read with section 329 C.P.C. not achieved.

4. It should be noted that the mother prior to these accusations had organized the child by contributing and coaching the child against him.

5. THAT the learned trial magistrate erred in law and in facts by not evaluating that the prosecution failed to prove their case beyond reasonable doubt.

6. THAT the learned trial magistrate more marked and erred in law and in facts by excluding the forensic examination report which was in this case.

7. THAT the learned trial magistrate erred in law and in facts by not considering the evidence adduced as stated through the mother's statement.

At the appeal he appeared in person. He made both oral and written submissions wherein he reiterated his grounds of appeal. He argued that the prosecution had not proved its case beyond reasonable doubt. He argued that the trial magistrate erred by failing to note that the evidence of PW1 was not corroborated. That the evidence of the Clinical Officer should have been disregarded as there was a mix up in the names where the medical report produced as evidence belonged to B A and whereas the complainant's name was V A. Further that no medical examination was carried out on him to ascertain that he is really the one that defiled the complainant. He contended that the whole issue arose from a land dispute and the complainant's mother was accusing him falsely to punish him for having refused to give her a share of his land. He concluded by arguing that the sentence meted out was too harsh and that the trial magistrate had refused to consider his mitigation.

Counsel for the state opposed the appeal and opted to argue all the grounds as one. She submitted that PW1 was able to positively identify the appellant as he was her step father and the Clinical Officer (PW4) corroborated her evidence of defilement as he tendered evidence pointing to the fact that PW1 had been involved in sexual activity. PW1's mother produced her baptismal card as evidence which proved the apparent age of PW1 to be nine years. Counsel submitted further that under Section 124 of the Evidence Act, the offence of defilement could be proved by the evidence of a single witness and the trial magistrate properly warned himself before convicting the appellant. On the issue of witness statements, counsel was of the view that the appellant should have raised the issue during trial and to raise it on appeal was tantamount to sending the court on a fishing expedition. She was categorical that the constitutional rights of the appellant had not been breached as alleged; That the trial Court considered his mitigation but the offence carried a mandatory sentence. Counsel urged the Court to dismiss the appeal.

As the first appellate Court I am required to reconsider the evidence so as to arrive at my own conclusion while bearing in mind that I did not have the benefit of seeing the witnesses. (See **Okeno V. Republic [1972] E.A. 72).**

The Complainant testified that she was 9 years old and that on the material day she had been sent to the shop when the appellant who is her step father found her at his door. He pulled her into his house and then removed her underpant before “removing his thing and putting it on her thing”. All this he did on the bed while lying on her. When he finished he let her go home. She felt very bad and could not walk properly. Her mother (PW2) testified that the complainant arrived home at 9PM but did not say anything. However she noticed the following morning that she was not walking properly and asked her. It was then that the complainant told her what the appellant had done to her. She went and obtained a P3 form and then took her to Ahero Hospital for examination. She subsequently reported the matter and the appellant was arrested. Chrisantus Mwangi (PW4) a Clinical Officer at Ahero Sub-District Hospital testified that he examined

B A aged 9 years old at the hospital and saw she had bruises on the labia majora and minora and bleeding in the vagina. She also had a foul smell and vaginal discharge indicative of a sexual act. He came to the conclusion that there was sexual defilement by someone known to her. He produced a P3 form which he completed after the examination (EXB2). Sergeant Rachael Chelengat (PW3) of Ahero police crime office confirmed receiving the report in respect of this case and that she recorded the statements of the victim and her mother. She also confirmed she issued them with a P3 form and took them to the hospital for examination. Later when the appellant was taken to the station by members of the public she arrested him and charged him with this offence. She produced a baptismal card belonging to the victim as proof of her age (EXB1).

The appellant denied the charge and testified that he was away on the material day. He stated that he was framed by the victim's mother for dissuading her from going home late in the evening with the child and for not allowing some aid providers she was associated with to construct a kitchen on his land. He accused the victim's mother of destroying his live fence on that day. He attributed the case against him to a land dispute.

The P3 form, the Outpatient record and the baptismal card tendered as EXB 1, 2, 3 all point to the victim being 9 years old. It was also her evidence that she was 9 years old at the material time and I am satisfied that she indeed was. I am also satisfied that it was proved beyond reasonable doubt that she was defiled. Whereas her own evidence would have been sufficient to prove this under the proviso to section 124 of the Evidence Act we have in this case medical evidence to corroborate it. The Clinical Officer PW4 who examined the victim found evidence of forceful and traumatic vaginal penetration. This confirms that the victim was truthful when she narrated the ordeal. Indeed her mother (PW2) confirmed that the next morning she noticed that she was walking with difficulty. The question then is who defiled her?

Having considered the evidence of the prosecution witnesses and the testimony of the appellant I am satisfied that he defiled the complainant. She knew him well as her "step father" and had no difficulty telling her mother that it was him. Indeed it was her evidence that the offence took place at the appellant's house. The appellant's evidence that he was away at the material day cannot be taken seriously as he does not state where he was. If his intention was to raise the defence of an alibi he did not do so. Simply stating that he was away is not sufficient. As for his allegation that he was framed by the mother of the victim cannot be true as we see in the evidence that the complainant did not even disclose what had happened immediately. It was only when she was asked what was wrong with her that she opened up. From the evidence there is nothing to show that the victim's mother had any reason to lie against him. He had an opportunity to cross examine her on the alleged grudge but never did so and raising it in the defence can only be interpreted as an after thought. The charge against him was proved beyond reasonable doubt . As I have stated the evidence of the complainant required no corroboration but corroboration was availed in the evidence of the Clinical Officer. That he himself was not examined is also immaterial as the evidence of the victim was itself sufficient to implicate him.

The appellant urged this Court to disregard the medical evidence for referring to B A rather than V A . I have considered this and come to the conclusion that it may have been a slip of the tongue on the part of the Clinical Officer to refer to the victim he examined as B. This is because the P3 form correctly refers to the victim seen at the hospital on that day as V A . Clearly this is an error that is curable under Section 382 of the Criminal Procedure Code. The appellant all along knew who the complainant/ victim in this case was and he does not allege any prejudice he suffered due to that error by the Clinical Officer.

The record shows that on the date of plea the trial magistrate directed the prosecution to supply witness statements to the appellant. The appellant did not through out the trial raise an issue regarding the statements and one could safely conclude that it was because they were supplied. Needless to say Section 324 of the Criminal Procedure Code which refers to a motion in arrest of judgment is not relevant and as for Section 329 of the Criminal Procedure Code referred to in ground 3 of the Petition the trial magistrate heard his plea in mitigation but his hands were tied by the minimum sentence provided and which I find was lawfully imposed. Accordingly I find no merit in the appeal and it is dismissed.

Signed, dated and delivered at Kisumu this …21st.. day of …April... 2016

E. N. MAINA

JUDGE

<u>In the presence of</u>:-

Wakio for the state

Appellant in person

CC: Felix Magutu