



**REPUBLIC OF KENYA**

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

**HCCRA NO. 80 OF 2014**

**DANIEL OTIENO ODONDI..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**From original Conviction and Sentence in Criminal Case number 211 Of 2012 of the Principal Magistrate's Court at Bondo – M.M. Nafula-SRM**

**JUDGMENT**

1. The Appellant was charged with Defilement Contrary to **Section 8(i)** as read with **Section 8 (3)** of the Sexual Offences Act. The particulars were that about 5p.m at [particulars withheld] village in Nyanza Province, Bondo Township within Siaya County, he unlawfully and intentionally caused into the genital organ vagina of **F A O** a girl aged 8 years .

2. He pleaded not guilty to the Charge and a trial ensued and upon considering the evidence before her the Trial Magistrate found the Appellant guilty, convicted him and sentenced him to 30 years Imprisonment. Being aggrieved, he filed this Appeal.

3. Briefly the facts of the case were that on the material day at about 5 p.m the Complainant was left looking after their cattle by her father. The Appellant, their neighbour was also herding cattle nearby and when her father left he went and took her to the bush, removed his clothes and then had canal knowledge of her about 4 minutes. He then went away. She too went home and narrated her ordeal to her mother, who upon confirming it was true informed her husband (**PW3**). She then took her to Bondo District Hospital where a physical examination showed that she had a tear in the labia majora and was bleeding. The matter was reported to the Police and the Appellant was then arrested and charged with this offence.

4. The Appellant made an unsworn statement in which he stated that he did not know why he was arrested. That on that material day he left his house at 10 a.m and returned at 7p.m. At about 5 p.m a man and his wife went and accused him of defiling their daughter. He was told to call his employer and they called their pastor. He was then taken to Bondo District Hospital where he was examined. He was thereafter arrested. He contended that there had been some animosity between him and the Complainant.

5. The Appellant has appealed on the following grounds:

**(I) That the learned Trial Magistrate erred in law and facts by failing to appreciate Hearsay and after thought evidence.**

**(II) That the learned Trial Magistrate erred in law and facts by convicting the Appellant on un-investigated case.**

**(iii) That the learned Trial Magistrate erred in law and facts by failing to appreciate the Medical**

**(iv) That the learned Trial Magistrate erred in law and Facts by failing to appreciate that the Appellant was not caught I the Act.**

**(v) That the learned Trial Magistrate erred in law and facts by failing to consider the Appellant Un-sworn Defence**

**Statement hence coming to a wrong conclusion.**

**(vi) That since I cannot recall all that was adduced transpired during the trial, I beg the trial Court to varnish me with true copies of the Trial Proceedings to enable me erect more reasonable grounds of Appeal.**

6. As the first Appellate Court, I have reconsidered and evaluated the evidence afresh while at the same time bearing in mind that I did not see the witnesses give evidence. I come to the same conclusion as the learned Trial Magistrate that the Charge against the Appellant was proved beyond reasonable doubt. I would even add that the evidence was water tight. This incident occurred at 5.30 pm hence in broad-day light and so the Complainant positively identified the Appellant. He was after all their neighbour and she knew him. She vividly narrated how he led her to the forest and knocked her down after which he removed her clothes before inserting his penis into her vagina and after doing it for four minutes he left. She told the Court that she bled in her vagina a fact which was confirmed by the Clinical Officer to who she was taken for examination. She remained unshaken in her evidence even upon cross-examination and it is no wonder that the Trial Magistrate believed her.

7. The Appellant alleges that the case was based on hearsay and that the evidence was an afterthought. That to me is not correct as the Complainant narrated first hand what happened to her. He parents **PW2** and **PW3** confirmed that she reported the matter to them and told the Court what action they took thereafter. The Clinical Officer testified as to what he saw upon examining the Complainant . Nobody gave hearsay evidence. The Police Officer who received the report was called as a witness and the investigations he carried out comprise sending the girl for examination. The results of that examination were tendered in evidence and it is therefore also not correct to say that the case was not investigated. The Trial Magistrate considered the medical evidence and has stated so in the Judgment. She also considered the defence but found that it could not hold in light of the Complainant`s evidence. A **DNA** analysis need not to have been done to corroborate the evidence of the minor as under **Section 124** of the Evidence Act her evidence was sufficient. The Appellant suggests that he was framed; that there was animosity between him and the Complainant. I do however wonder what animosity there could have been between him and a child of eight years. That her hymen was missing does not change the fact that he defiled her. The Prosecution produced a Birth Certificate showing that she was born on 25/2/2006 and that proved her age. Both the handwritten Proceedings and the typed proceedings show that **PW2** gave the Complainant`s date of birth as 25/2/2006 and not 2016 as submitted by the Appellant. Moreover, even had she said 2016 that would have been an error as we are yet to get to that year. The Birth Certificate produced clearly refers to the Complainant in this case. The evidence places the Appellant at the scene of crime. As I have stated **Section 124** of the Evidence Act removes the requirement for corroboration in Sexual Offences.

8. On the whole I find no merit in this Appeal and dismiss it. The Sentence of thirty years Imprisonment is confirmed.

**Dated, signed and delivered at Kisumu this 12th day of February, 2015**

**E.N. MAINA**

**JUDGE**

**In the presence of:**

Mr. Ruto for State Counsel

In person- Appellant

Moses Okumu- Court Interpreter

ENM/aar