REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 187 OF 2011

From original conviction and sentence in Criminal Case number 91 of 2011 of the Principal Magistrate`s court at Ukwala – Hon. P.C. BIWOTT (ESq)

JOHNSON AUMA AGURU ….....APPELLANT

VERSUS

REPUBLIC …..... RESPODNDENT

JUDGMENT

The appellant was convicted and sentenced to serve twenty years imprisonment for defilement contrary to **section 8(i)(3**) of the sexual offences Act. The particulars of the charge were that on 28th January, 2011 at about 8p.m at [particulars withheld] village in Kisumu East District, he intentionally caused his penis to penetrate the vagina of V K a child aged 13 years. He had pleaded not guilty to the charge. Briefly the facts of the case were that sometimes on 26th December, 2010 the appellant approached the complainant and asked her to become his girl friend. She did not respond but later when he asked again she accepted and they kept it a secret. On 28th January, 2011 at about 8 p.m she went to his house. He asked her for sex but she allegedly declined. He nevertheless forced himself on her while using a condom. In the meantime, her mother(pw2) went looking for her and went to the appellant`s house upon being alerted by one A A. She found the complainant with the appellant but she managed to flee. When she went back the complainant opened up and told her she had had sex with the appellant. PW2 reported the matter to the police and then took the complainant to Kisumu District Hospital for examination. A medical exam was conducted and it was found that the complainant`s hymen was missing. There were no spermatozoa seen. The appellant fled but on 29th January, 2011 he was apprehended by members of the public and handed over to the police. He was then charged with this offence. He gave an unsworn statement at the trial wherein he denied having defiled the complainant.

His petition of Appeal raises 4 grounds being that the complainant`s age was not proved, that his defence was not considered; that there was no medical evidence to link him to the offence as there were no spermatozoa seen and that the complainant was not warned of the consequences of taking an oath without understanding what it entails.

The appeal was heard on 10th February, 2015. the appellant relied on written submissions while Miss Wakio, prosecuting counsel submitted orally.

As the first appellate court it is my duty to reconsider and evaluate the evidence afresh so as to arrive at my own conclusion of course bearing in mind that I did not see the witnesses testifying. I have done this and also considered the submissions of both sides at the hearing of the appeal.

The complainant clearly and concisely narrated the events that culminated with the appellant defiling her on 28th January, 2011. She narrated how he had earlier asked her to be his girlfriend and how although she initially rejected his advances, she eventually agreed. She also testified that on the material day she went to visit him in his house and he asked her for sex. When she refused, he forced himself on her and defiled her after wearing a condom. Her mother(pw2) and brother (PW4) on noticing that she had taken long to return home, went out looking for her. They testified, which I believed, that they traced her to the appellant`s house at 10 p.m. PW3 Aboda boda rider also witnessed the complainant`s presence in the appellant`s house. The medical evidence confirmed that the complainant`s hymen was missing but that no spermatozoa were seen as a condom had been used. Whereas **section 124** of the evidence Act

provides that the evidence of a victim of a sexual offence does not require corroboration in this case we have more than sufficient corroboration. The evidence of PW2, PW3 and PW4 and also the Medical evidence strongly links the appellant to the commission of this offence. He was alone in his house with the complainant who was defiled and so it was him who defiled her. The sentence for defiling a child between the ages of 12 years and 15 years is the same and so even were we to go by the age of 14 years given by the girl`s mother, or the 13 years given by her brother the sentence imposed would still be lawful.

This appeal has no merit and is dismissed. The sentence is confirmed.

Signed, dated and delivered this 12th day of March, 2015

E.N. MAINA

JUDGE

In the presence of:

Mr. Ketoo for the state

Appellant in person

Court clerk -Moses Okumu