REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 73 OF 2014

P O J ….....…APPELLANT

VERSUS

REPUBLIC …..... RESPONDENT

(From original conviction and sentence in Criminal Case number 395 of 2013 of the Principal Magistrate`s court at Ukwala – Hon. R.M. Oanda-Ag PM)

JUDGMENT

The appellant was convicted and sentenced to twenty years imprisonment on a charge of defilement Contrary to **Section 8 (1)(3) of the Sexual Offences**, the particulars being that on **6th June, 2013** at [particulars withheld] sublocation in Ugenya District within Siaya County, he intentionally caused his penis to penetrate the vagina of R A L a child aged 14 years.

Briefly the facts of the case were that on the material day R A L , the complainant, then a class **7 pupil** at [particulars withheld] Primary school went to [particulars withheld] to visit her sister one J A. On the way there she met with the appellant. Thereafter her sister informed her that the appellant wanted her and indeed that evening the appellant went and spoke with her sister. She then told her that the appellant would pick her up at 9p.m and if she refused she would have nowhere to sleep. At 9 p.m he picked her and they went to his house and spent the night. It was her evidence that that night they had protected sex. The next morning she returned to her sister`s house but she was ordered to go back to the appellant`s house and when she did they again had sexual intercourse but this time he did not use protection. After one month she discovered she was pregnant. Sometimes in **September, 2013** she reported the matter to her mother who in turn informed the children`s Department. On **20th September,2013** she was taken to Ukwala sub-county Hospital where upon examination it was confirmed that she was pregnant. The matter had been reported to Ukwala police station the previous day and the accused was subsequently arrested and charged with this offence. A birth certificate showing that the complainant was born on **30th November, 1998** was among the documents produced in evidence.

The Appellant gave sworn evidence. Describing himself as a farmer, he stated that on **23rd September, 2013** when cycling to [particulars withheld] he got a puncture and took the bicycle to a repairer adjacent to the Administration police post where he found the complainant. It was then that an officer approached him and after inquiring into his names and where he came from ordered him to go to the camp. He found one AP Korir to who he admitted knowing the complainant as she was his in-law. Then a woman he did not know came and after she was asked if she had ever seen him he was handcuffed and put in the cells. The next day he was taken to Ukwala Police station and on **25th September, 2013** he was arraigned in court. He stated that he was surprised when the charges were read to him as he had no knowledge of the matter.

In the petition of Appeal the appellant faults the trial magistrate for failing to observe that he was never furnished with witness` statements before the trial as the law requires, for not considering that essential witnesses were not summoned to corroborate or provide sufficient evidence such as would make the case watertight and for not considering that he was himself not medically examined. He also faults the investigating officer for what he calls carrying out shoddy investigations and failing to table exhibits. He also states that his defence was overlooked.

As the first appellate court, I have reconsidered and evaluated the evidence in this case bearing in mind that I did not have the privilege of seeing the witnesses. I have also heard and considered the arguments by the appellant and Counsel appearing for the state. The age of the complainant was proved by production of a birth certificate. She was going to 15 years at the material time. The medical evidence tendered confirmed that she had had sexual intercourse. I am satisfied that she positively identified the appellant as the person who defiled her. She vividly narrated how she visited his house on the material day and on subsequent days and how she spent the night with him. Initially he had carnal knowledge of her using a condom but thereafter they had unprotected sex. All this happened with the connivance of her sister one J A who I agree with the learned trial magistrate ought to have been arrested and charged. Had the complainant not become pregnant she may never have opened up to her mother. The appellant admitted at the trial that he was well known to her being her in-law. This could therefore not be a case of mistaken identity. Moreover, the offence was committed over a number of days and there is nothing in the evidence to suggest that the complainant had a reason to lie against him. Like the trial magistrate, I found her a credible witness. The record shows that when the appellant requested for statements the court made an order for him to be supplied. He never raised the matter again and his complaint that they were never supplied could only be an afterthought.

The Proviso to **Section 124 of the Evidence Act** provides that no corroboration is required in cases such as these; That provided the court believes the complainant it can convict on her evidence alone. As I have stated I believe the complainant. She was very firm and consistent in her evidence and did not waver even in the face of cross-examination. Ground two of the Petition must therefore fail too.

As for the omission to take him for medical examination, the court of Appeal while considering a similar submission held as follows:-

> " **24. The appellant secondly contends that there was no medical evidence adduced to link him with the defilement of PW1. In our view, such evidence was not necessary the moment the trial court found there was sufficient medical evidence to prove that the complainant had been defiled and that the complainant`s evidence was trustworthy as to the identity of the person who had defiled her …..."**

(See **Dennis Osoro Obiri V.Republic (2014) eKLR)**. I need not say more on that ground. The offence with which the appellant was charged exists and I admit that the drafter of the charge would have done a better job by stating " **contrary to Section 8(1) as read with Section 8(3)**" However, I find that the defect is curable under **Section 382 of the Criminal Procedure Code** as it did not prejudice the appellant in any way. From the start he knew the charge facing him. Indeed in his defence he acknowledged that he knew why he was in court. His defence was not overlooked. The trial magistrate found it a mere denial. On my part, I find that it could not stand given the weight of the prosecution`s case. The sentence imposed was lawful.

Accordingly, I find that the appeal has no merit and dismiss it.

E.N. MAINA

JUDGE

Dated, signed and delivered at Kisumu this 16th day of April, 2015

<u>In the presence of</u>

In person for the Appellant

Mr. Ruto for state counsel/respondent

Court clerk – Moses Okumu