REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIMINAL APPEAL NO.121 OF 2014

S O O ….....APPELLANT

VERSUS

REPUBLIC ….....RESPONDENT

[Appeal from Original Conviction and Sentence from Ukwala PM's Court: C. N. WANYAMA – RM

in criminal case No.34 of 2014.]

J U D G M E N T

1. The appellant was charged with the Offence of Defilement Contrary to Section 8(1)(3) of Sexual Offences Act No.3/06. The particulars of the offence are that on the 25th day of January 2014 in Ugunja District within Siaya defiled 4 year old child A A O.

2 The alternative charge was committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No.3/06. The particulars were that on the 25th of January 2014 in Ugunja District of Siaya County intentionally touched the vagina of A A O A child aged 4 years old.

3. The prosecution called 6 witnesses to establish their case. The appellant gave sworn defence. He was convicted and sentenced to life imprisonment.

4. PW1 the complainant was unable to testify much as she became emotional according to the proceedings. She only stated;

> **" I know him as daddy. He slept with me.**
>
> **He removed my clothes at his house."**

5. PW2 J A told the court that they were preparing for a funeral, on that particular day. She then went home and heard a child crying and when she went to the house from where she was crying from she found the child naked with the appellant who was fully clothed. She was on the mattress. The appellant then threw the clothes to the child. The child was later taken to hospital when she realised that she was walking with difficulty.

6. PW3 GEORGE SIMBAO is the assistant chief Simenya Sub-Location. He said that on the material day he met PW4, S O O with his child. He was unable to arrest the appellant on that day but was later arrested at Hono Sub-location on 26/1/14.

7. PW4 S O took the minor to hospital on 25/1/14 and reported the matter at Ugunja Police Station where he was issued with a P3 form. He confirmed that the appellant was his cousin. He also told the court that the child was born on 16/7/09.

8. PW5 HOWARD OKEYO is the clinical officer who examined and treated the complainant. He found that **"she had a swollen upper genetalia with torn hymen, with tender vaginal wall had minimal perennial laceration on lower vulva.**" He indicated that there was forced vaginal entry and infection.

9. PW6 P.C. SUSAN CHEBET from Ugunja Police Station told the court that she got the complaint on 26/1/14 from the child's father. She issued him with a P3 form. The appellant was then arrested and she preferred the charges against him.

10. The appellant's sworn defence explains how he was arrested on 26/1/14 and placed in police cells at Ugunja Police Station. He generally denied the offence.

11. I have perused the proceedings as well as heard the learned State Counsel's submissions in opposing the appeal. According to her there was sufficient evidence that the appellant committed the act. Although there was no *voire dire* procedure the court's hands according to the respondent was tied as the child was too emotional to talk. She however confirmed her relationship with the appellant whom she called "daddy."

12. The appellant on the other hand has filed lengthy submissions and in particular attacked the charge sheet for being defective and in particular that it misses the words **"intentionally and unlawfully penetrated."** He further argued that the court failed to conduct a v*oire dire* evidence of the minor and that the age of the minor was not ascertained. He said that he was not subjected to any DNA test so as to ascertain that he was actually the defiler.

13. This court is enjoined to re-evaluate the evidence tendered and come with its own independent conclusion with the caution that it never had the benefit of hearing or seeing the witnesses. See **OKENO VRS REPUBLIC [1972] E.A.32.**

14. The issues to be determined is as clearly raised by the appellant namely:

a. **Whether the lack of *voire dire* evidence caused any.**
b. **Whether the charge sheet was defective.**
c. **The question of the minor's age.**
d. **Whether it was necessary to subject the appellant to any DNA test?**

15. The question of the charge sheet missing the words **"intentionally and unlawfully penetrated"** was well settled by the Court of Appeal in the case of **ROBERT OLE GWENI VRS REPUBLIC KISUMU CIVIL APPEAL NO.329/1**1 where the learned Judges stated thus:

> **"Although, ideally the phraseology of the particulars of the charge in this case should have been pleaded to include the word penetration, we do not think that that omission made the charge fatally defective. Sight should not be lost of the fact that Section 8(1) of the Sexual Offences Act quoted above simply defines what defilement is. For a sexual assault of a minor to amount to defilement there must be penetration ."**

16. In the case at hand the evidence of PW4 the clinical officer clearly demonstrated that there was penetration. The minor equally testified that the appellant slept with her. I do not find this ground sufficient enough.

17. The other issue raised was the question of lack of *voire dire* evidence. Although there was no direct evidence in the proceedings to suggest that the trial court conducted *voire dire* procedure, the notes clearly indicated that the child was too emotional for the court to continue examining the complainant. What is captured in the proceedings can be clearly discerned and in my finding sufficient enough. There

was no prejudice suffered by the appellant.

18. The other issue raised by the appellant was the age of the minor. Clearly the only evidence on record is that of the minor's father who produced the clinic attendance book showing that she was born on 16/7/09. Respectfully I do not find this argument sound enough. Although the birth certificate ought to be the proper age identification document it has been said severally that lack of it does not necessarily weaken a case. Other forms of evidence could as well be produced so as to determine the age. This age question is clearly critical as it determines the penalty required. See **FAPPYTON MUTUKU NGUN VRS REPUBLIC MACHAKOS HIGH COURT CRIMINAL APPEAL NO.296 OF 2010, HILLARY NYONGESA VRS REPUBLIC ELDORET HIGH COURT CRIMINAL APPEAL NO.129 OF 2009.**

19. In **PAUL ODHIAMBO MBOLA VRS REPUBLIC KISUMU CIVIL APPEAL NO.16/2014**, the Court of Appeal found hat the Sexual Offences Act adopts a definition of a child in the Childrens Act and Section 2 thereof, which defines 'age' as

"where actual age is not known means apparent age."

20. In this case the evidence of the card as well as that of the father was sufficient. In any case the trial court sufficiently satisfied itself to this question.

21. Was DNA necessary to be conducted? According to the appellant it was relevant. Section 36(1) and (2) of the Sexual Offences Act provides that DNA test may be conducted so as to ascertain whether the accused committed the offence. In this case the appellant has not stated what was the benefit of taking the DNA exercises. How was he prejudiced? I do not find any sufficient reason to allow this line of argument. In any case the appellant ought to have made this request at the trial court and not raise it at this juncture.

22. I think I have said much to indicate that this appeal ought to fail. There was no evidence to corroborate the appellant's argument that there was bad blood between him and the child's parents. In fact just as confirmed by PW1 and PW2 the incident took place in his house in broad daylight. Neither do I find any reasons to suggest that the child cooked up the story to implicate the appellant. This appeal is unmeritorious and the same is hereby dismissed.

Dated, signed and delivered this 28th September, 2015.

H. K. CHEMITEI

J U D G E