IN THE HIGH COURT AT BUNGOMA

CRA NO.211 OF 2011

A M L ….... APPELLANT

VRS

REPUBLIC ….... RESPONDENT

(Appeal from judgment of Hon. B. Arika, Ag Senior Resident Magistrate

in

Webuye Cr. No.81 of 2008)

JUDGMENT

1. A M L, the Appellant, was on 30th June 2009, charged before the Senior Resident Magistrate's Court, Webuye with the offence of defilement contrary to Section 8 (2) of the Sexual Offences Act No.3 of 2006. It was alleged that on the 20th January, 2008, in Bungoma North District, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of C.I. a girl aged 7 years. He was also charged with an alternative charge of indecent act contrary to Section 11 (1) of the Sexual Offences Act No.3 of 2006. The Appellant denied the charges and after trial, he was found guilty and convicted of the charge of defilement and sentenced to life imprisonment. The Appellant has now appealed to this court against conviction and sentence.

2. This being a first appeal, this court is obligated to re-evaluate the evidence afresh and come to its own independent conclusions and findings. However, in so doing the court has to bear in mind that it did not see the witnesses testify. See **Okeno -vs- Republic [1972] EA**.

3. The Appellant listed seven (7) grounds of appeal which can be summarised as follows; that:-

a. the trial Court erred in relying on inconsistent and uncorroborated evidence;
b. the evidence on record did not support the charge;
c. the trial Court failed to consider the Appellant's defence;
d. the trial Court erred in considering extraneous matters;
e. that the appellant was not accorded a fair trial; and
f. that the charge was defective as it did not disclose any offence.

4. The prosecution's evidence was that on 20/1/2008 at 7.00 p.m, the complainant PW1 was at their home playing with her brother PW2 when the Appellant asked them to escort him to his home; that when they reached his house he barred them from leaving; they slept in his bedroom on the same bed whereby the Appellant defiled the complainant when her brother had slept; on the following morning PW2 and

PW5 the father and mother of the complainant found PW1 and her brother outside the door to their house although they had looked for them the previous night without success; the complainant told the two (2) that Appellant had defiled her; they checked her vagina and was reddish and wide; they took her to Kitale District Hospital where she was examined and treated; they later reported the incident at Kiminini Police Station and a P3 Form was issued which was later filled.

5. PW4 was the Clinical Officer who examined the complainant on 21/1/2008 at Kitale District Hospital. On examination, he found that the complainant's hymen was torn (freshly looking) presence of pus cells; he concluded that the complainant had been sexually assaulted and had contracted a sexually transmitted disease. He filled the treatment book and P3 Form which he produced as Pexh.1 and Pexh.2, respectively.

6. In his sworn defence, the Appellant told the court that he was married, that on 10/1/2008 he went home at 7.00 p.m, he prepared food, ate and slept; he admitted that PW5 (the complainant's mother) was his neighbour; that he knew both the complainant and her brother; that he did not see them on the material night; that his home and that of the complainant was 50 metres apart; he denied defiling the complainant although he was arrested on 21/1/2008.

7. I have considered the able submissions of Mr. Ocharo, learned Counsel for the Appellant and those of Mr. Kamau the learned state Counsel.

8. The first ground of appeal is that the trial Court erred in relying on extraneous matters to convict the Appellant. That the court made a finding that further tests revealed that the complainant had contracted HIV and syphilis; that red blood cells were detected in the complainant's urine which showed that she had an injury in her reproductive or urinary tract. Mr. Ocharo relied on the Case of **Okethi Okale -vs- R. [1965] EA 555** and submitted that the court became a partial actor in favour of the prosecution.

9. I have seen the evidence of PW4, the Clinical Officer who examined the complainant. He found that the complainant had contracted a sexually transmitted disease which he could not tell when he signed the P3 Form. He also found that the Complainant's urine showed pus cells which he concluded would not have been normal pus cells that would be degenerated in the normal circumstances.

10. From the foregoing, it is clear that there was no evidence that the disease that the complainant contracted was HIV and Syphilis as the trial Court concluded. It is therefore correct that the trial Court erred by making a conclusion as to the actual sexually transmitted disease that the complainant had contracted which was not borne by evidence. As regards the conclusion by the trial court that the complainant had some injury in her reproductive or urinary system; I find that, that was a proper conclusion by the court borne by medical evidence of PW7 that the pus cells he found in the complaint's urine were abnormal and could not have been normally degenerated. In this regard, although the trial court made the conclusion of an injury, the same was borne by evidence. To my mind, that conclusion by the trial Court was not unfounded. As regards the earlier conclusion that the complainant was infected by HIV and Syphillis, I do not find the same to be fatal in that, there was a conclusion by the Medical Officer that the complainant had been infected with sexually transmitted disease. The conviction of the Appellant by the court was not based on the nature of the infection (the disease or otherwise) but that there had been a medical conclusion borne by evidence that defilement had taken place. Accordingly, I find that the trial Court did not rely on extraneous material in arriving at its judgment and I reject that ground of appeal. The Case of **Okale -vs- R** is not applicable as in that case, the trial Court was categorical that it was to rely on mere reasoning than on evidence on record which is not the case in the present case.

11. The second ground of appeal was that the Appellant was not accorded a fair trial. That the Appellant faced two trials; that the earlier trial was set aside and a subsequent one ordered; that the evidence tendered in the subsequent trial was contrary to the earlier one. It was further submitted that under Article 50 of the Constitution of Kenya, the Appellant was entitled to be told the case he was to face in advance. Counsel singled out the evidence of PW2 at pages 13, 16 and 40 of the record where

she allegedly stated that the Appellant threatened the complainant with a panga and that she went to the Appellant's house which in the later trial she denied.

12. I have looked at the evidence on record. The evidence which counsel for the Appellant referred to at pages 13 of the record was that of one D I. It is this witness who denied that the Appellant had threatened them with a panga if he and the complainant insisted on leaving his house. This witness did not testify in the subsequent trial after retrial was ordered. As regards the evidence of PW2 in the retrial, she was the complainant's mother. I do not find any contradiction in her evidence at pages 16 and 42 of the record. She never said in the original trial that she went to the house of the Appellant as suggested by the learned Counsel for the Appellant. What she is recorded to have told the court in the original trial was:-

> ***"I am saying what they told me. They said that since GORDON was a neighbour they decided to escort him. They went to his house but coming out became impossible. They said GORDON locked them up. He only opened for them the next day."***

And then:-

> ***"It is true you are my neighbour. I asked neighbours that night. Your house was locked. The children said you locked them up. Your wife was not there."***

13. During cross-examination at the retrial, it was never suggested that she had allegedly in the initial trial stated that she visited the Appellant's house. On the evidence on record, I am satisfied that the evidence of PW2 (mother of the complainant) was consistent and she never contradicted herself in the two trial. What she stated in the initial trial is what her children told her about the Appellant locking his house. As regard the evidence of D I at pg 13, of the record, there was no contradiction as he never testified in the retrial.

14. As regards the provisions of Article 50 of the Constitution of Kenya as to fair hearing, I have not found any material to suggest that the Appellant was not accorded a fair trial. It was never alleged that the Appellant applied for witness statements but was denied the same. It was further not alleged that there was any ambush upon the Appellant by the prosecution. Accordingly, I reject the ground that the Appellant was not accorded a fair trial or that he was convicted on inconsistent evidence.

15. The third ground was that the case was not proved to the required standard. It was submitted that the trial Court did not evaluate the evidence properly; that the evidence of the Clinical Officer was that the condition of the complainant's vagina was normal despite the allegation of defilement throughout the night; that the trial court relied on an infection which however could not be traced to the Appellant as he was not examined.

16. I have considered the evidence and the judgment of the trial Court. The trial Court evaluated the prosecution's evidence and found that the complainant and her brother were playing outside their gate on the material date at about 7.00 p.m when the Appellant took them to his house; that a search by the complainant's parents among their neighbours for the two did not yield any positive result; that the following morning when the complainant turned up, she told PW2 that she had been defiled by the Appellant; that on physically examining the complainant, PW2 found that the complainant's vagina was reddish and wide. That the complainant was taken to hospital whereby PW4, the Clinical Officer confirmed that the complainant had indeed been defiled. To my mind, the fact that PW4, did not find any deposit of sperms in the vagina of the complainant, does not discount the fact that she was defiled. There was evidence of the fresh tearing of the hymen and abnormal pus cell on her vagina being evidence of penetration. This was consistent with PW1's evidence that the Appellant had defiled her. In her evidence she had stated:-

> ***"He did bad things to my private parts. He removed my pant..... He slept on my top. I felt pain in my private parts. He then put his private part on mine and I***

felt pain..... He put his thing severally on me.....”

17. In my view, the evidence of PW1 and the rest of the prosecution witnesses was consistent. PW1 knew the Appellant very well as they were neighbours. Her evidence was not challenged on cross-examination as to what happened on the night of 20/1/2008. She was categorical that it was the Appellant who defiled her. The medical evidence proved that there had been penetration. The medical evidence corroborated PW1's evidence. Failure to examine the Appellant on the sexually transmitted disease that was found in the complainant, in my view, does not weaken the prosecution case. To my mind, the case was proved to the required standard.

18. The other ground is that the trial Court did not consider the Appellant's defence. I note that at page 56 of the record, the trial Court set out the Appellant's defence. At page 59 of the record, the trial Court considered the Appellant's denial as opposed to the prosecution's testimonies. The court made a finding that the Appellant was a neighbour of the complainant; that the complainant knew the Appellant very well; that there was nothing to suggest that the complainant could have mistaken the Appellant as the one who had defiled her; and finally that there was nothing to suggest that the Appellant had been framed. I agree with the trial Court and I see no reasons to fault it.

19. The other grounds that the evidence did not support the charge and that the charge was defective were not argued. On my part, upon carefully examining the charge sheet and the evidence, I am satisfied that the evidence tendered at the trial Court supported the charge and that the charge did disclose an offence which the Appellant was convicted of.

21. In the premises, I find that the Appeal has no merit and I hereby dismiss the same.

DATED and DELIVERED at BUNGOMA this 28th day of July, 2014

A. MABEYA

JUDGE