IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL NO. 35 OF 2013

BETWEEN

DOUGLAS MBERA ……..... APPELLANT

AND

REPUBLIC ……...…….……..... RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 604 of 2013 at Senior Principal Magistrate's Court at Migori, Hon. P. Kulecho, RM dated on 17th March 2014)

JUDGMENT

1. The appellant **DOUGLAS MBERA OMWERI** appeals against a conviction and sentence of 20 years imprisonment imposed after he was found guilty of defilement contrary to **section 8(1)(3)** of the ***Sexual Offences Act, 2006***. The particulars of the offence as set out in the charge were that:

On dates between 15th June 2013 and 31st August 2013 at [Particulars Withheld] within Migori County in the Republic of Kenya, he intentionally and unlawfully caused his penis to penetrate the vagina of IW alias LA, a child aged 14 years.

2. The accused also faced an alternative charge of committing an indecent act with a child contrary to **section 11(1)** of the ***Sexual Offences Act*** based on the same facts.

3. The prosecution marshalled four witnesses to prove its case. PW1, the complainant testified that she was aged 13 years old and a student at SJO primary school. She stated that she knew the appellant as *Baba Ombisi*. She testified how on three occasions she was called by the appellant, asked to go to his house and was sexually assaulted. After each incident she was given Kshs. 50/= but on the third occasion she was given Kshs. 500/=.

4. One Sunday after her mother had gone to church, PW1 recalled that the appellant asked her to go to his house. She was given a brief case, a yellow dress and five hundred shillings. She used the money to buy a pair of sandals and more clothes. Her mother later found the brief case and clothes. Her mother took her to the police where she was questioned and she disclosed how she had obtained the clothes.

5. PW2, PW1's mother, testified that on 1st September 2013, after church, she came home and she found a black suit case and three pairs of shoes in the house. On the 2nd September 2013, she found a purple skirt and orange top which were new. She asked PW1 where the items came from but she did not tell her. She reported to the school that PW1 had strange items but PW1 could not tell the head teacher where she got them from. She reported to the police. When PW1 was interrogated, she disclosed that she had sexual intercourse with the appellant who was referred to as *Baba Ombisi*.

6. PW3, the medical doctor from Migori District Hospital testified that she examined PW1 on 4th September 2012. He found that the hymen was torn and the pregnancy test was positive.

7. PW4 the investigating officer, confirmed that on 3rd September 2013, she received PW1 and PW2. She interviewed PW1 who informed her that the appellant had intercourse with her and would give her money after the act. She was told by PW1 that on each occasion the appellant gave her Kshs. 500 which she used to buy clothes and on another occasion he bought her a suit case, a dress and three pairs of sandals. After this, she caused PW1 to be examined by PW3, collected the items that had been given to PW1 by the appellant, arrested and charged the appellant.

8. When the accused was put on his defence, he gave unsworn evidence where he denied the charge. He stated that PW2 was a tenant in the premises where he was a care taker and he had issued her with a notice to vacate as a result of differences in 2013. She vacated in August 2013 while he was away and was only arrested when he came back. He stated that if the complainant came to his house, she could have been seen by his family. He also stated that he has a sexually transmitted disease which PW1 could have contracted.

9. The learned magistrate found that the prosecution had proved its case beyond reasonable doubt and convicted the appellant. The appellant appeals against the judgement on the following grounds raised in the petition of appeal:

i. *That the learned trial magistrate grossly erred both in law and in fact in convicting and sentencing the appellant on the offence the appellant had pleaded not guilty and a plea of not guilty entered.*
ii. *That the learned trial magistrate grossly erred in law and fact in her finding and holding that the prosecution case had been proved beyond reasonable doubt.*
iii. *The learned trial magistrate grossly erred in law and in fact in convicting and sentencing the appellant on the basis of a charge that was patently defective and thus null ab initio so far as the crucial and/ or high witness of the matter was not summoned to come and testify in support of the complaint evidence.*
iv. *That the learned trial magistrate further grossly erred both in law and in fact in finding, convicting and sentencing the appellant on the basis of offence charged when the silent ingredients had not been captured as well as in the evidence recorded pertaining the doctrine evidence, consequently the examination of the minor's private part showed the hymen was torn and pregnancy was positive yet DNA test was not done.*
v. *That the learned trial magistrate further grossly erred both in law and in fact to misapprehended the tenor and extent the nature of the offence charged, consequently the judgement is coloured with illegalities of and commission by arriving at erroneous decision thus render same manifestly unsafe.*
vi. *That the trial magistrate further grossly erred both in law and in fact in disapproved the appellant's unsworn defense evidence in support of the prosecution side, consequently in prosecution case was single evidence which has no probative value to sustain the upshot.*
vii. *That the trial magistrate further grossly erred both in law and in fact in convicting and sentence the appellant on the basis of un corroboration evidence of the minor's and the doctrine was so far examine the minor when necessary caution and/ or circumspection thus to establish the principal laws, consequently the judgement of the trial magistrate is legally unattainable.*

10. Ms Owenga, learned counsel for the State, supported the conviction on grounds that there was direct evidence demonstrating that the accused committed the offence and that the complainant's evidence was consistent, precise, dependable and corroborated by the evidence of other witnesses.

11. As this is the first appeal, the court is enjoined to consider the entire evidence, evaluate it and reach an independent conclusion bearing in mind that it neither heard nor saw the witnesses testify (see ***Okeno v Republic*** **[1972] EA 32**).

12. In order to prove the offence of defilement under **section 8(1)(3)** of the ***Sexual Offences Act***, the

prosecution must establish that the accused committed an act which caused penetration. Penetration is defined at **section 2** of the ***Act***, to mean the partial or complete insertion of the genital organs of a person into the genital organs of another person.

13. The fact that the appellant is the one who committed the act was established by PW1 who testified that she knew the appellant as *Baba Ombisi*. She was defiled on separate occasions and given money with which she bought new clothes. In the circumstances, there was no opportunity for mistaken identity.

14. PW1's evidence of sexual intercourse was clear, consistent and credible. She testified that it was the first time for her to have sexual intercourse. Her testimony was corroborated by the medical evidence of PW3 who confirmed that her hymen had been torn as evidence of prior sexual intercourse. **Section 124** of the ***Evidence Act*** is clear that it is not necessary for the evidence of a single witness to be corroborated in sexual offences. As I have outlined above, the evidence of the fact of penetration were corroborated by the other evidence.

15. In the case of ***Andrew Cauri v Republic*** **NAI CA Criminal Appeal No. 132 of 2008 [2013]eKLR,** the Court of Appeal had his to state about the necessity of DNA evidence; *"We agreed that there are instances in which an accused person ought to be medically examined before a court of Law can positively connect him to commission of an offence but we do not think that this particular case there was dearth of evidence to enable the two (2) courts below reach a conclusion that it was the appellant who defiled the complainant. Even in the absence of a medical examination on the appellant, there was sufficient evidence to enable the trial court reach the finding that it arrived at, we must therefore reject the third ground of appeal.*" In light of this evidence, and the finding that the complainant had been sexually assaulted by the appellant, it was not necessary to perform a DNA test to establish that the appellant had done the felonious act.

16. Age is crucial ingredient to be proved in sexual offences. The age of a child is a question of fact to be proved by evidence. In this case, the original immunization card of the child was produced which showed that she was born on 21st September 1999, hence at the time of the offence, she was 14 years old. The accused did not contest this issue on cross-examination.

17. The appellant's defence is that he did not know the complainant cannot be believed in light of the evidence of PW1. The allegation of a grudge with PW2 is to be disbelieved as the appellant did not put any questions on the issue to PW2 in cross-examination particularly when she stated that she did not know who *Baba Ombisi* was.

18. I also agree with the learned magistrate that the fact that the appellant suffers from an undisclosed sexually transmitted disease is of no consequence as it was unsubstantiated and even if it was true, it does not mean that the complainant would be infected. The magistrate also observed that the appellant disclosed that he was sick on 26th February 2014 yet the offence took place between June and September 2013 hence he could have contacted the sickness much later.

19. On the whole therefore, I find that the conviction was well founded on the evidence established by the prosecution. It was unnecessary to call any other witness as contended by the appellant.

20. The sentence imposed was well within the law. It was neither harsh nor excessive.

21. The appeal is dismissed.

DATED and DELIVERED at MIGORI this 15th August 2014

D.S. MAJANJA

JUDGE