**IN THE HIGH COURT AT MIGORI**

**CRIMINAL APPEAL NO. 27 OF 2014**

**(FORMERLY KISII HCCRA NO. 261 OF 2012)**

**BETWEEN**

**NAHASHON OTIENO ODHIAMBO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal from the original conviction and sentence in Criminal Case No. 204 of 2012 at Senior Principal Magistrate's Court at Migori, Hon. E. M. Nyaga, SRM dated on 12th November 2012)***

**JUDGMENT**

1. The appellant, **NAHASHON OTIENO ODHIAMBO**, was convicted of the offence of defilement contrary to **section 8(1)** and **(2)** of the ***Sexual Offences Act, 2006***. He was sentenced to serve life imprisonment. The particulars of the offences were that on 2nd April 2012 at [Particulars Withheld] , Migori County he intentionally caused his penis to penetrate the vagina of JA a child aged 5 years. He also faced an alternative charge of committing an indecent act with a child contrary to **section 11(1)** of the ***Sexual Offences Act***. He now appeals against the conviction and sentence on the principal charge.

2. In order to prove the offence, the prosecution called 4 witnesses. PW 1, the child gave unsworn testimony. She stated that on 2nd April 2012 at around11 am, the appellant, *"did bad things to me."* She was not cross-examined as the learned magistrate considered her vulnerable. PW 2, her mother, testified that on the material day she went home early as she was feeling unwell. She found PW 1 lying at her door complaining of pain. She examined her and saw a white discharge. She told her that the appellant had defiled her. She identified the appellant as the person who works for *"Baba Daddy."* She knew the appellant as the person working for her in law. She took the child to Savo dispensary first and then to Migori District Hospital.

3. PW 3, a clinical offer at Migori District Hospital, examined PW 1 when she was brought to the hospital on the same day. When he examined her she had a tender abdomen, her vagina had a laceration and there was seminal fluid flowing. The vaginal swab revealed red blood cells and active spermatozoa. He also examined the appellant who was accompanied by a police officer. There was seminal fluid when his penis was squeezed.

4. PW 4, the investigating officer, confirmed PW 2 came to Migori Police Station on 2nd April 2012 at about 5 pm to report the defilement of PW 1. By the time the report was made the area assistant chief had already apprehended the appellant. She later arrested him.

5. In his defence where he gave an unsworn statement he denied the allegations against him. He stated he was arrested away from the place he works when he went to collect his dues.

6. The learned magistrate found that the prosecution had proved its case. The appellant now appeals against the conviction and sentence primarily on the ground that there was no tangible evidence to prove that he committed the offence. He also stated the sentence imposed was heavy and harsh without considering that that he was an orphan and only bread winner of the family.

7. As this is the first appeal, the court is enjoined to review all the facts and evidence and come to its own independent conclusion bearing in mind that it neither saw nor heard the witnesses testify (see ***Okeno v Republic*** **[1972] EA 32**).

8. In order to secure a conviction for the offence of defilement under **section 8(1)** of the ***Sexual Offences Act***, the prosecution must establish that the person has committed an act which causes penetration with a child. *"Penetration"* under **section 2** of the ***Act*** means, *"the partial or complete insertion of the genital organs of a person into the genital organs of another person."*

9. In his written submissions and grounds of appeal the appellant contends that he was charged with an offence not known in law hence his trial was illegal. According to the charge, the section under which he was charged is **section 8(1)(2)** of the ***Sexual Offences Act***. Obviously no such section exists in the statute. However, **section 134** of the ***Criminal Procedure Code*** dealing with the framing of charges states;

> *Every charge shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."* [Emphasis mine]

10. The charge as framed was lucid and it disclosed the offence of defilement and I do not think that the error fatal to the charge and the appellant was not thereby prejudiced nor was a failure of justice occasioned. Such an error is curable under **section 382** of the ***Criminal Procedure Code*** which provides;

> *382. Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:*
>
> *Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.*

11. The first issue for consideration in this appeal is whether the accused committed the offence. PW 1 identified the appellant as the person who did bad things to her. PW 1 also identified him to PW 2, her mother, as person known to her. There is no reason to believe that she was lying to her mother. PW 2 also knew the appellant as someone who worked for her relative. All this evidence points to positive identification of the appellant.

12. The next issue is that of penetration. This was proved by the testimony of PW 1. Independent testimony of PW 2 confirms the unsworn testimony of the PW 1. The fact that she was in pain and her account to the mother coupled with the fact that he account was confirmed by physical examination which revealed a white discharge. She also witnessed a tear and bleeding at the hospital. The medical evidence of PW 3 also corroborated the fact that PW 1 had been defiled.

13. It is in light of the prosecution evidence that the appellant's defence, which was a mere denial, could not stand scrutiny. I therefore find and hold that there was sufficient evidence that it is the accused who defiled PW 1.

14. The issue of proof of age is a question of fact. The age of the child PW 2 proved that the child was 5 years old as shown on her clinic card. PW 3 also estimated the age of the child to be 5 years in theP3 form produced in evidence. For purposes of the ***Sexual Offences Act,*** it is clear that the child was less than eleven years old which is the lowest bracket for sentencing under **section 8** of the ***Act***. The fact that the child was in nursery school leaves no doubt that she was below the age of eleven. The sentence of a person convicted of defilement of a person less than 11 years old is a mandatory sentence of life imprisonment. In the circumstances, the sentence is affirmed.

15. I now turn to the issue concerning the testimony of the child which I think merits consideration. When PW 1 testified as the first witness and the proceedings were recorded as follows;

*18/4/2012*

*Before E. M. Nyaga, SRM*

*Prosecutor: Dorcas*

*Court Clerk: Margaret*

*Accused: Present*

*PW 1: Minor – Girl*

*Order: The child is obviously not able to understand what taking an oatha means. She's timid and fragile.*

*I am J A. I go to school at [Particulars Withheld]. I am in baby class. I don't know my age. On 24/4/12 at around 11 am the accused did bad things to me.*

*Prosecution: I wish to stand down the witness as she not capable of being cross-examined.*

*Court: PW 1 is hereby stood down*

16. The mode of examination of children of tender years is not set out in **section 19** of the ***Oaths and Statutory Declaration Act (Chapter 15 of the Laws of Kenya)***. In the case of ***Johnson Muiruri v Republic*** **[1983] KLR 445**, the Court of Appeal stressed the need for setting out the questions put by the court to the child and the responses given to those questions by the child but in ***Mohammed v Republic*** **[2005] 2KLR 138** the Court held that it is not mandatory to record both questions and answers from the witness unless in the circumstances of any particular case there is need for the setting out of the particular questions and answers. It must be apparent from the record that the decision taken by the learned magistrate is supported by the answers given by the child. In this case it is apparent that the learned magistrate concluded that the child was unable to take the oath.

17. According to the record the learned magistrate acceded to the suggestion by the prosecutor to stand down the witness on the ground that she was not capable of being cross-examined. The learned magistrate acceded to this request without giving an opportunity to the appellant to respond. Furthermore, the appellant was not given an opportunity to cross-examine or put questions to the witness. **Article 50(2)(k)** of the Constitution protects the right of every accused to challenge evidence given against him. Even where the victim is young or vulnerable the right to challenge evidence through cross-examination should not be denied. The accused should always be given an opportunity to put forth his questions. It is for the court to provide sufficient safeguards to the vulnerable witness under **section 31** of the ***Sexual Offences Act*** by for example

asking the questions through an intermediary. **Article 50(7)** of the Constitution likewise provides that, *"In the interest of justice, a court may allow an intermediary to assist a complainant or an accused person to communicate with the court."*

18. In the present case neither the learned magistrate nor the prosecutor directed their minds to the appointment of an intermediary. As a result the appellant was denied the chance to put forth his question to the child. Was there a miscarriage of justice in this case? In ***MM v Republic*** **CA NRB Crim. App. No. 41 of 2003 [2014]eKLR**, the Court of Appeal considered such a position and stated as follow;

> *Turning to the appeal before us, we reiterate that the victim did not herself testify due to her tender years. In cases like this where the victim is too young to give evidence, section 33 of the Sexual Offences Act allows the trial Court to rely on either the evidence of the surrounding circumstances, or under section 31 (4), to give evidence through an intermediary or both.*
>
> *In the absence of the complainant's testimony, there was independent evidence of the complainant's mother, that of the father and the clinical officer that linked the appellant to the defilement of the complainant. From what we have said, we conclude that it was in error for the two courts below to treat the evidence of the complainant's mother as that of an intermediary, the steps leading to such appointment having not been followed. It was sufficient to rely on her direct evidence as an independent eye witness.*
>
> *Any requirement that insists on a child victim of defilement, irrespective of his or her age to testify in order to found a conviction would occasion serious miscarriage of justice.*

19. In light of the entire evidence, I have outlined above, I do not think there was any miscarriage of justice as a result of the learned magistrate's failure to give the appellant an opportunity to examine the child. As I have outlined above, there is sufficient and independent evidence to support the conviction.

20. The conviction and sentence are therefore affirmed and the appeal is dismissed.

**DATED and DELIVERED at MIGORI this 24th day of October 2014**

**D.S. MAJANJA**

**JUDGE**

Appellant in person.

Ms Owenga, Principal Prosecuting Counsel, instructed by the Director of Public Prosecutions for the respondent.