



**IN THE HIGH COURT AT HOMA BAY**

**CRIMINAL APPEAL NO. 40 OF 2013**

**BETWEEN**

**SAMWEL ODOYO AJUOGA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Appeal from the original conviction and sentence in Criminal Case No. 1148 of 2012 at the Chief Magistrates Court at Homa Bay, Hon. P. Mayova, Ag SRM, dated 9<sup>th</sup> December 2013)***

**JUDGMENT**

1. The appellant, **SAMUEL ODOYO AJUOKA**, was charged with defilement contrary to **section 8(1)** as read with **section 8(2)** of the ***Sexual Offences Act, 2006***. It was alleged that on 28<sup>th</sup> September 2012 at [Particulars Withheld] of Mbita District, he intentionally and unlawfully caused his penis to penetrate the vagina of EA, a child aged 8 years. He also faced an alternative count of an indecent act with a child contrary to **section 11(1)** of the ***Sexual Offences Act*** based on the same facts.
2. The appellant was convicted on the principal charge and was accordingly sentenced to serve life imprisonment. He now appeals against the conviction and sentence on the following grounds which may be summarized as follows; That the trial court denied him his constitutional right of access to the prosecution witness statements before the start of the proceedings and despite his constant request for them; the trial court erred in holding that he was not medically linked to the offence and that the medical evidence did not amount to corroboration and that the learned magistrate erred in shifting the burden of proof. The appellant supplemented the grounds by filing written submissions on the issues raised.
3. Learned counsel for the State, Mr Oluoch, opposed the appeal. He submitted that the appellant was given witness statements and there was an order to that effect and that he never complained thereafter and that he actively participated in the proceedings. He urged that there was sufficient evidence to convict the appellant and that under the proviso to **section 124** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** it was not necessary for the complainant's testimony be corroborated. Counsel finally submitted that the learned magistrate did not shift the burden of proof and dealt properly with the evidence.
4. Before I consider the evidence, I will deal with the first ground of appeal that the appellant was not issued with witness statements. The record shows that on 16<sup>th</sup> October 2012, after recording the plea, the learned magistrate directed that the appellant be supplied with the statements. Thereafter, the appellant did not request for statements or indicate to the court that the request had not been met. He actively participated in the proceedings by cross examining the witnesses and

- giving his own statement. I therefore find no merit in this ground.
5. The other grounds of appeal relate to appreciation of the evidence. As the first appellate court, this court is entitled to re-appraise the evidence and come to its own conclusion bearing in mind that it neither heard nor saw the witnesses testify.
  6. 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.*"
  7. As regards the issue of penetration, EN testified that on 28<sup>th</sup> September 2012 at about 6.00 am while she was at home, the appellant came, blocked her mouth and had sexual intercourse with her. She informed her sister of the incident and her mother. Her mother, PW3, took her to the Mbita District Hospital where she was treated and issued with a P3 form.
  8. PW3, the complainant's step mother, testified PW 1 was at her home when she was defiled. She testified that she was informed of the incident by PW 1 in the morning of 28<sup>th</sup> September 2012. She saw PW 1's private parts were swollen. She used warm water to massage her as she was in deep pain. When she was asked to identify the person, she was reluctant at first but said it was the appellant. PW 3 knew the appellant as he was a friend to the children.
  9. PW 2, a clinical officer at the Hospital, confirmed that he examined PW 1 on 28<sup>th</sup> September 2012. When he examined the complainant's private parts he noted that there were no blood stains, there was a laceration of the labia majora and the hymen was broken. He did not see any discharge or evidence of venereal infection. He concluded that there was penetration. He filled the P3 form on 3<sup>rd</sup> October 2012.
  10. PW 4, a police officer, recalled that on 1<sup>st</sup> October 2012, the complainant came with PW 3 and made a complaint about the appellant having defiled PW 1. He gave them the P3 form. On 25<sup>th</sup> October 2013, he received information that the appellant was spotted at the Mbita Children Office. He proceeded there and arrested him. She testified that the appellant was identified by PW 1.
  11. When put on his defence, the appellant gave an unsworn statement. He stated that he used to herd cows for PW 1's mother but she refused to pay him. He was later arrested while grazing cattle.
  12. PW 1's testimony was clear that she was defiled. Although such evidence need not be corroborated by other evidence, by reason of **section 124** of the **Evidence Act**, corroboration is to be found in the evidence of PW 2 and PW 3. PW 2 received the complainant soon after the incident and examined the complainant's private parts which showed she had been defiled. PW 3 did not find any evidence of discharge or blood stains on PW 1 genitalia because PW 2 had cleaned her up. He however observed a tear and laceration on the private parts which led him to conclude that there had been penetration.
  13. The prosecution also proved that it is the appellant who committed the felonious act. PW 1 knew the appellant and she identified him to PW 2 who also knew him. In the circumstances, I hold that the issue of mistaken identity does not arise. In his defence, the appellant seemed to imply that there was a grudge between him and PW 1's mother but in light of the prosecution evidence, the defence case is but a mere denial that does little to create doubt.
  14. The age of the child is a question of fact and PW1's age was established by the complainant herself who stated she was 8 years old. The clinical officer confirmed the age and PW 3 produced the child health card which confirmed this fact. All this evidence points to the fact that the age was proved.

15. Having considered the entire evidence, I am satisfied that the offence of defilement was proved.  
The sentence imposed was the sentence provided by the law.

16. I affirm the conviction. The appeal is dismissed.

**DATED and DELIVERED at HOMA BAY this 24<sup>th</sup> day of November 2014**

**D.S. MAJANJA**

**JUDGE**

Appellant in person.

Mr Oluoch, Senior Assistant Director of Public Prosecutions, instructed by the Office of Director of Public Prosecutions for the respondent.