REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 20 OF 2013

A O O.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[From original conviction and sentence in the Principal Magistrate's Court at Ukwala Criminal Case No. 106 of 2011]

J U D G M E N T

The appellant was charged with the offence of Defilement contrary to section 8 (1) (3) of the Sexual Offences Act No. 3 of 2006.

The particulars were that on diverse dates between the months of June and December 2010 at [particulars withheld] Sub Location, North East Location in Ugenya District within Nyanza Province intentionally caused his penis to penetrate the vagina of L A O a child aged 15 years.

The alternative charge was that of Indecent Act contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006.

The particulars were that on diverse dates between the months of June and December 2010 at [particulars withheld] Sub Location, North East Location in Ugenya District within Nyanza Province did commit an indecent an indecent act to L A O a girl aged 15 years by touching her breasts.

The appellant was sentenced to 20 years imprisonment after a full trial. The appellant has filed this appeal citing several grounds.

The brief facts were that PW2 the in law to the complainant noticed that she had swollen legs. She then took her to the hospital whereupon she was confirmed that she was 5 months pregnant. Upon inquiry she told PW2 that the appellant was responsible. The appellant was later arrested and taken to the police station and subsequently charged.

The complainant told the court that he had slept with the appellant 4 times and in her unsworn evidence she said that he was responsible. On cross examination however she denied that it was the appellant who had defiled her.

The appellant gave unsworn evidence. He denied the charge and further said that during interrogation she told the officers that at her home she had sex with her in laws.

There are about 3 issues raised in the appellant's petition of appeal which are:

a. **Whether the child's evidence ought to have been corroborated.**
b. **Whether the appellant who had sexually abused the complainant and therefore responsible for her pregnancy.**
c. **Whether there was sufficient evidence to convict the appellant.**

The question of the appellant's age came during trial. The respondent did not have any objection to the production of the appellant's birth certificate which shows that he was born on [particulars withheld] 1996 meaning therefore that at the time of commission of the offence he was 14 years old.

The only available evidence which led to the appellant's conviction was that of PW1 the complainant. She gave unsworn evidence and in a strange twist the trial court permitted her to be cross examined by the accused. Legally and procedurally this was wrong. Once a party chooses to give unsworn evidence then he or she is not subject to cross examination. Even in the cross examination the complainant denied that it was the appellant who had defiled her.

Under the provisions of section 124 of the Evidence Act the evidence of minor ought always to be corroborated but in a situation where there is no corroboration the court ought to convict when it is satisfied that the minor is saying the truth.

From the evidence on record I do not think there was sufficient to suggest that the minor was saying the truth. First of all she never stated the place where she had sex with the appellant 4 times. I believe that she ought to have been candid enough to state who and where this occurred. But to state that he slept with her 4 times was too vague and general.

Beside this the appellant raised the issue of her admitting that she slept with her in laws. Although the evidence was unsworn, it lends credence to the fact that the provisions of section 124 of the Evidence Act may not benefit the complainant.

It would have been better in my opinion to buttress this matter with sufficient medical proof like for example a production of DNA reports. Such analysis would put to rest the question of whether the appellant was the father of the child. Even more puzzling is why the complainant had to wait for several months without notifying any of the close friends. The age of 15 years suggests to me that even if the minor is afraid there must be at least a confidant within the society whether in school or out of school that she can confide to including her teachers.

I do find therefore that there are glaring loopholes which the trial court failed to consider. The benefit ought to go in favour of the appellant. He is hereby set free unless lawfully held.

Dated, signed and delivered at Kisumu this 16th day December, 2014.

H.K.CHEMITEI

JUDGE