SOLOMON WANJALA.....PETITIONER.

VERSUS

REPUBLIC.....RESPONDENT.

(*Being an appeal from the original conviction and sentence of D.M. Ochenja – PM. in Criminal Case No. 487 of 2009 delivered on 4th February, 2011 at Kitale*)

J U D G M E N T.

This appeal arises from the decision and judgment of the Principal Magistrate at Kitale in Criminal case No. 487 of 2009, in which the appellant, **SOLOMON WANJALA**, was convicted and sentenced to life imprisonment for the offence of defilement contrary to section 8 (1) read with section 8 (2) of the Sexual Offences Act.

It was alleged that on the 21st January, 2009 in Trans Nzoia West district, the appellant unlawfully and intentionally caused penetration of his genital organ into the genital organ of N.K, a child aged eight (8) years.

There was an alternative count of indecent Act with a child contrary to section 11 (1) of the Sexual Offences Act but the appellant was convicted and sentenced on the main count of defilement.

Being dissatisfied with the conviction and sentence, the appellant preferred the present appeal based on the grounds of appeal filed herein on his behalf on the 11th February, 2011 by **Risper Arunga & Co. Advocates**.

The grounds are as follows:-

1. That the learned magistrate erred in law and infact when he failed to appreciate that the failure of the prosecution to establish the age of the complainant was fatal to the case.

2. That, the learned magistrate erred in law and in fact when he held that the complainant had been defiled when the medical evidence and evidence on record did not support the finding.

3. That the learned magistrate erred in law when he relied on the uncorroborated evidence of the prosecution witnesses.

4. That the learned magistrate erred in law and in fact when he relied on hearsay medical evidence to arrive at his decision.

5. That, the judgment was based on extraneous matters.

At the hearing of the appeal, M/s. Arunga appeared for the appellant and argued ground one separately while combining grounds two and four and arguing them collectively, likewise grounds three and five. On ground one, learned counsel submitted that the age of the complainant was not established as the

complainant stated that she was nine (9) years and while the clinical officer (PW6) stated that she was about eight (8) years old. Further, the trial court in its judgment placed the age of the complainant between 9 to 12 years.

Relying on the decision in the case of **John Cardon Wagner vs. Republic (2010) e KLR,** learned counsel contended that the age of a complainant in cases of defilement is a crucial matter as it would impact on the sentence to be meted out. On grounds two and four, learned counsel submitted that there was no medical evidence to prove that the complainant was defiled since the alleged blood stained clothes were not produced in court and the evidence of the clinical officer amounted to hearsay as he did not treat the complainant.

On grounds three and five, learned counsel submitted that the trial court relied on the uncorroborated evidence of the complainant, since the person alleged to have witnessed the incident denied the fact. The said person (PW4) stated that the assailant ran away without him (PW4) identifying him (the assailant). Learned counsel submitted that PW2 and PW3 relied on information given to them by PW4 to the extent that he had seen the complainant being defiled by the appellant. Further, the evidence by PW4 contradicted that of the complainant yet the trial court relied on it to convict the appellant.

Learned counsel contended that the evidence of PW4 did not corroborate that of the complainant with regard to the identity of the assailant.

The learned counsel therefore urged this court to allow the appeal.

The learned prosecution counsel, **M/s. Bartoo**, opposed the appeal on behalf of the state/respondent by submitting that the age of the complainant was ascertained and proved to be eight (8) years old and that the appellant was properly convicted and sentenced. Further, under section 124 of the Evidence Act, corroboration is not required in sexual offences.

The learned prosecution counsel went on to submit that the trial court observed the minor complainant and believed her evidence. There was therefore no need for corroboration. In any event, PW4 confirmed that an offence was committed against the complainant by an assailant who was identified as the appellant. Further, the P3 form indicated that the complainant had been defiled. The learned prosecution counsel urged this court to dismiss the appeal.

Having considered the rival submissions, it becomes incumbent upon this court to reconsider the evidence adduced at the trial and arrive at its own conclusion bearing in mind that the trial court had the advantage of seeing and hearing the witness (see, **OKENO VS. REPUBLIC (1972) EA 32).**

In that regard, the prosecution's case was briefly that on the material date, the complainant **N.M (PW1),** a nine (9) year old primary school pupil was heading to her home from a posho mill when she met the appellant on the way. The appellant who was previously known to her knocked her down and pulled her into a bush where he defiled her. In the process, her mouth was covered with clothes. A person called M (PW4) appeared at the scene and rescued her even as the appellant took to his heels. The incident was reported to her mother (PW2) by the said M and later to the police. She was taken to the district hospital where she was examined and treated. The complainant's mother **J.H (PW2)** indicated that she was informed by M that he had found the appellant defiling the complainant near a river before taking off. She (PW2) went looking for the appellant while in the company of the complainant but they did not find him in his house. She examined the complainant and noted spermatozoa on her thighs and vagina. There was bleeding from the vagina. She (PW2) received confirmation from the complainant that the appellant had defiled her and reported to a village elder and eventually to the police at Kitale police station. Thereafter, the complainant was taken to the Kitale District Hospital where she was treated and discharged.

R.K (PW3), is the father of the complainant. He was at home on the material date at about 6.00 p.m. when he heard the complainant and Moses, quarrelling. He remained inside the house but after thirty (30) minutes he could not see the complainant and her mother (PW2). He picked a club (rungu) and followed them into the homestead of the appellant where he found the appellant's wife and mother. It was then that

he enquired as to what had happened and was informed that the appellant had defiled the complainant. Engulfed by shock, he ran and reported the matter to the village elder. **Moses Barasa (PW4**) indicated that he was on his way to charge his cell phone when he spotted a person lying on the complainant near a stream. He could not identify the person. He was a distance of about 50 metres away. The person ran away on seeing him (PW4). He (PW4) informed the complainant's mother about the incident.

Senior Sergeant Zelea Akiru (PW5) of Kitale police station was at the police station on the 28th January, 2009 at about 4.30 p.m. when the appellant was taken there on allegations of having defiled the complainant. He (PW5) arrested the appellant and commenced investigations of the case. He later charged the appellant with the present offence.

A clinical officer based at the Kitale district Hospital, **Reuben Bunyasi (PW6)**, produced a medical examination report (P3 form) prepared and signed by his colleague one Masinde who carried out a medical examination of the complainant.

The appellant denied responsibility for the offence. His defence was that on a date he could not remember he had gone to the prison to see a nephew. He thereafter returned home and had his lunch. In the evening, he attended a funeral at a neighbouring homestead. He left at 9.00 p.m. and went home where-of his wife informed him that people were looking for him for defiling a girl. On the following day, he reported the matter to the village elder but after a few days rumours were spreading that he had defiled the complainant. Later, while at a shopping centre, the complainant's father summoned and told him that he (complainant's father) had been sent to arrest him. He (complainant's father) demanded that he (appellant) sells his land to buy his freedom. A sale agreement was effected but he (appellant) was later arrested and charged.

The appellant contended that he was arrested and charged after refusing to give the complainant's father some money.

With the closure of the defence case, the learned trial magistrate considered the evidence in its totality and rendered his judgment in which he concluded that the prosecution had established its case against the appellant beyond reasonable doubt. Having re-examined the evidence, this court is satisfied that the offence of defilement was duly established to the required standard by the testimony of the complainant (PW1) in conjunction with the medical evidence by the clinical officer (PW6) which evidence was in the form of the findings made by his colleague after examining the complainant. This was punishable under section 77 of the Evidence Act. Therefore, grounds two (2) and four (4) of the appeal are unsustainable.

With regard to the identification of the assailant, the evidence by the complainant clearly indicated that the appellant was the culprit. He was previously and very well known to the complainant who not only knew his name and his house, but also his children by names, S1, S2 and C. Besides, the offence was committed in circumstances which were favourable for identification. The evidence showed that the offence was committed before darkness i.e. between 4.00 p.m. to 6.00 p.m.

Indeed, the evidence of identification of the appellant by the complainant was based on recognition which is more reliable and in most cases, renders the possibility of mistaken identity remote.

Under Section 124 of the Evidence Act, the evidence of the complainant did not require corroboration and could be acted upon by the trial court if it was satisfied that the complainant spoke the truth. Therefore, the evidence by Moses (PW4) did not have to corroborate that of the complainant with regard to the identification of the appellant as the offender. It however, corroborated the fact that the complainant was indeed sexually assaulted by an individual suspected and eventually proved to have been the appellant herein. The defence raised by the appellant was clearly discredited by the totality of the evidence adduced against him by the prosecution. His suggestion that he was arrested and charged after failing to give money to the complainant's father was apparently an afterthought.

From the foregoing, it is obvious that grounds three (3) and five (5) of the appeal cannot be sustained.

With regard to the complainant's age, there is no dispute that she fell within the definition of a child of tender years contained in the children Act (Cap 141 Laws of Kenya). Thus, she was a child under the age of ten (10) years at the time of the offence. She said that she was aged nine (9) years old. Her parents (PW2 and PW3) confirmed as much. The medical report indicated that she was eight (8) years old. There was therefore nothing wrong with the learned trial magistrate's opinion that the complainant was aged between 9 to 12 years. This was the complainant's apparent age and was only relevant for the purposes of sentencing. In any event, there was no dispute that the complainant was a child of tender years. This was established and confirmed by her own evidence coupled with that of her parents, when it was disclosed that she was aged nine (9) years old.

Ground one of the appeal is also unsustainable. All in all, this appeal is devoid of merit. There is nothing to compel this court to interfere with the conviction and sentence of the appellant by the learned trial magistrate.

The sentence meted out was lawful and in accordance with section 8 (2) of the Sexual Offences Act. Both the conviction and sentence are hereby upheld with the result that the appeal stands dismissed.

Delivered and signed this 16th day of February, 2012.

Right of Appeal.

J.R. KARANJA.
JUDGE.