



(Appeal arising from the decision of Senior Resident Magistrate's Court at Hamisi in Criminal Case No. 269 of 2009 [P. A. OLENGO, SRM])

JONATHAN ATSIAYA APPELLANT

V E R S U S

REPUBLIC RESPONDENT

JUDGMENT

The Appellant, **JONATHAN ATSIAYA** was charged with the offence of defilement contrary to **section 8 (1) (2)** of the Penal Code.

The particulars of the offence are that on the 10th day of July 2009 in K village, K Sub-location, Banja Location in Hamisi District within the Western Province, intentionally caused his Penis to penetrate the vagina of P K a child aged five (5) years.

In the alternative charge, the appellant was charged with the offence of committing an indecent Act with a child contrary to Section 11 (1) of the of the Sexual Offences Act No. 3 of 2006.

The particulars of the offence are that on the 10th day of July 2009 in K village, K Sub-location, Banja Location in Hamisi District within the Western Province, intentionally touched the vagina of P K with his penis against her will.

The appellant pleaded not guilty to the charges. After a full trial, the appellant was convicted on the main count of defilement and sentenced to life imprisonment. Aggrieved by the conviction and sentence, the appellant appealed to this court.

In his Petition of appeal, the appellant raised several grounds of appeal which can be summarized as follows:-

1. That the trial magistrate failed to subject the evidence on record to an exhaustive analysis.
2. That the trial magistrate failed to record the evidence properly.
3. That the prosecution failed to discharge its burden of proving the case beyond reasonable doubt.
4. That evidence of a minor was relied upon without sufficient corroboration.
5. That the unsworn testimony of a minor was subjected to cross-examination contrary to the law.
6. That crucial prosecution witnesses were not called to testify.

7. That the sentencing of the accused was harsh as it was based on an extraneous observation after mitigation which is not backed by any evidence on record.

At the hearing of the appeal, Mr. Amasakha, learned counsel for the appellant submitted on all the seven grounds of appeal. He argued that the record does not reflect any evidence of PW3. That one PA who was at the scene of the alleged crime was not called to testify although she was a crucial witness.

Mr. Orinda for the State opposed the appeal. He submitted that the parties knew each other and therefore that the issue of mistaken identity did not arise. He further argued that the evidence of the minor was sufficient if it was believable. That the trial magistrate indicated good reasons for believing the minor. That the VOIRE DIRE covered the bare necessities.

The State Counsel contended that the evidence on record was sufficient and that the conviction was safe.

This being a first appeal, it is the duty of this court to re-evaluate and to re-consider the evidence adduced before the trial magistrate's court so as to reach its own independent determination whether or not to uphold the conviction of the appellant. In reaching its decision, this court is required to put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore cannot be expected to make any determination regarding the demeanour of the witnesses (*see **Okeno v Republic [1972] EA 32***).

I have carefully re-evaluated the evidence that was adduced before the trial magistrate and also considered the submissions made by Mr. Amasakha on behalf of the appellant and by Mr. Orinda on behalf of the State.

The facts of the Prosecution case were that PW1 M A was at her home when one PA called her and informed her that her daughter P K (PW2) who was about five years of age was crying in the appellant's house. PW1 found the minor had already been removed from the house of the appellant. The minor was bleeding from her private parts. The appellant was arrested and escorted to the Police Station. The minor was taken to Hamisi District Hospital where she was examined by PW5, JOHN KIZINDA, a Clinical Officer who also filled the P3 form. The P3 form reflected that the minor had been defiled. The appellant was subsequently charged with the present offence.

In his defence, the appellant stated that when he returned home from work, he was arrested by his family members who beat him up and escorted him to the Police Station. He denied the offences that he is charged with and attributed this case to a grudge between him and his brother.

It is apparent from the record of the trial magistrate that the evidence on record is very sketchy. The evidence of PW1 who is the mother of the minor does not even reflect whether the minor explained to her what had happened. The *Voire Dire* that the minor was taken through by the trial magistrate is also not exhaustive. The evidence of the minor states that the appellant "did bad manners to me". The minor was not taken through any attempt to explain what she meant by "bad manners".

The issue of defilement only comes out clearly during the testimony of PW4, P.C. Jackson Kagogo and that of the Clinical Officer. Although the medical evidence clearly shows that the minor was defiled, evidence of identification of the culprit is insufficient. One PA who is a crucial witness was not called to testify yet it was the said witness who reported the incident to the minor's mother.

Under **Section 124** of the Evidence Act, a court can convict on uncorroborated evidence of a child of tender years in criminal cases involving a Sexual Offence if for reasons to be recorded, the court is satisfied that the child (alleged victim) is telling the truth. However, given the scanty evidence of the minor, it is difficult to see how the trial magistrate weighed that the minor was telling the truth.

I do not agree with the submissions that the sentence meted out was harsh and excessive. **Section 8 (2)** of the Sexual Offences Act provides for a mandatory sentence of imprisonment for life upon conviction.

The trial magistrate was also within the law when he subjected the unsworn evidence of the minor to

cross-examination.

With the foregoing, this court's conclusion is that there is no sufficient evidence to sustain the conviction of the appellant. Consequently, the conviction is quashed and the sentence set aside. The appellant is at liberty unless otherwise lawfully held.

Delivered, dated and signed at Kakamega this 6th day of March, 2012.

B. THURANIRA JADEN
J U D G E