**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KSIUMU**

**CRIMINAL APPEAL NO. 49 OF 2011**

**J O O alias D O O ……..….APPELLANT**

**VERSUS**

**REPUBLIC ……..RESPONDENT**

**(From original conviction and sentence in Criminal Case number 816 of 2010 of the Principal Magistrate's Court at Siaya – Mr. S. O. Temu Esq.)**

**JUDGMENT**

The appellant herein was charged with three (3) counts namely:-

**Count I:** Incest contrary to Section 20 (1) of the Sexual Offences Act number 3 of 2006.

The particulars of the offence are that on the night of 14th June 2010 in Siaya District within Nyanza Province intentionally penetrated the vagina of **P.A** with his penis who was to his knowledge her daughter the age of six (6) years.

**Count II:** Committing indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act number 3 of 2006.

The particulars of the offence are that on the 14th June 2010 in Siaya District within Nyanza Province intentionally touched the vagina of P.A.O a child of six (6) years with his penis.

**Count III**: Deliberate Transmission of HIV threatened sexually transmitted disease contrary to Section 36 (1) of the Sexual offence Act number 3 of 2006.

The particulars of the offence are that on 14th June 2010 in Siaya District within Nyanza Province intentionally penetrated the vagina of P.A and transmitted diseases to P.A a girl aged six (6) years with his penis.

The appellant was sentenced to serve life imprisonment. The appellant has filed six (6) grounds of appeal as well as two more which he has termed them (hand written) "**substitute grounds of Appeal"** namely:-

**1. That the learned trial Magistrate erred in law and facts by failing to appreciate the language used during the proceedings and the charges read in that I was not acquainted with ability to promptly understand and argue effectively.**

**2. That the learned trial Magistrate erred in law and facts by passing a harsh sentence on me without conclusive and corroborating evidence on records.**

**3. That the learned trial Magistrate erred in law and facts by failing to establish the age of the girl before passing on me an excessive sentence.**

**4. That the learned trial Magistrate erred in law and facts by convicting and sentencing me relying on an inconclusive medical report.**

**5. Due to my epileptic condition that attacked me prior to my arrest I failed to have my full conscience hence pray for a retrial.**

**6. Since I cannot recall all that took place during my proceedings, I pray to be served with the certified copies of the trial court proceedings and judgment to enable me erect more grounds.**

**7. That the appellant's right as per Section 50 (2) (c) was infringed.**

**8. That the honourable trial court erred in not complying with Section 211 Criminal Procedure Code.**

The complainant who is a minor testified that the appellant is her father. Her mother died sometimes back. On the material night the appellant was sleeping with the complainant in the same room. The appellant was on the bed whereas the complainant on a sack on the floor. It was the evidence of PW1 that the appellant took her and placed her on his bed. He then proceeded to defile her. She testified that the ordeal was painful and she bled.

Later on the following day she was asked by her teacher in the school and she informed her of what her father had done to her. She was later taken to the hospital by her uncle D O after her teacher intervened. She was later issued with a P3 form by the police.

**PW2 D.O.A** was the complainant's uncle. After getting information from the school through teacher Juliana he took the complainant to Yala sub District hospital. He testified that PW1 told him what the father had done to her. He also reported the incident at Yala Police Station.

**PW3 J.T** is the complainant teacher. She realized that PW1 was not well that morning in school. On examining her she found that she had injuries in her private parts. She went ahead to inform the child's relatives who took her to the hospital.

**PW4 Zadick Mwita** is the clinical officer who examined the minor and filled the P3. It was his testimony that there was no full penetration but there was partial penetration. He further examined the appellant and confirmed that he was HIV positive. He didn't find though sperms on his genital parts.

**PW5 P C Joseph Kagiri** the police officer who carried out the investigation after receiving report from the minors uncle. He had the appellant arrested and charged with the offences.

When he was put on his defence the appellant denied the charge completely. His witness H A didn't help the appellant either.

At the hearing of this appeal the appellant centered mainly on the fact that he needed a retrial. Before reaching such conclusion, it's necessary at this stage to determine whether indeed the offence was committed by the appellant.

From the evidence on record it's not disputed that the appellant is the father to the complainant. It's not in dispute that the appellant's wife has since died. It's not further in dispute that the appellant who is the biological father of the complainant do stay together in one house.

It has been raised by the appellant in his petition that the age of the complainant was never determined. But from the Baptismal card produced as exhibit 3 its clear that the child was born in April 2004. At the time of the offence she was six (6) years old. Further the court takes judicial notice that the complainant was in the nursery class and invariably six (6) years is the age when such children are expected to be in the said class.

As to whether or not it's the appellant who committed the offence, the evidence on record clearly points to this fact. The complainant was discovered at around 10:00 a.m while at school that she was sick. The complainant had not come from any other place or home that morning except her home. At her home the only person that she lived with was her father. Had she been elsewhere then perhaps it would have been possible to attribute the injuries to another possibility.

The medical report (P3) form is equally conclusive. PW4 testified that "**When she came to hospital she was walking with her legs apart. Then she was examined, her genital parts had injuries. Minor wash had specimens forcible Labia Majora was hyper which meant that there was struggle to have penetration. There was no full penetration but there was partial penetration".**

For the above reason I do hold that the appellant defiled the complainant. The trial court didn't err in any way.

The appellant has raised an issue that the trial court didn't comply with Section 211 of the Criminal procedure Code Chapter 75 laws of Kenya. Before tackling this its necessary to reproduce the said Section **S(211) (1). At the close of the evidence in support of the charge and after hearing such summing up, submissions or arguments as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused and shall inform him that he has a right to give evidence on oath from the witness box and that if he does so he will be liable to cross – examination or to make a statement not on oath from the dock and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence and the court shall then hear the accused and his witnesses and other evidence (if any)**

**(2) If the accused person states that he has witnesses to call but that they are not present in court and the court is satisfied that the absence of those witnesses is not due to any fault or neglect of the accused person and that there is a likelihood that they could if, present give material evidence on behalf of the accused person the court may adjourn the trial and issue process, or take other steps to compel the attendance of the witnesses".**

From the evidence on record when the ruling was read on 2nd January 2011 the accused said: **"I have witnesses. I will give unsworn evidence".**

On 8th February 2011 the accused indeed gave unsworn evidence and called DW2 who gave sworn evidence. It's clear from the court record that the court didn't record that it explained to the appellant the purpose and relevance of Section 211 of the Criminal procedure Code. However reading and deducing from the remarks quoted above its instructive that the appellant fulfilled the requirements of Section 211 (1). He went ahead to give unsworn evidence and called DW2 to testify and who gave sworn evidence.

Even if I could be wrong on this, Section 382 of the Criminal Procedure Code Chapter 75 laws of Kenya cures such errors. The said Section states 382: **"Subject to the provision herein before 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 <u>other proceedings</u> 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**". (***underling mine)***. The court does not see any miscarriage of justice in the proceedings. The appellant was able to testify and call his witness without any form of coercion or intimidation. I do belief that he understood the proceedings in court.

He further contended that he was never allowed time for preparation. I don't find this argument convincing. The appellant had about seven (7) days to prepare for his defence. The fact that DW2 came and testified was indeed adequate preparation. Further he never raised the issue in court during the proceedings.

On sentencing the appellant has argued that the same was excessive in the circumstances. Section 20 (1) the provisal thereof is very clear on the sentencing. It provides life imprisonment. The complainant as proved above was a minor aged six (6) years. She was the appellant daughter. This squarely falls within the Section 20 (1) of the Act.

For the above reason I shall dismiss the appeal. The appellant is not only a threat to his child but also to the rest of the society. He is fully aware of is HIV status and his desires was obviously to infect his daughter who was helpless and under his mercy. Let him serve the rest of his life in jail.

**Dated, signed and delivered at Kisumu this 5th of March 2012**

**H. K. CHEMITEI**
**JUDGE**

**In the presence of:**
**……for State**

**…….Appellant in person**

*HKC/aao*