



**PHILIP OCHIENG MWERESA..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*{Being an original conviction and sentence of T. A. Odera – SRM in Criminal Case No. 1557 of 2009 delivered on 17<sup>th</sup> May, 2010 at Kitale.}*

### **J U D G M E N T**

The appellant, **Phillip Ochieng Mweresa**, appeared before the Senior Resident Magistrate Kitale charged with defilement of a child contrary to Section 8 (1) read with Section 8 (4) of the Sexual Offences Act, in that on 20<sup>th</sup> April, 2009 in Trans-Nzoia West District, by use of his genital organ caused penetration into the genital organ of F.O, a child aged three (3) years. He pleaded not guilty to the charge but after trial, was convicted and sentenced to life imprisonment.

Being dissatisfied with the conviction and sentence, the appellant preferred the present appeal on the basis of the grounds contained in his petition of appeal dated 25<sup>th</sup> May, 2010. He appeared in person and argued the appeal by way of written submissions.

The learned Prosecution Counsel, **M/S Bartoo**, opposed the appeal on behalf of the respondent and submitted that under Section 124 of the Evidence Act, corroboration is not required in sexual offences and therefore the witnesses who testified provided sufficient evidence for the conviction of the appellant.

The learned Prosecution Counsel also submitted that the grudge alluded to by the appellant was not relevant as there was evidence to show that the appellant was employed by the mother of the victim. Further, penetration was established. The appellant was known to the victim. Therefore, his conviction was sound and the sentence lawful.

The learned Prosecution Counsel urged this Court to dismiss the appeal.

This is a first appeal. The duty of this Court is to reconsider the evidence and draw its own conclusions bearing in mind that the trial Court had the benefit of seeing and hearing the witnesses.

In summary, the Prosecution case was that on the material date at about 7.30 am, **H.M (Pw 1)**, proceeded with her children to the hotel where she worked. The children included the victim herein who was aged three (3) years at the time. She (Pw 1) was in the hotel with two of her workmates including the appellant. At about 2.00 pm, her children left the premises and shortly thereafter she saw the child victim crying. The child victim told her that she had been pricked by the appellant and was in pain.

The child victim cried while holding her vagina. Her mother (Pw 2) examined her private parts and noted male semen on the child's pants. She immediately took the child to the nearby Police patrol base and made a report. The appellant was arrested and the child taken to hospital.

The child victim **F.O (Pw 2)**, indicated that she was sexually assaulted by the appellant in a bathroom. She identified the appellant in Court.

**Chrisantus Masinde (Pw 3)**, a Clinical Officer at Kitale District Hospital examined the child victim and confirmed that she had been defiled. He placed her estimated age at three (3) years. He produced the necessary P3 form.

**P. C. Jillo Wario (Pw 4)**, received the necessary report and arrested the appellant. He investigated the matter and later preferred the present charge against the appellant. In his defence, the appellant denied the offence and stated that he was working as usual at the material hotel when a colleague by name Dominic called him at 2.00pm and informed him that the Police were calling him. He (appellant) proceeded to the Police post which was ten (10) metres away. It was then alleged that he had defiled the child. The appellant indicated that he had worked for his employer for one year without pay and that he had quarreled with the child's mother (Pw 1) because of his salary. He thus implied that he was fabricated due to his outstanding salary.

The learned trial Magistrate considered the evidence placed before her and concluded that the evidence by the Prosecution was firm and consistent such that the charge was proved against the appellant. Consequently, the appellant was convicted and sentenced accordingly.

This Court has also considered the same evidence. Its opinion is that the fact that the child (Pw 2) was sexually assaulted was not disputed. This was in any event established by the evidence adduced by the child (Pw 2), her mother (Pw 1) and the Clinical Officer (Pw 3). The main issue for determination was whether the appellant was the person responsible for the unlawful act.

The evidence by the child (Pw 2) and her mother (Pw 1) showed that the appellant was a person very well known to them. In the circumstances it would have been highly unlikely that an innocent three year old child would implicate the appellant if indeed he had not done what the child said he did. It would appear that the appellant preyed on the innocence of the child and her familiarity to him and exploited a rare opportunity that was available to him given that his colleague, the mother of the child was busy working in the hotel.

It would also appear that the child's mother (PW2) may have had some proprietary interest in the hotel. This explains why the appellant implied that he was fabricated due to the child's mother indebtedness to him in salary arrears.

The Prosecution evidence against the appellant was cogent and credible. It proved that he was the person responsible for sexually assaulting the child victim. His defence was thus discredited and rendered an afterthought. His conviction by the learned trial Magistrate was sound and proper. The sentence imposed against him was lawful.

In sum, this appeal is lacking in merit and is hereby dismissed.

**[Delivered and signed this 28<sup>th</sup> day of July, 2012]**

**J. R. KARANJA**  
**JUDGE**