



ABEL ATELU OLUBUI.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

[An Appeal from original conviction and sentence in Molo SNR.P.M.CR.C. NO.1904/2007 by Hon S.M.S Soita, Principal Magistrate, dated 3rd July, 2009]

JUDGMENT

The appellant, Abel Atelu Olubui, was charged and convicted of the offence of **defilement of a child under the age of 11** years contrary to **Section 8(2)** of the **Sexual Offences Act, 2006**.

According to the particulars of the offence, it is alleged that on the 26th day of October, 2007 at 4.00 pm at {*particulars withheld*}, Londiani in Kipkelion District, the appellant had unlawful and intentional carnal knowledge of CA, a child under the age of 11 years.

According to the evidence led before the lower court, while going home from school, at about 5pm, P.W.1 met the complainant weeping and upon inquiry the complainant told her that Abel (the appellant) had done bad manners to her. The following day, as the complainant had not informed her mother what the appellant had done to her, P.W.1 broke the news to the complainant's mother, P.W.2 who had arrived home at midnight and found the children including the complainant sleeping. P.W.2 noticed that the complainant appeared unwell and complained of stomach-ache.

At that stage, the complainant told her that the appellant had lured her into his house, removed her pants and inserted "*a big thing*" into her vagina. In the company of P.W.1, she took the complainant to hospital and later on reported the matter to the police.

P.W.3, Corporal Abraham Maina, received the report of the alleged offence on 28th October, 2010, two (2) days after it was alleged to have occurred. He issued the complainant with a P3 form and later on arrested the appellant and charged him with the offence before the court.

P.W.4, Eliud Cheruiyot, a registered clinical officer examined the complainant after 2 days. On physical examination he observed that the complainant's clothes had blood stains and that there were yellowish stains on her underpants; that there was bilateral tenderness on both thighs and that she had bruises on the labia majora and labia minora. He formed the opinion that the complainant had been defiled.

It should be noted at this stage that the complainant did not testify for the reason that she was born prematurely and was not talkative by nature.

In his defence the appellant denied any involvement in the offence. He maintained that he had been framed-up by the complainant's mother because he had refused her offer for a relationship.

This was the evidence before the trial court upon which the trial court found the offence proved beyond

any reasonable doubts, accordingly convicted the appellant as charged and sentenced him to life imprisonment.

Learned counsel for the respondent supported the conviction and sentence arguing that there was sufficient evidence to support the charge and the conviction.

The appellant, on his part has challenged the conviction and sentence on eight (8) grounds but which can be reduced to four namely:-

1. that the trial court erred in law and fact by convicting him when the prosecution had not proved its case beyond reasonable doubt;
2. that the trial court erred in law by failing to consider his defence;
3. that the trial court erred in law and fact by denying him a fair trial as guaranteed in **Section 77** of the former **Constitution** and;
4. that the trial court erred in law and fact by relying on the uncorroborated evidence of the prosecution witnesses.

This being a first appeal, it is the duty of this court to re-evaluate the evidence adduced during trial, in order to arrive at its own independent conclusion, bearing in mind that it did not hear or see the witnesses testify.

I reiterate that the appellant herein was charged under **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act, 2006**, with the offence of defilement of a child under the age of 11 years, which offence is committed when there is an act which causes penetration with a child. Penetration, on the other hand, is defined to mean the partial or completed insertion of the genital organs of a person into the genital organs of another.

Two things are important in proving the offence of defilement under the Sexual Offences Act, namely, penetration and the age of the child.

There was evidence before the trial court that the complainant was ten (10) years at the time of the incident. Regarding penetration, there was no direct evidence from the complainant as she did not testify. Because of this omission there is no evidence as to when, where and by whom the offence was committed. The evidence on record amount to hearsay. Furthermore, I do not see how the complainant was able to narrate to her friend, P.W.1, her mother and even the doctor what the appellant had done to her and be unable to repeat the same to the trial magistrate even after the trial court tried to make it easy for her.

Apart from that, the description of what happened to the complainant as given by third parties fell short of what is expected to prove penetration. P.W.2 testified that:

“..... She told me she had gone to look for K. and Abel lured her into his house and removed her pants and removed a big thing which he inserted into her vagina”

The thing the appellant removed, in my view, ought to have been properly described and specified as the penetration envisaged to **Section 2** of the **Sexual Offences Act** is by a genital organ.

For the reasons stated, I find that the prosecution evidence did not prove beyond reasonable doubt. The appeal is allowed, the conviction quashed and sentence set aside. The appellant is hereby set at liberty unless otherwise lawfully held.

Dated, Signed and Delivered at Nakuru this 3rd day of August, 2012.

W. OUKO

JUDGE