P N K……………………..APPELLANT

VERSUS

REPUBLIC…………………………………….……………….PROSECUTOR

[An Appeal from original conviction and sentence in Nyahururu P.M.CR.C.NO.1020/2007 by Hon C. K. Obara, Resident Magistrate, dated 18th May, 2010]

JUDGMENT

The appellant was tried and convicted on two counts of **defilement** contrary to **Section 8(1)** of the **Children Offences Act**. Upon his conviction, the appellant was sentenced to life imprisonment.

Being dissatisfied with the conviction he has brought this appeal challenging the conviction on the following five (5) grounds:

i) that the appellant's constitutional rights under **Section 72(3)** of the former **Constitution** were violated;

ii) that essential prosecution witnesses were not called;

iii) that the magistrate erred in convicting the appellant on the evidence of children without corroboration and in the absence of evidence as to where the offence was committed;

iv) that the learned magistrate failed to consider the grudge between the appellant and his wife (the mother of the complainants);

v) that the appellant's defence was rejected without assigning reasons.

These grounds were articulated by the appellant in what has come to be known as "*home-made petition of appeal*." Learned counsel for the appellant based his arguments on the grounds contained in that home-made petition and submitted that:

(i) the charge was defective for not correctly specifying the law and the provisions under which the offence was charged;

(ii) the trial court erred in correcting the omission in the judgment;

(iii) the complainant gave contradictory testimony;

(iv) the record of the trial court does not disclose the language used at the trial;

(v) the *vior dire* examination was conducted casually;

(vi) the mother of the complainants and the arresting officer were not called to testify;

(vii) one witness, Abraham King'ori was stood down and was not recalled to complete his testimony;

(viii) the P3 form was produced by a person who did not make it without laying a basis why it could not be produced by the maker;

(ix) the examining doctor did not make a finding that there was penetration and it was erroneous for the witness who produced the P3 form to purport to conclude that there was penetration;

(x) the complainants did not identify the appellant;

(xi) the appellant was not given the chance to cross-examine the complainants and;

(xii) the appellant's constitutional rights under **Section 72(3)** of the **Constitution** were violated by being detained by the police for five (5) days,

The appeal was opposed by learned counsel for the respondent who argued that the complainants are the daughters of the appellant; that the alleged offence was committed during the day when their mother was away; that medical evidence confirmed defilement; that the appellant understood the language used at the trial and fully participated.

Finally he stated that a basis was laid for the production of the P3 form on behalf of the examining doctor. Before I consider these arguments, I must re-evaluate the evidence on record in order to arrive at an independent conclusion, bearing in mind that I have not seen or heard the witnesses.

The evidence was first recorded by two magistrates. The hearing started before H. M. Nyaberi, Resident magistrate who from the record appears to have been transferred to another court. There was compliance with **Section 200** of the **Criminal Procedure Code** when C. K. Obara, Resident Magistrate took over.

The first complainant, A.M. who gave her age as seven years recalled in her testimony that her mother went to the hospital leaving her and her younger sister, D.N. whose age is shown in the charge sheet to be as 3½ years at the time of the alleged offence, under the care of their father, the appellant. According to A.M, the appellant took her to the living room, removed her pant, his long trousers and had sexual intercourse with her. After this, he turned to D.N. and repeated the act. D.N. confirmed this in her evidence. When their mother came they reported the incident and she in turn took them to the hospital.

Both the complainants were examined at the Ol Kalou District Hospital by Dr. Bingwa who had retired from the public service at the time of the hearing. The medical report was therefore produced by Peter Nginyo, a clinical officer. According to the report in respect of A.M. there were 3-4 days old bruises over the abdomen and chest and scratch marks on the hands. The hymen was broken and thick yellowish discharge in the vagina noted. Spermatozoa were also noted.

Regarding D.N. a tear of the genitalia and a broken hymen were noted. There was also yellowish vaginal discharge and spermatozoa seen. The appellant was arrested and charged as explained at the beginning of this judgment.

In his defence he denied defiling the complainants. He explained that his wife, the mother of the complainants returned to her parents' home with the complainants where she remained for 1½ months. She returned without the complainants on 3rd April, 2007 and explained to the appellant that she was planning to get married to another man. The next day, the complainants were brought home by the appellant's cousin.

On 5th April, 2007 thugs broke into the appellant's house and insisted that his wife had reported that he had defiled his children. As this was happening the complainants and their mother were at their grandmother's house. On 7th April, 2007, the appellant was arrested.

The learned trial magistrate considered this evidence and was satisfied that it proved the chargers beyond

all reasonable doubt.

The only issue at the trial and indeed in this appeal is whether the appellant defiled his two children, A.M. and D.N. In terms of **Section 8(1)** of the **Sexual Offences Act,** the offence of defilement is committed by an act that causes penetration with a child. Penetration is explained in **Section 2** as the partial or complete insertion of the genital organ of a person into the genital organ of another person. **Section 8(2)** to **(4)** provides for the punishment based on the age of the child.

In the matter before me the first complainant A.M. gave her age as seven (7) years. The doctor who examined her assessed her age as 6½ years. The doctor also estimated that the 2nd complainant, D.N. was 3 years old at the time of examination. That estimation brings the offence within **Sub-section (2)** of **Section 8** of the **Sexual Offences Act,** whose penalty is life imprisonment. Has penetration by the appellant been proved?

A.M. in her evidence said that when their mother went to the hospital she left her and her younger sister D.N. under the care of the appellant. She explained that the appellant

"……….. took me to the sitting room and he laid on top of me after he removed my pant. He also removed his long trousers. He put his urinating organ into my vagina (child pointing into her legs). I felt so painful. He blocked my mouth with a cloth. I was unable to scream. I was injured on my neck. He grabbed my neck."

A.M. also stated that after she had been defiled, the appellant turned to D.N.

D.N. for her part stated as follows:

"I was raped on the chair by my father, N. He removed my dress and pant. He put his urinating organ into my urinating organ. I felt so painful. He first raped A.M. She is my elder sister."

Apart from the clear testimony by the young girls, the doctor confirmed that their hymen had been broken. They were both infected and had traces of spermatozoa in their private parts. The doctor also noted scratch marks on the throat of A.M. and similar marks on the abdomen of D.N. There in no way the complainants would have mistaken their father for someone else.

I am satisfied from their evidence that it was the appellant who defiled them. Furthermore the proviso to **Section 124** of the **Evidence Act** permits the trial court to receive the evidence of a victim of sexual offence and convict on such evidence if, for the reasons to be recorded, it is satisfied that the alleged victim is truthful. The learned trial magistrate appreciated this role in her judgment. The complainants were seen by the trial magistrate who in her assessment found them to be truthful. In making that finding, the trial court did not believe the appellant's side of the story.

I find no material to warrant me to overturn the finding of the trial magistrate. The fact that **Sub-section (2)** of **Section 8** of the **Sexual Offences Act** was not cited in the charge sheet is not fatal. Similarly reference to **Sexual Offences Act, 2007** in the second count instead of 2006 is of no consequence. There is nothing on record to suggest that the appellant had any difficult in following the proceedings on account of language. As a matter of fact, the appellant actively participated in the trial cross-examining witnesses, making applications for adjournment, to be taken to the hospital and even submitted in Kiswahili at the close of his defence.

No doubt essential witnesses were not called but that did not lessen the credibility of the evidence of the complainants or weaken in any way the entire prosecution evidence. Where evidence is not given on oath or affirmed, there is no requirement that the witness be cross-examined. Indeed this ground and the ground on the alleged violation of **Section 72(3)** of the former **Constitution** were not contained in the petition contrary to **Section 350(2)** of the **Criminal Procedure Code.**

For these reasons, this appeal fails and is dismissed.

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

W. OUKO
JUDGE