



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL CASE NO. 175 OF 2009**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**DENNIS OSORO OBIRI.....ACCUSED**

**JUDGMENT**

The appellant, **DENIS OSORO OBIRI**, was convicted for the offence of defilement contrary to **section 8 (2) of the Sexual Offences Act**. He was then sentenced to life imprisonment.

In his appeal before me, the appellant has submitted that there was no corroboration of the evidence adduced by the complainant.

As far as he was concerned, it is only the complainant, a child of 9 (nine) years who had allegedly identified him. He believes that there ought to have been medical evidence linking him to the commission of the offence.

Secondly, he faults the trial court for failing to comply with **section 169 (2) of the Criminal Procedure Code**. It was his understanding that that section requires the court to state the section of the law on which the conviction was founded.

The appellant's advocate, Mr. Begi, cited the case of **NYANAMBA Vs REPUBLIC [1983] KLR 599**, as authority for the proposition that the failure of the court to specify the statutory provision pursuant to which it was convicting an accused person was a fatal error.

In answer to the appeal, Ms Mwanza, Learned State Counsel submitted that the appeal had no merit. She said that the complainant had known the appellant even before the incident, and that the complainant was thus able to positively identify the appellant as the person who had defiled her.

Secondly, the respondent pointed out that the evidence of the complainant, regarding the fact of her being defiled, was

corroborated by the doctor who examined the said complainant.

As the complainant's evidence was not shaken by the appellant's cross-examination, the respondent submitted that this court ought to uphold the conviction.

The complainant, M.M, who was also known as 'M.M", was 9 years old when the incident took place.

She testified that on the material day, she had gone to fetch firewood. She was alone. Whilst she was fetching firewood, the appellant greeted her, then held her by the hand, and led her to some bushes.

Once she was within the said bushes the appellant removed her panties, and he then inserted his penis into her vagina. **PW 1** felt bad.

Later, she told her guardian about what had transpired. Her guardian (**PW 2**) also noticed that **PW 1** had some whitish substance on her.

When **PW 2** asked **PW 1** to take her where the assailant lived, **PW 1** took her guardian to the house where the appellant lived. The appellant lived with his colleague, Job, with whom they worked for a Mr. Ombui. When Job and Dennis (the appellant) were brought to where **PW 1** and **PW 2** were, the complainant identified Denis as the person who had defiled her.

**PW 2** then took the complainant to the Nairobi Women's Hospital; where the doctor verified that **PW 1** had been defiled.

**PW 2** also examined the complainant and confirmed that she had a tear on her hymen.

**PW 3, DR. KETRA MUHOMBE**, was based at the Nairobi Women's Hospital. It is she that examined **PW 1** at the hospital, and verified that the complainant had been sexually assaulted. She made that conclusion the basis of the complainant's torn hymen.

**PW 4, DR. Z. KAMAU**, examined the complainant and found that she had no physical injury. He also found that the complainant's external genitalia was normal, and her vulva and vagina had no injuries. However, the complainant had no hymen, as the same had been broken.

Furthermore, **PW 4** found that the complainant could not control excretion.

**PW 5, CPL. JOSHUA MOSIA**, received the complainant, who was escorted to the Kerarapon Police Patrol Base, by her guardian (**PW 2**).

According to **PW 5**, the complainant was in pain, when she walked.

**PW 5** was led by **PW 1** and **PW 2**, to the home of Mr. Ombui, where the appellant used to work, as a "shamba boy". **PW 1** did identify the appellant as the person who had defiled her.

Thereafter, when the appellant was put to his defence, he confirmed that he used to work as a "shamba boy", in the Ngong area. However, he denied having defiled the complainant.

He told the trial court that he was arrested at his house, after he had passed through the homestead where **PW 1** used to live.

The appellant was arrested together with his colleague. However, the said colleague was later released.

Meanwhile, although he insisted that the police should take him to the hospital for medical examination, the police declined to do so.

After giving due consideration to the evidence tendered, the learned trial magistrate held that the complainant had no reason to frame the appellant. She therefore rejected the appellant's defence, as being a mere denial.

In arriving at the decision to convict the appellant, the trial court expressly stated that it had taken into account the provisions of **section 124 of the Evidence Act**. That section provides as follows;

***“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of a child of tender years is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.***

***Provided that where in a criminal case involving a sexual offence the only evidence is that of a child of tender years who is the alleged victim of the offence, the court shall receive the evidence of the child and proceed to convict the accused person, if for reasons to be recorded in the proceedings, the court is satisfied that the child is telling the truth.”***

The proviso to **section 124 of the Evidence Act was enacted in the year 2003**. Therefore, it was not present as at 1983, when the Court of Appeal decided the case of **NYANAMBA Vs REPUBLIC [1983] KLR 599**.

Ever since the proviso was enacted, a trial court was entitled to convict on accused person who is charged with a sexual offence if the court is satisfied that the child victim, who is of tender years, was telling the truth.

Secondly, there was corroboration provided by two medical doctors, who verified that the complainant had been sexually molested.

Thirdly, the learned trial magistrate stated very clearly, at the start of her judgment, that the appellant had been charged with the offence of defilement **contrary to section 8(2) of the Sexual Offences Act No. 3 of 2006**. She then concluded her judgment by convicting the appellant for the offence of defilement. Although the trial court did not recite the statutory provisions at the end of its judgment, it would be inaccurate to assert that it did not specify the offence and the statutory provision under which the accused person was convicted.

In the result, I find no merit in the appeal. The same is therefore dismissed. I uphold both the conviction and the sentence.

**Dated, Signed, and Delivered at Nairobi, this 16<sup>th</sup> day of May, 2011**

.....

**FRED A. OCHIENG**

**JUDGE**

