REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEAL NO. 72 OF 2010

(Appeal from the Judgment of the SRM'S Court Siaya in CR. CASE NO. 537 OF 2009)

ROBERT OLEGWENI :: APPELLANT

-VERSUS-

REPUBLIC :: RESPONDENT

JUDGMENT

This is an appeal preferred from the judgment of the Principal Magistrate's court in Criminal Case No. 537 of 2009. The appellant herein **ROBERT OLEGWENI** was charged with the offence of defilement of a girl of 11 years contrary to Section 8(1) of the Sexual Offences Act with an alternative count of Indecent Act of a child of the age of 11 years contrary to Section 11(1) of the said Act. He pleaded not guilty, was tried, convicted on main count and sentenced to imprisonment for life. The particulars of the charge being that on the 4th day of May 2009 at in Siaya District within Nyanza Province defiled M.O.O a girl of 11 years.

Being dissatisfied with the judgment the appellant appealed to this court on the following grounds:-

1. That the trial magistrate did not appreciate that the testimony of PW1 (complainant) was not supported by PW2 and PW3.
2. That the trial magistrate passed his sentence based on a single witness which was not enough to warrant a conviction.
3. That the trial magistrate failed to make accurate record with regard to dates entered on P3 Form, and failed to note the examination report from the doctor.
4. That the trial magistrate failed to act upon the appellant's violated Constitutional rights.
5. That the learned trial magistrate erred in law and facts by failing to appreciate that the eye witness who was with the complainant during the incident as alleged did not appear in court.
6. That the trial magistrate erred in putting aside my unsworn defence alibi.

The appellant also relied on written submissions at the hearing of the appeal.The same may be summarized as follows; that the circumstances prevailing at the time of the commission of the offence were not conducive to positive identification of the assailant as the attack was sudden and unexpected, a crucial witness who was present at the time of the commission of the offence did not testify, the prosecution failed to prove its case beyond any reasonable doubt, the appellant was not examined and there was therefore no medical evidence to connect him to the case.

The prosecution conceded to the appeal on the grounds that the trial court convicted on the evidence of a single witness, the court did not warn itself of the danger of relying on a single witness, court only relied on the medical evidence on the examination of the victim yet the appellant was not examined. 2 people allegedly at the scene did not testify and the question is who defiled the complainant, there was contradiction in the prosecution case and lastly it was not safe to convict the appellant.

Despite the concession by the prosecution this court being the first appellant court is not bound by that decision. It has a duty to reconsider the evidence a fresh examine, analyze the same and come to an independent decision so as to arrive at an

independent opinion. See **OKENO V R** (1972) E.A at 32.

The case for the prosecution is that the complainant E.O.O aged 11 went back to her School J Primary School at about 6 pm on 4/5/2009 to pick her School bag. At the School gate the School watchman and one other person told her she could go for the bag but they went after her, one held her by her neck and pushed her on to the ground. One undressed her and defiled her. She felt pain, she screamed and another child threw stones on the roof and they left her. They had a knife. She was later found by the mother who took her to hospital. The matter was reported and the appellant arrested.

The issue here is not whether the complainant was defiled. This is evidence admission even by the appellant who blames his friend for it. The issue is whether the appellant was the defiler as alleged by the complainant.

The complainant **PW1** E.O.O was found fit by the court to be put on oath. She said as follows in her evidence:-

- On 4/5/2009 at 10 am she was in School. She was sent home to collect a panga.
- When she went for her school bag and as she was leaving the class, 2 people came to her, one held her on the neck and pushed her cloth, the other one put his penis in her vagina.
- She was later taken to hospital and treated.
- She knew the appellant as their watchman.
- She identified the appellant as the one who defiled her.

PW2 SADIKI MWITI a Clinic Officer at Yala Sub-District hospital stated in his evidence that;-

- On 5/5/2009 examined PW1 who complained of having been defiled.
- On examination he observed the complainant's vagina had tears, bruises, literally the hymen was tampered with and there was discharge. He classified the degree of injury was harm. He concluded that there was forceful vaginal penetration.

PW3 R.O :-

- Complainant's mother.
- Complainant aged 11 years born on 28/3/1998.
- On 4.5.2009 at about 7 pm she found the complainant on the road crying.
- The complainant informed her that she was in pain and could not walk.
- Her clothes were dirty and wet.
- The underpants were wet with sperm.
- She took her to the Yala Sub – District hospital.
- She reported the matter to the police.
- The appellant was arrested as a result.
- The short that was identified by the complainant as the one worn by the appellant on the material day. The same was received from the appellant.

The appellant was put on his defence. On his part he gave an unsworn statement as follows; that he did not the offence was committed by his colleague who had since run away.

In this case no eye witness testified. The only direct evidence against the appellant is that of **PW1** a child of 11 years. Although the lower court did not warn itself of the danger of convicting on the evidence of a single witness, this court warns itself of this danger and takes note that **PW1** was clear as to who defiled her, she gave the identity of the person to her mother, the head teacher and the investigation officer. She was consistent. The issue of time and contradiction raised by the appellant in my view is not material as the victim maintained that she had gone back to school to pick her bag.

PW1 stated that the assailant (appellant) was known to her as the school watchman such that the issue of mistaken identity does not arise. The witness **(PW1)** appears truthful and consistent and very clear she did not waiver in her testimony. Evidence of the clothing of her assailant was corroborated as the appellant was found with the pair of short and the knife.

In **Abdalla bin Wendo** and Another V R E.A.C..A at P 163 the court stated:-

"Subject to certain well known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the condition favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of era."

In convicting the appellant the trial court stated:-

“ The complainant clearly testified it was accused who committed the act of defilement while his Masai friend held her. I do believe her evidence, I do not therefore believe the accused person admitted and told the court that it was his friend who committed the offence. His defence is only meant to shift blame from himself.”

I share the above sentiments. For the said reasons and others articulated above I find that the prosecution made out a case beyond reasonable doubt. I therefore see no reason to interfere with the judgment of the trial court. I disagree with the sentiments of the prosecution, as a close study of the evidence on record clearly goes to the contrary. I therefore dismiss the appeal.

DATED AND DELIVERED THIS 23RD DAY OF SEPTEMBER, 2011.

ALI-ARONI
JUDGE

In the presence of:

…….…… for State

…….…….. Appellant present in person.