



**understand;**

**ØThat the learned trial magistrate convicted the appellant on inadequate, conflicting and discredited evidence;**

**ØThat the learned trial magistrate failed to consider the defence put forward by the appellant; and**

**ØThe sentence imposed is manifestly excessive.**

When the appeal came up before me for hearing on 6<sup>th</sup> October, 2011, **Mr. Obwatinya** represented the appellant and submitted that the substance of the charge was not explained to the appellant; that the learned trial magistrate relied upon contradictory and hearsay testimony in convicting the appellant.

On sentence, counsel argued that the Children's Act leaves no discretion to the Court which event is unconstitutional.

Responding to those submissions, **Mr. Oluoch**, learned Senior Deputy Prosecution Counsel, submitted that the challenge based on the Constitution was misplaced as no Constitutional reference had been sought. With regard to the evidence, counsel submitted that the learned Senior Resident Magistrate accepted the testimony of the complainant under the proviso to section 124 of the Evidence Act in which event corroboration was not required. In his view however, if corroboration was necessary, the same was provided by P.W.2 and the Clinical Officer.

The brief facts of the case were as follows:- On the material date, at about 2 p.m., the complainant was going back to school after her lunch. She used the road which abuts the appellant's house. Near the house of the son of the appellant, the appellant got hold of the complainant by the hand and dragged her into his son's house. He tore her pant and pulled it down. He knocked the complainant down and pushed his penis into her vagina. The complainant felt pain and screamed which screams attracted the appellant's wife. She forced the door open and fought with the appellant. The complainant then went to school.

In the meantime, the wife of the appellant complained about the appellant's action to **Fredrick Sirengo** (P.W.3). The latter then sent **Eshiwani Benson Manyonge** (P.W.2), to call the complainant from school. P.W.2, while accompanied by a village elder, took the complainant to Lumakanda Police Station where she was issued with a P.3 form by **Cpl Mutwi** (P.W.5), which she took to Lumakanda Hospital where she was treated by **Peter Wenani** (P.W.4), a Clinical Officer.

On examination, P.W.4 observed that the complainant was in pain, her hymen was torn and a whitish discharge oozed from her vagina. The clinical officer concluded that there had been penetration of the complainant's vagina. He produced the P.3 with respect to the complaint which he had completed.

P.W.5 produced the Baptismal Card and the torn clothes of the complainant.

The appellant was later arrested and charged as already stated. On being put on his defence, he denied committing the offence already stated.

On the above facts, the learned Senior Resident Magistrate found that the main offence of defilement had been proved against the appellant as required in law and convicted him as already stated. In doing so, the learned Senior Resident Magistrate believed the complainant and gave her reasons for doing so.

This being a first appeal, I am duty bound to analyze, re-examine and re-evaluate the evidence upon which the appellant was convicted and arrive at my own independent conclusion bearing in mind that I did not see or hear the witnesses testify and should give allowance for that – (*See Okeno –vrs- Republic [1972] E.A 32*)

The record of the learned Senior Resident Magistrate shows that the appellant's plea was taken on 5<sup>th</sup> June, 2009. The substance of the charge and every ingredient thereof was read to the appellant in a language he understood-which was Kiswahili. The appellant is recorded to have denied the principal and the alternative count and a plea of not guilty entered for him.

All the witnesses, save P.W.4, testified in Kiswahili. The appellant himself gave his statement in Kiswahili. The record also shows that the appellant cross-examined all the witnesses except P.W.2. He did not cross-examine P.W.2. because he had no question for the witness. The testimony of P.W.4 was given in English. Yet the appellant cross-examined him which shows that the testimony was interpreted to him in a language he understood. It is significant that the appellant does not specifically state that he does not understand Kiswahili. He fully participated in the proceedings. in the premises, the ground of Appeal that the appellant did not understand the proceedings is an afterthought. It is without merit and is dismissed.

I have perused the record of the learned Senior Resident Magistrate again and again and I have failed to identify any serious material conflict in evidence adduced by the prosecution. The appellant was convicted mainly on the evidence of the complainant and P.W.4, the Clinical Officer. The complainant knew the appellant. He was her neighbour and lived next to the road the complainant always used on her way to school. There could therefore be no question of mistaken identification. In the premises, I agree with the learned Senior Deputy Prosecution Counsel that corroboration was not necessary as the complainant was believed by the learned Senior Resident Magistrate. In her own words:-

**“ I believe the minor is telling me the truth because:-**

- 1). She alleged it is the accused person’s wife who came and then left her free.**
- 2). The complainant’s father corroborated her evidence since he confirms she learned about the incident from accused person’s wife. He sent the brother to school to call the complainant.**
- 3). The minor said her pant was torn. All the witnesses confirmed the pant was torn. They brought it to court. I confirmed the allegations.**
- 4). The doctor confirmed the hymen was torn at orifices. The minor had an infection. The minor was penetrated.”**

Save for the misdescriptions of the witnesses in 2 above, the findings of the learned Senior Resident Magistrate cannot be faulted. Having believed the complainant, the learned magistrate did not require corroboration to convict in view of the proviso to section 124 of the Evidence Act. However, even if corroboration was required, it was provided by the medical evidence, the torn items of clothes and the complainant’s distressed condition as noted by P.W.2 and P.W.4.

With regard to the challenge that the appellant’s defence was not considered or adequately considered. The record of the learned trial magistrate speaks for itself. In her own words:-

**“ From the above evidence, I hence find that the prosecution evidence is consistent. Accused’s denial of the offence, I find it a mere denial”.**

So the appellant’s defence was considered and rejected and properly so in my view.

In the end, I find that the appellant was convicted on sound evidence. I therefore dismiss the appeal and uphold the conviction. With regard to sentence, the same was lawful. It may be harsh but it is not unconstitutional. However, a detailed discussion on the constitutionality of the said sentence is not merited in this appeal.

In all those premises, I uphold the conviction of the appellant and affirm the sentence imposed. The entire appeal is accordingly dismissed.

**DATED AND DELIVERED AT ELDORET THIS**

**10<sup>TH</sup> DAY OF NOVEMBER, 2011.**

**F. AZANGALALA**

**JUDGE**

**Read in the presence of:-**

The appellant and **Mr. Oluoch** for the state.

F. AZANGALALA

**JUDGE.**

10/11/2011.