REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CORAM: D.S MAJANJA J.

CRIMINAL APPEAL NO. 81 OF 2017

JOHN OTIENO MORARA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence of Hon. O. Wambani – CM

dated 13th November 2017 at the Chief Magistrate's Court

at Nyamira in Criminal Case No. 6 of 2016)

JUDGMENT

1. After the trial the appellant, JOHN OTIENO MORARA, was convicted of the alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act ('the Act'). It was alleged that on 21st September 2016 at Bomanyange Sublocation, West Mugirango Location in Nyamira South Sub County within Nyamira County, the appellant unlawfully and intentionally touched the genital organs, the anus of BNM, a child aged 3 years with his genital organ, the penis.

2. At the hearing, the court conducted a voire dire and since the child could not talk or give rational answers, the magistrate concluded that her testimony could not be taken and dispensed with it.

3. The other evidence was that the child's mother, PW 2, recalled that on 21st September 2016, she went to fetch water at about 6.30 pm. She left the child (PW 1) and her other children PW 3 and PW 4 at home. According to PW 3 and PW 4, the appellant came and took the child. When PW 2 returned, the child was not there and as she went to look for her by calling out his name, the appellant appeared with PW 1 holding hands. PW 1 told PW 2 that the appellant had taken him into a bush and put his *"kukuti"* in his back side. PW 2 reported the incident to the police station and took the child for treatment in the company of the father, PW 5. PW 5 also confirmed that PW 1 told him what the appellant had done to him in the bush.

4. The investigating officer, (PW 6), recalled that the incident was reported to the police station after the child had received treatment on 21st September 2016. He issued the P3 form. He testified that the appellant was arrested on 22nd September 2016 by members of the public.

5. The doctor who filled the P3 form, PW 7, a day after the incident noted that the child's genital area was normal, without visible laceration. He did not detect any laceration or discharge but noted a whitish substance on the lumbar region above the anus. When the substance was taken for laboratory examination, no spermatozoa was seen of blood cells. The doctor concluded that, *"There was no clear evidence of penetration."*

6. When put on his defence, the appellant denied the offence. He claimed that there was a disagreement between him and PW 2 after PW 2's cow had eaten their napier grass.

7. The appellant's contention is that the offence was not proved. Under section 11(a) of the Act, the prosecution has no prove *"any contact between any part of the body of a person with the genital organs, breasts or buttocks of another …"*

8. In this case PW 1 did not testify as to what took place because she was too tender. As I understand the law, it is not necessary in certain cases for victim to testify. On this issue the Court of Appeal in **M M v. Republic NRB CA Criminal Appeal No. 41 of 2013 [2014]eKLR**

observed as follows;

> *Turning to the appeal before us, we reiterate that the victim did not herself testify due to her tender years. In cases like this where the victim is too young to give evidence, section 33 of the Sexual Offences Act allows the trial Court to rely on either the evidence of the surrounding circumstances, or under section 31 (4), to give evidence through an intermediary or both.*
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> *In the absence of the complainant's testimony, there was independent evidence of the complainant's mother, that of the father and the clinical officer that linked the appellant to the defilement of the complainant. From what we have said, we conclude that it was in error for the two courts below to treat the evidence of the complainant's mother as that of an intermediary, the steps leading to such appointment having not been followed. It was sufficient to rely on her direct evidence as an independent eye witness.*
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> *Any requirement that insists on a child victim of defilement, irrespective of his or her age to testify in order to found a conviction would occasion serious miscarriage of justice. What fair hearing would a child victim aged six (6) months, like that in the case of Robinson ToleMwakuyanda V. R. HC. Cr. Appeal No.227 of 2007, get if the courts were to insist on the evidence of such a child, who on account of his/her tender age cannot speak.*

9. In this case though, what was the circumstantial evidence or evidence that could corroborate the act of indecency? First, I must disregard the testimony of PW 3 and PW 4. It is clear that they were children of tender years and their testimony was not received in accordance with section 19 of the Oaths and Statutory Declarations Act.

10. Second, the medical evidence of PW 7 was ambivalent whether an act of penetration or otherwise took place. I however accept that if it is a case of an indecent act, there may be no medical indications of an act or injury which would be visible on the child's body.

11. I have come to the conclusion based on the evidence that the appellant is entitled to the benefit of doubt. This is a classic case whether the trial magistrate ought to have invoked the provisions of section 31 of the Act to use a mediator to communicate with the child.

12. I allow the appeal. The appellant is set free unless otherwise lawfully held.

Dated and **delivered** at **Kisii** this **5th** day of **April 2019**.

D.S MAJANJA

JUDGE

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions.

Appellant in person.