



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT HOMA BAY**  
**CRIMINAL APPEAL NO.37 OF 2016**

**BETWEEN**

**CHARLES DIANGA ADOK ..... APPELLANT**

**AND**

**STATE ..... RESPONDENT**

*(An appeal from original conviction and sentence of the SRM's Court at Oyugis in SOA No.7 of 2013 dated 29.04.2016 – Hon. S.M. Mokuu, SRM)*

**JUDGMENT**

1. **CHARLES DIANGA ADOK** (the appellant) was convicted for the offence of defilement contrary to **Section 8 (1)** as read with **Section 8 (2)** of the **Sexual Offences Act**.
2. The prosecution case was that on 25<sup>th</sup> day of April 2013, at **[particulars withheld]** location in **RACHUONYO** District within Homa Bay County he intentionally caused penetration of his penis to the vagina of **LA** a child aged six years. He denied the charge and after trial was sentenced to life imprisonment.
3. **LA** (PW1) told the trial court that one day when her mother was away, the appellant whom she knew as **OCHIMBO** went to their office at **[particulars withheld]** village and took her to his house. He removed his trouser then removed her dress and panty then placed her on his bed. He stretched her legs and lay on top of her, and she felt pains on her vagina. She screamed, but he urged her not to tell anyone. She informed her mother about the incident.
4. **LA** knew the appellant as he used to look after goats, and in any event he worked within her mother.
5. **LA's** mother, **M A O** (PW2) told the trial court that **LA** was born in the year 2005 and produced her birth certificate as exhibit.
6. On 28.04.2013 at about 9.00 a.m. while washing clothes at home, she noticed blood stains on the trouser of **LA** near the thigh area. She called the child and asked where the blood had come from – and she told her about her encounter with the appellant. She checked PW1's genitals and realized there was blood in her vagina and a pus discharge.
7. She looked for the appellant who used to work for her relative named **O** (PW2). The appellant tried to run away and denied the allegations but a neighbour ran after and caught him.
8. **CPL THOMAS MUTUA** (PW3) who received the report at **KOSELE** police station told the trial

court that PW1 was accompanied to the police station by PLW2 and one **IO** who reported that she had been defiled by the appellant. They handed over to him a red trouser with blood stains (it was produced as exhibit.) He observed that PW1 was in pain and walking with difficulty.

9. **DR. PETER OCHOLLA** (PW5) who examined **LA** found that she had lower abdomen pains with multiple bruises to the external genitalia and which was bleeding. She also had a pus discharge. She was given antibiotics and trauma counselling. He concluded **LA** had been defiled. The appellant was also examined but nothing significant was noted in the genitalia.

10. In his unsworn testimony the appellant gave a narrative of events surrounding the day of his arrest, saying that when he demanded his salary arrears, he was arrested. He made no reference to the incident in question.

11. The trial magistrate considered the evidence and had no doubt that **LA** was a minor who understood well what had been done to her, and coupled with the medical evidence, it was apparent that there was an act causing penetration with the minor.

12. The trial magistrate also observed that the appellant was known to **LA** as he had been working for her relative within the locality.

13. The appellant's defence was also considered but the trial magistrate noted that he did not challenge the prosecution's contention that he was at the complainant's home on 25/04/2013, and although PW1 was the sole witness he believed she was telling the truth saying she was knowledgeable, understood why one should tell the truth and was categorical and consistent in describing what she went through. Further that PW1 gave the same information about her ordeal to her mother.

14. These findings have been challenged on appeal on grounds that PW2 was not subjected to cross examination and no explanation was availed for that omission. Secondly that there was no significant medical findings on the appellant's genitalia to link him to the act of defilement and in any event the complainant was medically examined three days after the offence yet no explanation was given for this time lapse. The trial magistrate was faulted for relying in the evidence of PW1 and PW2 which was described as worthless and of no probative value.

15. The appellant also contends that the trial magistrate did not consider his defence and that PW1 ought to have been corroborated.

16. At the hearing of the appeal, Mr. Oduk represented the appellant and **MR. OLUOCH** on behalf of the State submitted that the appeal was conceded as PW2 was not cross examination. However he urged this court to order a retrial arguing that PW2 was not the complainant but merely a witness who corroborated the evidence of PW1 and the issue of prosecution, filling in the gaps at the re-trial would not arise. It was his contention that even without the evidence of PW2 there was a real likelihood of prosecution securing a conviction.

17. **MR. OLUOCH** further stated that the witnesses were readily available and the gravity of the offence is such that justice can only be seen to be done through a re-trial. He argues that at the time of the offence the complainant was only 6 years old and on denying a retrial will mean the appellant walks out of a situation he is not entitled to. He referred to the case of **MICHEAL KAMURU QUANTAI –VS- REPUBLIC** which replicated the current situation.

18. **MR. ODUK** on behalf of the appellant urged the court not to order a re-trial saying the appellant had served a considerable part of the sentence and would be greatly prejudiced as he'd be subjected.

19. It is his contention that prosecution will have a chance to fill in the gaps left at the initial trial and since the mistake leading to questioning of the conviction was due to a glaring omission by the court, the appellant ought to benefit unconditionally.

20. According to **MR. ODUK**, PW2 who was not cross examined was the star witness as she is the one who preferred the complaint against the appellant. He urged this court to be guided by the decision in **PATRICK MWANGI MUNGA –VS- R – CRIMINAL APPEAL NO.1023 OF 2003 (Nrb)** where Makhandia (J) held that a re-trial should not be ordered unless:-

*a) The original trial was a nullity or defective;*

*b) The interest of justice require it;*

*c) No injustice will be occasioned to the appellant;*

*d) An order for retrial should not accord the prosecution an opportunity to fill in the gaps in the evidence tendered during the initial trial;*

*e) On consideration of the admissible and potentially admissible evidence if tendered during the re-trial a conviction is likely to result;*

*f) An order of retrial would not prejudice the appellant;*

*g) Each case must be decided on its facts and circumstances.*

21. **MR. ODUK** also referred this court to the decision by Sitati (J) in the case of **ERICK OCHIENG – VS- REPUBLIC 2015 e KLR** where similar findings were made that mistakes of the court should not be visited on the accused. **MR. ODUK** insisted that without PW2 no conviction would be secured.

22. I have perused the trial court's record and confirm that on 25/09/2015 PW2 did not complete her testimony and was stepped down so as to enable her identify an exhibit. The hearing was then adjourned to 21/10/2013. She was never recalled, and the matter was eventually concluded without PW2 being recalled to complete her testimony nor for cross examination. Certainly this omission by prosecution and the court was prejudicial to the appellant and was not of his own making. Would that warrant an unconditional quashing of the conviction and setting the appellant at liberty?

23. The victim was a six year old girl – she played no role in the omission to have PW2 called back to complete her testimony and be offered for cross examination. The original trial was defective due to the omission and I am persuaded that the recall would not be tailored at filling in the gaps left by prosecution – actually it is in the appellant's interest that PW2's evidence be fully tested under cross examination.

24. Ordering for a trial would not offend any of the rules set out by Makhandia J in the Mungai (supra) case. The witnesses are said to be readily available, the appellant has not spent too long a time in prison custody considering that he was sentenced to life imprisonment. I am persuaded that in the interest of justice both to the victim **LA** and the appellant, a re-trial is appropriate.

25. Consequently the conviction is quashed and the sentence is set aside. The appellant shall appear before the SPM at Oyugis Law Courts on 18/05/2017 for trial directions and the matter be heard before a magistrate other than the one who heard and determined the initial trial.

**Delivered and dated this 15<sup>th</sup> day of May, 2017 at Homa Bay**

**H.A. OMONDI**

**JUDGE**