**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**HCCRA No.145 OF 2013**

**BETWEEN**

**J O ……...APPELLANT**

**AND**

**REPUBLIC ……RESPONDENT**

**(Being an appeal from the judgment of Hon. B.N Ireri Acting PM in Vihiga SRM's CR. Case No.682 of 2011 delivered on 11/07/2013)**

**J U D G M E N T**

## Background

1. The appellant was charged with the offence of defilement contrary to Section 8(1) (2) of the Sexual Offences Act No.3 of 2006 particulars of which were that the appellant on the 21st June 2011 and 23rd June 2011 at [particulars withheld] village in Vihiga district within Western Province, intentionally caused his penis to penetrate the vagina of S.M. a child aged 11 years.

2. In the alternative the appellant was charged with Indecent Act contrary to section 11(1) of the Sexual Offences Act No.3 of 2006 particulars of which are that he on the 21st June 2011 and 23rd June 2011 at [particulars withheld] village in Vihiga district within western province intentionally and unlawfully caused his genital organ to make contact with a genital of a girl child namely S.M aged 11 years old by touching her vagina.

3. The appellant pleaded not guilty to the charges but was convicted and sentenced to life imprisonment upon full trial after the trial Court was satisfied that the Prosecution had proved its case against the appellant beyond reasonable doubt. The appellant was aggrieved and dissatisfied by the said judgment of the lower Court hence the appeal herein.

## The Appeal

4. The following are the home made grounds filed by the appellant:-

> 1. THAT the trial Magistrate erred in Law and facts by failing to appreciate that the complainant did not appear before Court in person or appear to testify and convicting the appellant in the absence of the complainant.
>
> 2. THAT trial Magistrate erred in Law and facts [and] misdirecting by failing to

appreciate that the Prosecution case was insufficient but also affricative, speculative, conjecture, discredited, unconstitutional and lacked probative value.(sic)

3. THAT the trial Magistrate failed to evaluate that the case was poorly investigated.

4. THAT the learned Magistrate erred in law and facts by not appreciating that the age of the complainant was not established because no birth certificate or any document confirming the age of the complainant. [was produced]

5. THAT the trial Magistrate erred in Law and facts by considering that the Prosecution case did not [give] any plausible reason why the complainant her mother or any member from her family could not testify against me before the Court.

The appellant wants the appeal allowed, conviction quashed and sentence set aside.

**APPELLANT'S SUBMISSIONS**

5. When the appeal came up for hearing the appellant handed in his written submissions which he highlighted as follows:-

1. That during the trial, he was not provided with statements and therefore he was unable to prepare his defence.

2. That the complainant was not called to testify.

3. He was never examined by the doctor

4. That the origin of this case against him was J A his wife's uterine sister and the payment of a dowry dispute as a result of poisoning.

He submitted further that J A wanted to live with him but when he refused and she realized he had married another wife she planted this case on him. He maintained that he did not commit the offence.

**RESPONDENT'S SUBMISSIONS**

6. Mr. Omwenga for the State opposed the appeal. He submitted that the testimony by PW1 – PW3 was very consistent and pointed to the defilement of the complainant (PW1). PW2, the clinical officer also confirmed that PW1 had been defiled. He submitted that the chain of events was consistent throughout and confirmed the report made by the complainant. Counsel also submitted that it was not true that the complainant did not testify as she was PW1.

7. In a short rejoinder the appellant submitted that he was entitled to examination by a doctor and that he requested for statements five (5) times without success. He maintained that this case was planted on him by J his sister in law and lastly that he was in Kisumu on the day of the alleged offence.

**DUTY OF THIS COURT**

8. This being the first appeal this Court has the duty to re-evaluate and analyze the evidence in detail and come up with its own conclusions bearing in mind that neither saw the witness nor heard the evidence when parties were testifying to see their demeanor. See the case of **MARK OIRURI MOSE –VS- REPUBLIC [2013] e KLR Criminal Appeal No.295 of 2012** where the Court of Appeal stated: "It has been said over and over again that the first appellate Court has the duty to revisit the evidence tendered before the trial Court afresh, analyze it, evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial Court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that." See also the well known case of **OKENO –VS- REPUBLIC [1972] E.A. 32** which sets out the same principle.

**THE PROSECUTION CASE**

9. The Prosecution called five (5) witnesses. The complainant PW1 S.M was taken through a *voir dire* examination by the trial Court which found that she understood the meaning of telling the truth and allowed her to testify under oath. She told the trial Court that she was 12 years old and was in class six (6) at a school at [particulars withheld]. She explained that the appellant was her father and that her mother by the name M M had died when she was in class five. She testified that after the death of her mother she continued living at home with other siblings, A.A and J.M together with the appellant and they slept in the same house only that the appellant slept in his own bedroom.

10. She told the trial Court that between 21/6/2011 and 23/06/2011, she was asleep in their bedroom with the other children when the appellant entered the room and carried her to his bedroom and he did bad things to her. She explained that the appellant removed her skirt and panty and inserted his thing (penis) on her thing which she uses to urinate (vagina). She felt pain. The appellant did that twice that night. She then went back to her bed where she slept but slowly she woke up and told her elder brother J.M who in turn told her uncle M. She was then told to relocate to Majengo where her uncle took her to her grandmother.

11. Her aunt J A took her to Mbale hospital where she was treated. She was taken to the Police Station and was issued with a P3 form. She added that the appellant had not done that to her again. Her brother N.M now lives with one of her aunts and her other brother A.A with her grandmother whereas J.M lives at Boyani.

12. She was cross examined by the appellant and she explained that on that date the 21/6/2011 she had not gone to school and that the appellant had blocked her mouth with a piece of cloth so she could not scream. The following morning she told her brother J.M who told the appellant's brother. She maintained that she was not framing the appellant and was not lying against him.

13. PW2 CHARLES LIPARAMOZOSO a clinical officer attached at Vihiga district hospital filled the P3 Form for S.M. He testified that S.M was aged eleven (11) years old and was taken to the hospital on the 8th June 2011 having been sexually assaulted by her father between 21st and 23rd June 2011. On examination he observed that her hymen was broken and the labia majora/minora were swollen. Lab tests showed syphilis was negative, pulse cells were found on microscopy and her age was estimated to be 11 years. He concluded that she was defiled and had an STD which he could not identify. He produced P3 form PExhibit 2 and her treatment notes PExhibit 2. He explained that he had worked with Ndege who filled the treatment book for three (3) years. He was familiar with his hand writing and signature.

14. On cross examination PW2 explained that the child was brought to the hospital two (2) weeks after the alleged defilement and that the appellant was also taken there after two weeks and they could not defect sickness on him since he may have been treated. PW3 No.2007109449 APC Aspafil Washington Abiero who was attached at Tigoi A.P Camp Hamisi testified that on 4/7/2011 they re-arrested the appellant who was brought to the A.P Camp by a village elder Ephraim Ombego and Wellington Masisa. They took the appellant to Gambogi Police Patrol Base. He identified the appellant during the trial.

15. PW4 No. 228354, APC Francis Nyamwamba Nyakawa testified that they were with PW3 when the appellant was brought to the AP camp by village elders on accusations that he had defiled S.M a class five pupil. They interrogated the girl who told them how the appellant defiled her and threatened to kill her if she disclosed. The happenings to anybody. She told them that she informed her brother of what happened who in turn informed her aunt who took her to the hospital. They re-arrested the appellant and took him to the Police Station where he was charged. He had known the appellant before.

16. PW5 No.177677 PC Philip Gichui attached at Vihiga Police station investigated the case herein. He testified that the appellant was arrested on 4/7/11 at [particulars withheld] village. He then took statements which had been recorded at Gambogi Police Post. He told the trial Court what PW1 told him of how she was defiled by her father the appellant. He recorded her statement issued a P3 form and on the 6/7/11 took the appellant and his daughter to Vihiga hospital for examination. He prepared the charge

sheet and charged the accused on 7/7/2011. He explained that PW1 was the 2nd born of the appellant and that her mother had died in March 2011. The appellant was not known to him. He did not take the child for age assessment.

**The Appellant's Case**

17. At the conclusion of the Prosecution case, the trial Court found that the Prosecution had established a prima facie case against the appellant and placed him on his defence. Section 211 CPC was complied and the appellant opted to give a sworn testimony and called one witness.

18. In his defence the appellant told the trial Court that though he understood the offence facing him the people who made the allegations against him did not testify. He claimed that he didn't know the witnesses who testified and maintained that he was framed as he cannot do such an act. He claimed that since he was operated on he only sleeps on one side and that he has 4 children but no wife. He claimed that his wife abandoned him and left S.M at the village. He maintained that he was framed.

19. DW2 F M testified that the appellant was his younger brother and that he did not witness the offence but just heard that the appellant had been arrested for allegedly defiling his daughter. He was shocked since he had not heard of the incident. He said he called relatives but the child's father refused to discuss the matter and he was arrested and charged.

20. On cross examination DW2 told the trial Court that as the older son nothing was reported to him by the children of the appellant though he conceded that he could not tell whatever went on at the appellant's home at night.

**ISSUES FOR DETERMINATION**

21. This Court has carefully re-evaluated and analyzed the evidence on record and the following are the issues which arise for determination.

a. Whether the Prosecution proved the age of the complainant
b. Whether it was fatal for the Prosecution not to call some witnesses
c. Whether the Prosecution witnesses statements were contradictory fabricated and full of conjectures
d. Whether the appellant was issued with witness statements to enable him prepare his defence, and if not what is the consequence of such failure;
e. Whether the appellant was examined by the doctor and what the implications of not being examined are

22. On the first issue the complainant told the trial Court that she was twelve (12) years old on 23/10/2012 when she testified and was in class six. The trial Court took her through a *voir dire* examination to establish whether she understood the meaning of telling the truth and it was satisfied that she did and took her evidence on oath. PW2 produced the P3 form and treatment notes for the complainant as Exhibits 1 and 2. In the documents the age of the complainant was estimated to be eleven (11) years as at the time of commission of offence in June 2011.

23. In the case of **RUA NGAO MWATUMA –VS- REPUBLIC [2014] e KLR**, H.C. AT MALINDI CRIMINAL APPEAL No.21 of 2012 the learned Judge while relying on the decision in the case of **KAINGU ELIAS KASOMO –VS- REPUBLIC MALINDI CRIMINAL APPEAL No.304 of 2010** observed as follows:-

> "The date of birth was not given and it would seem that the only medical evidence tendered was the P3 form which gives the estimated age as 15 years. In the case of KAINGU supra the Court of Appeal stated that the age of the minor is an element of a charge of defilement which ought to be proved by medical evidence. Documents such as baptismal cards, school leaving certificates in my view would also be useful in this regard. Since the passage of the

> Sexual Offences Act, the practice has been that age assessment of defilement victims is carried out by dentists. The said assessment while useful in defilement cases is just that. In this case the minor appeared before a qualified medical officer who estimated her age to be 15 years old, the same age given by the minor and her mother. The trial Court heard the minors evidence and saw her. The Court was convinced that she spoke the truth."

24. In the case of **LAMECK OKEYO ONYANGO –VS- REPUBLIC [2014] e KLR** HC. AT KISII CRA. No.2 of 2010 the learned judge while relying on **JOHN OTIENO OBWAR –VS- REPUBLIC HC. CR.A. No.34 'B' of 2010** stated as follows:

> "In John Otieno Obwar case Makhandia J (as he then was) held, "Defilement is a strict offence whose sentence upon conviction is staggered depending on the age of the victim. The younger the victim the stiffer the sentence. Accordingly it is important that the age of the victim be proved by credible evidence. In the circumstances of the case the charge sheet talks of the complainant being 14 years. Other than that allegation, there was no other proof. The clinical officer who examined her never assessed her age. It would have been easy for the Prosecution to tender in evidence documents like the complainant's birth certificate to prove age. This was not done with the consequence that the age of the complainant was not proved as required."

25. In the case of **WILLIAM O. SIRA –VS- REPUBLIC [2014] e KLR H.C at Kisumu CR.A 77 of 2012** the learned Judge delivered himself as follows:-

> "In ground 4 of the petition of appeal it was contended that the age of PW3 was not proved beyond reasonable doubt. I agree that because of the fact that the various sentences under the act are dictated by the age of the complainant, it is incumbent upon the Prosecution to prove age beyond doubt. For PW3, her mother (PW1) gave her date of birth to be 2/3/99. That was not challenged. She also gave her baptismal card which showed date of birth. It is noticeable that documents like birth certificates, baptismal cards or school admission papers will indicate date of birth and unless they are shown to have been made at the time when the prosecution was launched, are material corroborating evidence. An age assessment by a doctor would be useful, but it would be borne in mind that any such assessment is a medical approximation. I am satisfied that PW3 was 12 going to 13."

26. In the case of **JOSEPH KIETI SEET –VS- REPUBLIC [2014] e KLR** HC. at MACHAKOS CR.A. No.91 of 2011 the learned judge held as follows:

> "It is trite law that the age of a victim can be determined by medical evidence and other cogent evidence. In the case of FRANCIS OMURONI –VS- UGANDA C.C. No.2 of 2000 it was held that:
>
> > "In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by Birth Certificate, the victims parents or guardian and by observation and common sense….."

I fully associate myself with the above stated holdings.

27. The foregoing holdings are applicable in this particular case. As already stated the treatment note (PExhibit 2) and the P3 form (PExhibit 1) showed the age of the complainant as eleven (11) years at the time of the incident. The P3 form has been held as proof of age of a child in defilement cares. This Court, duly guided by precedent finds that the age of the complainant was proved by the P3 form. Thus the appellant's argument that the age of the complainant was not proved cannot stand. The complainant duly testified as PW1 and at no time was she challenged as to her age by the appellant or his witness.

28. On the second issue touching on witnesses, the appellant claims that the trial Court relied on the

evidence of one (1) witness and that other critical witnesses such as J.M, M and J A did not testify. He has relied on the case of **BUKENYA & ANOTHER –VS- UGANDA [1972] E.A. 326 OF 1972** for the proposition that an accused should not be convicted on the basis of a single identifying witness.

29. It should be stated from the onset that the offence in this case arises out of a sexual offence involving a child and that the trial Court would rely on the evidence of the victim even if she is the only one who testified. As it is in this case PW1 S.M was the only one who told the Court what she went through in the hands of the appellant. Her brothers were asleep. She was under threat by the appellant and she must have been afraid and traumatized. When it was too much for her to bear, she gathered courage and told her brother who in turn told the uncle. PW1 could not scream in such a situation. The argument by the appellant that she did not scream because it was not her first time to engage in sex cannot stand. And with whom had PW1 engaged in sex with the appellant? No one else saw what was done to her. It was at night in her father's house. She knew her father and could not have confused her for another. Her evidence was straight forward and the same was not shaken by the appellant's defence.

30. Further, as provided under Section 124 of the Evidence Act as amended by Act No.5 of 2003 and Act No.3 of 2006 in cases of sexual offences there is an exception to the general rule that an accused person cannot be convicted on the uncorroborated evidence of a child of tender years. In **JACOB ODHIAMBO OMUMBO –VS- REPUBLIC Cr. App No.80 of 2008** (Kisumu) the Court of Appeal made position clear by stating as follows:-

> "Though PW1's evidence was that of a child of tender years, the Court can convict on it by virtue of the proviso to Section 124 of the Evidence Act Cap 80 Laws of Kenya, as amended by Act No.5 of 2003."

31. Earlier in the case of **MOHAMED –VS- REPUBLIC [2006] 2KLR 138** the Court of Appeal asserted that "it is now settled that the Courts shall no longer be harmstrung by requirements of corroboration where the victim of a Sexual Offence is a child of tender year if it is satisfied that the child is truthful.

32. In the instant case, the trial Magistrate took the child through a *voir dire* examination and was satisfied that she knew the consequences of telling lies and was allowed to give sworn testimony. The appellant asked questions according to how he felt, but those questions never shook her evidence. The girl remained consistent and explained what she experienced. With the backing of the proviso to Section 124 of the Evidence Act, the trial Court needed no other evidence. Thus it was not fatal for the Prosecution not to call the evidence of other witnesses as desired by the appellant.

33. On the third issue the trial Court relied on the evidence of five Prosecution witnesses. It is not true that their evidence was contradictory PW2 confirmed that PW1 was defiled which was corroboration of PW1's evidence. PW3 and PW4 re-arrested the appellant and PW5 investigated the incident and from his investigations he established that the appellant committed the offence. As an investigator he had to rely on what he was told by the witnesses, and from PW1's statement he concluded that the offence was committed and consequently preferred the charges against the appellant. There is no iota of evidence on record suggesting that the appellant was framed or that the evidence was fabricated.

34. I now turn to the more difficult issue of whether or not the appellant was supplied with witness statements before commencement of trial and if not what is the consequence of such default. Article 50 of the Constitution, 2010 guarantee an accused person the right to a fair and public hearing of his case before a Court or, if appropriate, another independent and impartial tribunal or body. A fair trial includes the right-

> "50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court of, if appropriate, another independent and impartial tribunal or body.
>
> (2) Every accused person has the right to a fair trial, which includes the right-

a. To be presumed innocent until the contrary is proved;
b. To be informed of the charge, with sufficient details to answer it;
c. To have adequate time and facilities to prepare a defence;
d. To a public trial before a court established under this Constitution;
e. To have the trial begin and conclude without unreasonable delay;
f. To be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;
g. To choose, and be represented by, an advocate and to be informed of this right promptly;
h. To have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
i. To remain silent, and not to testify during the proceedings;
j. To be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

In this regard, the evidence required to be provided to an accused person comprises witnesses statements and documents such as post mortem reports, P3 forms and the like upon which the Prosecution intends to rely.

35. From the record in the instant case, the appellant appeared for plea on 07/07/2011 and on that date the trial Court made an order that "the accused be supplied with statements recorded by Prosecution witnesses. He may be released on bond of kshs.80,000/= with one surety in similar sum." Between that date and 11/05/2012 when the hearing commenced the case was mentioned 13 times. On 05/09/2011 the only complaint made by the appellant was that he was suffering from diarrhea with blood. An order was made for the appellant to be taken to hospital. On 30/03/2012, the case could not proceed at the instance of the Prosecution. The appellant did not object but he asked the Court to review the bond terms granted to him.

36. On the 11/05/2012, when the case came up for hearing, the Prosecution indicated its readiness to proceed with the case. The appellant then told the Court: "I am ready to proceed," and the case proceeded to hearing on that date and also on 28/10/2012 and 05/04/2013. The appellant gave his sworn testimony on 18/06/2013. At no point during the proceedings did the appellant tell the Court that the Prosecution had not supplied statements as ordered by the trial Court on 07/07/2011. It is therefore my considered view that it is an afterthought on the part of the appellant to allege an appeal that he was not supplied with witness statements. The conclusion on this issue is that there is no evidence that the appellant was not issued with witness statements before trial. Accordingly, I do not think that Article 50(2) was infringed as far as the trial was concerned.

**Conclusion**

37. The upshot of what I have stated above is that this entire appeal lacks merit. The same is therefore dismissed. I confirm both the conviction and sentence of the learned trial Magistrate.

38. The appellant has a Right of Appeal to the Court of Appeal within 14 days from the date of this judgment.

39. Orders accordingly.

Judgment delivered, dated and signed in open Court this

4th day of February 2016.

**RUTH N. SITATI**

**J U D G E**

In the presence of:

Present in Person For Appellant

Mr. Omwenga (present) For Respondent

Mr. Lagat - Court Assistant