



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NO.303 OF 2011**

*(An Appeal arising out of the conviction and sentence of Hon. Onyango– SRM delivered on 7<sup>th</sup> November 2011 in Kibera CM. CR. Case No.3598 of 2010)*

A O A.....1<sup>ST</sup> APPELLANT

C O A.....2<sup>ND</sup> APPELLANT

**VERSUS**

REPUBLIC.....RESPONDENT

**JUDGMENT**

The Appellant, C O O and her husband A O A stood trial together before the magistrate's court as accused number 2 and 1 respectively. The Appellant's husband was charged with the **defilement of a child** contrary to **Section 8(1)(2)** of the **Sexual Offences Act**. The particulars of the offence were that on diverse dates between 3<sup>rd</sup> August 2010 and 12<sup>th</sup> August 2010 at [Particulars Withheld] in Nairobi within Nairobi County, the husband intentionally caused his penis to penetrate the vagina of M A, a child aged eleven (11) years. On her part, the Appellant was charged with **assault causing actual bodily harm** contrary to **Section 251** of the **Penal Code**. The particulars of the offence were that on the diverse dates between 3<sup>rd</sup> August 2010 and 12<sup>th</sup> August 2010 at [Particulars Withheld] in Nairobi within Nairobi County, the Appellant unlawfully assaulted M A, thereby occasioning her actual bodily harm. The Appellant was further charged with the offence of **sexual assault** contrary to **Section 5(1)(a)(i)** and **(ii)** of the **Sexual Offences Act**. The particulars of the offence were that within the aforementioned dates and at the same place, the Appellant unlawfully penetrated the vagina of the said M A, a girl child aged eleven (11) years with a bottle manipulated by her. She was alternatively charged with **committing an indecent act with a child** contrary to **Section 11(1)** of the same **Act**. The particulars of the offence were that within the aforementioned dates and in the same place, the Appellant intentionally touched the vagina of the said M A, a child aged eleven (11) years. When the Appellant and her husband were arraigned before the trial magistrate's court, they pleaded not guilty to the charges. After full trial, the Appellant's husband was convicted on the offence of defilement and was sentenced to serve life imprisonment. On her part, the Appellant was convicted of the offence of **assault causing actual bodily harm** and on the main count of **sexual assault**. In respect of the first offence, she was sentenced to serve twelve (12) months imprisonment. In respect of the second offence, the Appellant was sentenced to serve ten (10) years

imprisonment. Both sentences were ordered to run concurrently. The Appellant was aggrieved by her conviction and sentence and filed an appeal to this court.

In her petition of appeal, the Appellant raised several grounds of appeal challenging her conviction and sentence. In essence, the Appellant was aggrieved that she was convicted on the basis of evidence that was not sufficient to sustain her conviction. She faulted the trial magistrate for convicting her yet the prosecution had not established its case to the required standard of proof. She complained that the sentences imposed by the trial court were harsh and excessive. In the premises therefore, the Appellant urged the court to allow her appeal, quash her conviction and set aside the sentence that was imposed on her.

During the hearing of the appeal, both the Appellant and the Respondent filed written submissions in support of their respective positions. A further oral submission was made by Ms. Auka on behalf of the Appellant urging the court to allow the Appellant's appeal. A response to the submission was made by Ms. Nyauncho on behalf of the State. Learned counsel for the Appellant submitted that the prosecution had failed to prove its case against the Appellant to the required standard of proof beyond any reasonable doubt. On this argument, counsel for the Appellant submitted that the prosecution failed to tender in court evidence of the bottle allegedly used by Appellant to commit the offence. She further submitted that there was no corroboration of the complainant's evidence. Learned counsel for the Appellant further submitted that the trial court failed to properly conduct *voire dire* examination of the complainant to determine whether she understood the nature of the oath. Ms. Auka submitted that the prosecution did not prove the age of the complainant. On the issue of sentence, Ms Auka urged the court to set aside the sentence that was imposed on the Appellant. She pleaded with the court to consider the best interests of the Appellant's young children when considering the Appellant's appeal on sentence. She also urged the court to take into account the fact that the Appellant was a '*woman of ill health*' when considering the appropriate sentence. In support of the Appellant's case, learned counsel for the Appellant relied on the cases of **Miller –Versus- Minister of Pension (1947) ALL ER 372**, **Okethi Okale & Another –versus- Republic [1965] EA 555** and **David Wironja –versus- Republic (eKLR)**. She urged the court to allow the appeal.

Ms. Nyauncho for the State opposed the appeal. She submitted that the prosecution adduced sufficient evidence upon which the Appellant was properly convicted. She submitted that the trial court properly conducted *voire dire* examination on the complainant. She further submitted that the complainant's evidence was corroborated by medical evidence which revealed that she had bruises on her breast and was also found to have a torn hymen. Ms. Nyauncho submitted that the age of the complainant was established through an age assessment carried out by PW3 Dr. Zephania Kamau who found that the complainant was indeed aged about eleven (11) years at the time of the incident. She submitted that the investigating officer had explained during trial the reason why the bottle could not be produced into evidence during trial. For the above reasons, the State urged the court to find the appeal without merit and dismiss it.

According to the prosecution, the charges against the Appellant arose out of incidents that occurred in August 2010. The complainant in this case is M A. At that time she was said to have been aged eleven (11) years. She was staying with one A who she referred to as her uncle together with his wife, the Appellant who she referred to as her aunt in Nairobi. It was said that the complainant's father was deceased while her mother lived upcountry. The complainant recalled that sometime in August 2010, she was alone in the house with her uncle. They were in her uncle's bedroom. She testified that her uncle told her to take her clothes off. She testified that she undressed herself including her panty. He then got on top of her and inserted his penis into her vagina. She testified that her uncle then proceeded to have sexual intercourse with her. When he finished, he asked her to go and sit outside the house. She testified that about three (3) days later, her uncle took her to his bedroom where he again had sexual intercourse with her. He told her not to disclose the incident to anyone.

The complainant further testified of an incident whereby she was assaulted by the Appellant. She testified that on the night in question, the Appellant returned home at night while drunk. The following morning, the Appellant woke her up and accused her of stealing her money. When she denied the allegation, the

Appellant became aggressive and violent towards her. The complainant testified that the Appellant started whipping her using a wire. She testified that when her uncle returned home from work that morning, he found the Appellant whipping her. He was told about the lost money. The complainant testified that both her uncle and the Appellant continued to whip her with the wire while urging her to produce the money. It was at this point that the Appellant picked a bottle of soda and inserted it into her vagina. The complainant testified that the Appellant shoved the bottle inside her vagina twice.

Later that night, the Appellant came home in the company of two males and a female. The complainant testified that one of the men later left the house in the company of the female while the other man remained behind with the Appellant. The complainant testified that she saw the man undress the Appellant. She was asked to put on the television before the said man and the Appellant proceeded to have sexual intercourse on the seat in her presence. When they were finished, the Appellant went to sleep in her bedroom while the man remained in the sitting room with the complainant. In the morning, when the complainant's uncle came home from work, he found the man in his house and chased him away. Thereafter, an argument ensued between her uncle and the Appellant regarding the man and the Appellant left the house.

When she left, the complainant told her uncle what the Appellant had done with the said man and he confronted her. The complainant testified that when the Appellant returned to the house, she got hold of her and started punching her using her fist. Her uncle tried to stop her but she would not. Instead, according to the complainant, the Appellant inserted her toes into her vagina. She also pulled her breasts. She testified that after her uncle left for work that evening, the Appellant told her to also accompany "*her husband*" to work. She dragged the complainant by her hand to her uncle's place of work. On the way, the Appellant kicked her. At the Appellant's place of work they got into a room. Inside the room, the Appellant undressed the complainant and began to punch her once more as her uncle watched. She also whipped her using a pipe. When she finished, her uncle asked her to escort her back to the house. At the house, the Appellant picked a knife and threatened to kill the complainant. The following morning when the complainant's uncle came back from work, the complainant woke up to open the door for him but was stopped by the Appellant. She testified that the Appellant again caned her. Later in the day, the Appellant took the complainant to a certain lady's house and left her there. She told her not to go back home. She testified that she stayed with the lady for about one (1) week before the lady took her to Kenyatta National Hospital.

At the hospital, the complainant was seen by PW2 Dr. Hezron Chege Macharia on 10<sup>th</sup> August 2010. On observing the complainant's genitalia, PW2 noted that her hymen was torn and she had a white discharge. He also noted that she had ulcers around her genitalia. She had bruises on both breasts and had a painful abdomen. He concluded that the complainant had been sexually assaulted. He filed a Post Rape form and a P3 form in respect of the complainant which were produced into evidence *as Prosecution's Exhibit No. 1 and 2* respectively. The complainant was also seen by PW3 Dr. Zephania Kamau 30<sup>th</sup> August 2010 who noted that the complainant's breasts appeared large for her age. He also noted that the complainant was injured by a blunt object. She had a tender lower abdomen. On examining her genitalia, PW3 also noted that her hymen was absent. On cross examination, PW3 testified that he assessed the age of the complainant and established that she was aged eleven (11) years old. He filled a P3 form in respect of the complainant which was produced into evidence as *Prosecution's Exhibit No. 3*.

The case was investigated by PW4 PC Susan Ndungu of Kilimani Police Station. She testified that she recorded the statements from all the witnesses after which she formed the opinion that a case had been made for the Appellant to be charged with the present offences. When the Appellant was put on his defence, she denied committing the offence.

Upon re-evaluation of the facts of the case and the submission made by the parties to this appeal, this court is of the firm view that the prosecution did indeed prove its case against the Appellant to the required standard of proof beyond any reasonable doubt on the charges of **assault causing actual bodily harm** contrary to **Section 251** of the **Penal Code** and **Sexual Assault** contrary to **Section 5(1)(a) (i) and (ii)** of the **Sexual Offences Act**. In the present appeal, the complainant testified that she had on several occasions been physically assaulted by the complainant. She testified that the Appellant had inserted a

bottle inside her vagina and also pulled her breasts. The medical examination by PW2 revealed that the complainant's hymen was torn and she had a white discharge. He also noted that she had ulcers around her genitalia. She had bruises on both breasts and had a painful abdomen. On his part, PW3 noted that the complainant's breasts appeared large for her age. He also noted that the complainant was injured by a blunt object. She had a tender lower abdomen. On examining her genitalia, PW2 also noted that her hymen was absent.

From the foregoing, it was apparent that the complainant's evidence was corroborated by the medical evidence of PW2 and PW3. The fact that the bottle used by the Appellant was not tendered into evidence does not lessen the prosecution's case. The trial court and this court believe that the complainant was telling the truth. The Appellant was well known to the complainant. They lived together. She referred to her as aunt. This court finds that the Appellant was properly identified by the complainant. On the issue of the age of the complainant, it was the evidence of PW3 that he assessed the complainant's age and determined that she was aged eleven (11) years at the time. The age of the complainant was therefore established to the required standard of proof beyond any reasonable doubt.

In the premises therefore, this court finds no merit in the Appellant's appeal. The appeal is therefore dismissed. The sentence meted by the trial court is legal. It is hereby upheld. It is so ordered.

**DATED AT NAIROBI THIS 5<sup>TH</sup> DAY OF APRIL 2016**

**L. KIMARU**

**JUDGE**