REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 32 OF 2015

GEORGE ODHIAMBO SWAN ….....APPELLANT

VERSUS

REPUBLIC ….....RESPONDENT

[Being an appeal from the conviction and sentence of the Chief Magistrate's Court at Kisumu (Hon. Madam Lucy Gitari CM) dated 26th February 2015 in Kisumu CMCCRC No. 575 of 2011]

JUDGMENT

The Appellant was charged with defilement Contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act and also with Indecent Act with a child Contrary to Section 11(1) of the Sexual Offences Act.

On the first count it was alleged that on 27th September 2011 in Kisumu West he intentionally and unlawfully committed an act which caused penetration of his genital organ into the genital organ of J A a girl aged 14 years.

On the second count it was alleged that on the same day and place he intentionally and unlawfully committed an indecent act with J A a girl aged 14 years by touching her genital organs using his hand.

He pleaded not guilty to the charge but upon evaluating the evidence adduced by both sides the trial Magistrate found him guilty, convicted him and sentenced him to serve twenty years imprisonment on the charge of defilement and ten years imprisonment for the indecent act. The sentences were to run concurrently.

Being aggrieved by the sentence and conviction he filed this appeal the gist of which is that the trial Magistrate erred by relying and basing the conviction solely on the evidence of the Complainant; by not considering that there was need for forensic evidence; not considering his alibi and for failing to comply with Sections 324 and 329 of the Criminal Procedure Code.

At the hearing the Appellant also argued that the trial Magistrate erred by omitting to comply with Section 200(3) of the Criminal Procedure Code and further for admitting a defective charge. He also contended that there was not sufficient evidence to convict him as the Complainant had testified she had a boyfriend and the doctor could not ascertain when her hymen was broken. He contended that although thirty eight people lived in the plot where the offence is alleged to have been committed none of them was

called to testify. He stated that no voire dire was conducted and the evidence of the Complainant was all lies. He stated that he is in jail for an offence he did not commit and his family for which he was the sole bread winner is suffering.

The appeal was opposed. Relying on the record Prosecution Counsel, Mr. Muia, submitted that Section 200 of the Criminal Procedure Code was complied with. On the evidence he submitted it was more than sufficient and as for the charge sheet he stated it was properly drawn. As for the alibi he referred to pages 54 and 55 of the judgment and submitted that the same was considered. He urged the Court to dismiss the appeal. He relied on the Court of Appeal decision – **Kossam Ukiru V. Republic [2014] eKLR.**

Briefly the facts of the case were that on the material day at about 9pm the Complainant, then aged 14 years, who was home alone decided to go fetch water but not finding money where it was normally put by her mother she went to the Appellant's house to look for her brother. Their house was directly opposite that of the Appellant. She found the Appellant's brother and asked him if he had seen her brother but instead of replying he ran off towards the gate. It was then that the Appellant who was in the house pulled her inside. He pulled her to a bed, removed her underpant and after gagging her mouth with a piece of cloth he had carnal knowledge of her. After he left her she went home, took a bath and washed her pant. She did not tell her mother for fear she would reprimand her and that the Appellant would make good his threat to beat her and her mother. When she went to school the next day however she narrated her ordeal to a fellow pupil who told their teacher, B A (PW2) who in turn reported the matter to the police. Thereafter she was then taken to District Hospital and then the Provincial General Hospital where a doctor confirmed she had been defiled. Her P3 form was filled and the Appellant was subsequently charged with this offence.

The Appellant gave evidence on oath and called two witnesses. He confirmed he knew the Complainant as they were neighbours but stated that on the material day he was away in Nairobi having left at 9pm the previous day. When he returned on 30th September 2011 and heard it being alleged he had defiled the Complainant he confronted her mother who said it was the cousin who was living with him who used to do it. He stated that he found a photograph the Complainant had taken with his cousin and that the Complainant had opposed the said cousin going away. His first witness was Jenifer Akoth Oduor the caretaker of the plot the parties resided. Her evidence was that the Appellant left for Nairobi at 6.30pm on 26th September 2011 being escorted by his wife and did not return until 30th September 2011 at 7pm. She also stated that as a result of the allegations made by the Complainant it was resolved that the Appellant should move from that residence. Samson Oduor Okoth (DW3) his neighbour testified that on 26th September 2011 he escorted the Appellant to the booking office at 3pm and only returned home after he confirmed the Appellant booked the vehicle. He too stated that the Appellant returned from Nairobi on 30th September 2011.

As the first appellate Court it is my duty to reconsider and evaluate the evidence so as to arrive at my own conclusion all the while bearing in mind that I did not have the benefit of seeing the witnesses testify.

There is no doubt that on the material day the Complainant was defiled. Her own evidence and that of Dr. Kamau Wangari (PW4) who examined her on 28th September 2011 proved beyond reasonable doubt that she was defiled. She was still bleeding when she was taken for the examination a fact confirmed by the Doctor. The issue for determination then would be whether it was proved beyond reasonable doubt that the Appellant was the person who defiled her. The Appellant has vehemently denied that it was him who defiled her and stated that he could not have done it as he was in Nairobi on that day. The Appellant correctly submitted that in finding him guilty the trial Magistrate put reliance solely on the evidence of the Complainant. The proviso to Section 124 of the Evidence Act empowers the Court to do so. There was no eye witness when this offence was committed and the Complainant is essentially the only witness to the crime. The other witnesses only lend credence to her evidence that she was defiled. Having considered her evidence I am convinced that she told the truth. She knew the Appellant well as they were neighbours and the Appellant himself admits this. She also knew the other members of his household and this clearly is not a case of mistaken identity. When he pulled her into the house the television was on and she could clearly see him. She did not tell her mother about the incident for fear of being reprimanded but immediately she went to school she told a friend who in turn told a teacher. That teacher

testified as PW2. She narrated how the Complainant who was crying incessantly told her she was defiled and even gave her the name of the assailant. PW2 struck me as a truthful and credible witness. She did not know the Appellant and her involvement in this matter was only because she was the Complainant's teacher. It was she who took the girl to hospital and called her mother. She told this Court that the Complainant was inconsolable. This demeanor is not that of a Complainant who was not telling the truth. I believed the Complainant. She was very consistent and remained unshaken even upon rigorous cross examination by Counsel for the Appellant. The alibi defence put forth by the Appellant was on the other hand very inconsistent. His own testimony differed sharply with that of his witnesses. While he stated that he left for Nairobi at 9pm his witnesses said it was 7pm and 6.30pm and although DW3 claimed to have escorted the Appellant to the booking office, DW2 testified that it was the Appellant's wife who escorted him. In addition to these inconsistencies and contradictions the witnesses also sounded rehearsed and indeed there was no cogent evidence that the Appellant left for Nairobi at all. None of the witnesses saw him boarding the bus and leaving.

I am satisfied that the charge against him was proved beyond reasonable doubt. The trial Magistrate duly complied with the provisions of Section 200(3) of the Criminal Procedure Code. The Appellant's Advocate who was there throughout the trial intimated to the Court they did not wish to recall the witnesses both at the stage where the trial Magistrate was taking over and when the charge was amended. In **Kossam Ukiru V. Republic [2014] eKLR** the Court of Appeal held that it was sufficient that Counsel for the Appellant informed the Court that the case proceeds from where the other Magistrate left it. I have already stated that the medical evidence in this case corroborated that the Complainant was defiled. As to who did it it is my finding that the Complainant's testimony proved beyond reasonable doubt that it was the Appellant. The proviso to Section 124 of the Evidence Act removes the necessity for corroboration where the only witness is the victim of the sexual offence. The charges were proved beyond reasonable doubt. The charge was not defective and indeed no defect has been pointed out to the Court. The Complainant's age was proved by a birth certificate and the sentence imposed was therefore lawful.

In the end my finding is that this appeal has no merit. The same is dismissed. The conviction and sentences imposed by the trial Magistrate upheld.

Signed, dated and delivered at Kisumu this 6th day of October 2016

E. N. MAINA

JUDGE

<u>In the presence of</u>:-

Mr. Muia for the state

Appellant in person

CC: Serah