



**REPUBLIC OF KENYA**

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

**HCCRA 131 OF 2012**

*( From original conviction and sentence in Criminal Case number 678 of 2008 of the Principal Magistrate`s court at Maseno – Hon. S. Onger-RM)*

**CHARLES OSIR OWINYO .....APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

**JUDGEMENT**

1. The Appellant in this case was charged with defilement contrary to section 8(i) as read with **section 8(2)** of the **Sexual Offences Act** the particulars being that on 24/7/2008 at [particulars withheld] sublocation in Kisumu West District within Nyanza Province he unlawfully caused penetration with his genital organ to a child namely L A aged **eleven years**.

2. He faced an alternative charge of indecent Act with a child contrary to **section 11(i)** of the Sexual Offences Act and the particulars were that on 27/7/2008 at [particulars withheld] sublocation in Kisumu West District within Nyanza Province, he committed and indecent act with a child namely L A by touching her genital organ.

3. He pleaded not guilty to both charges but after hearing and considering the evidence of the prosecution witnesses and the sworn testimony of the appellant, the court found him guilty on the charge of defilement and sentenced him to serve 20 years imprisonment. Being aggrieved, he filed this appeal. In the grounds he faults the trial magistrate for not evaluating the evidence and for going out of his way to convict him. He also contends that his rights to a fair trial were not secured and that the burden of proof was shifted to him. He further contends that the trial court based its findings on wrong Principles of law and that the sentence imposed was excessive.

4. Briefly the facts of the case were that on the material day the complainant who said she was fetching firewood in their farm when the appellant whom she knew beckoned her to where he was. It was at 1700 hours and he was standing close to a bush. He knocked her down, removed her pant and penetrated her vagina with what is in the proceedings described as his testis. She screamed and her mother heard her and rushed to the scene. The Appellant ran away but the complainant`s mother had seen him. They went and reported the matter to the area chief who accompanied them to Kombewa police station where they reported the matter. The appellant was then arrested. A medical examination conducted at Kombewa District Hospital revealed that the complainant had been defiled. The appellant was also examined by the same clinical officer who concluded that he had had sexual contact. On his part, the appellant stated that he had found the girl cutting his brother`s trees and when he asked her she insulted him. He decided to go to the chief to report but the girl went there ahead of him and it was then that he was arrested.

5. At the hearing of the appeal the appellant was represented by Mr. Onsongo Advocate and and before the appeal started Miss Wakio, Prosecution Counsel informed the court that the age of the complainant had not been proved and as this was an error she wanted the court to order a retrial. Mr. Onsongo did not oppose that request.

6. Having reconsidered and evaluated the evidence before the trial court, I am satisfied that this case is suitable for a retrial as there is evidence that could result in a conviction. Accordingly the conviction is

quashed and the sentence set aside. The appellant be produced before Maseno Principal Magistrate`s court within 14 days of this judgment for expeditious retrial. In the meantime to be remanded in prison custody.

**E.N. MAINA**

**JUDGE**

**Signed, dated and delivered in Kisumu this 5th day of March, 2015.**

**In the presence of:**

Mr. Ruto for state

Appellant in person

Cc: Moses Okumu

ENM/aar