REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

HCCRA NO. 58 OF 2012

From original conviction and sentence in Criminal Case number 206 of 2011

of the Principal Magistrate`s court at Nyando – Hon. C. Owiye-SRM)

MORRIS OWINO OGUNYO.....APPELLANT

VERSUS

REPUBLIC.....RESPODNDENT

JUDGMENT

The appellant was charged with Defilement contrary to **section 8(i) (3) of the Sexual Offences Act** and in the alternative Indecent Assault with a child contrary to **section 11 (i) of the Sexual Offences Act**.

The particulars in the main count were that on 22nd August 2010 at [particulars withheld] sublocation in Nyando District within Nyanza Province he intentionally caused his penis to penetrate the vagina of P A O a child aged 12 years. In the alternative charge the particulars were that on the aforesaid date, place and time he unlawfully and indecently assaulted P A O a child aged 12 years by touching her private parts namely vagina.

The Appellant denied both charges but after hearing the evidence of the seven prosecution witnesses and the appellant`s unsworn defence the trial magistrate found him guilty on the main count, convicted him and sentenced him to twenty years imprisonment and being aggrieved he filed tis appeal.

His petition of appeal raised the following grounds:

1. **That the appellant was never medically examined hence be directly linked with the said offence**

2. **That the prosecution was not able to discharge its duty adequately by relying on the evidence from the same family**

3. **That the lower court failed to table any material evidence ie exhibits to support the allegations particularly the inner part.**

4. **…..... “**

At the hearing the appellant relied on his written submissions where he stated that this case was never

booked in the Occurance Book. He also stated that the charge as drawn does not exist and that it was defective. He further stated that it was a grave mistake for the police to charge anyone not stated in writing and further that the clinical officer never established penetration yet it is the most essential ingredient of defilement. He contended further that he was prejudiced by being tried for an offence that does not exist and that as the charge was defective it ought to be rejected.

The appeal was opposed. Miss Muriru prosecution counsel referring to the evidence submitted that the prosecution`s case was proved to the standard required. She further submitted that the appellant after the commission of the offence disappeared for 3 months which is a pointer to his culpability. She contended that the issue regrading the Occurance Book should have been raised at the trial and hence an after thought which does not dislodge his culpability.

On the issue of the charge she submitted that the failure to put the words as read with ` between section 8(i) and 8)3) does render the charge fatally defective as even if there was a defective it is curable under section 382 of the Criminal Procedure Code.

In his reply the appellant reiterated that the medical officer did not observe injuries on the complainant. He also reiterated that the charge sheet was not drawn properly.

As the first appellate court, I have reconsidered and evaluated the evidence in this case afresh. The complainant a girl aged 13 years as confirmed by a birth certificate produced in evidence as Exb P.3, testified that on the material day, at about 6 p.m she was on her way back home after running an errand for her mother; that she met the appellant who she knew as they were neighbours; he was armed with a panga and after holding her by the hand, he led her to a bush undressed her and inserted his penis into her vagina. Once he was done he told her to put on her underpant and warned her not to tell her mother. He then promised to make her as his second wife before cycling away on his bicycle. On reaching home she reported the matter to her mother who in any case had gone out to look for her as she had overstayed. Her mother (PW2) looked at her genitalia and upon seeing blood and sperms went and confronted the appellant but he denied he had defiled her. The next morning she took the complainant to Ahero sub-district hospital. She then obtained a P3 form at the Ahero police station where she also made a report. The treatment notes and a duly completed P3 form were produced in evidence as exhibits P1 and P2. Like the Trial Magistrate, I am satisfied that the appellant was proved beyond reasonable doubt. The complainant knew the appellant as they were neighbours a fact that was confirmed by the complainant`s mother who stated that she went to his house ad spoke to him as well as to his mother. Secondly, when the appellant accosted the complainant it was at 6pm and hence not dark. The complainant gave a very vivid description of what transpired from the time the appellant held her hand, led her to the bush, defiled her and ordered her to put on her underpant. She told the court how he promised to make her his second wife and how after that he cycled away on his bicycle. Although her evidence does not require corroboration**(see section 124 of the evidence Act)** hers was corroborated by her mother who stated that she met the appellant riding a bicycle shortly before she met the complainant who she had gone to look for. I am satisfied that the complainant was faithful. Her evidence was so vivid as to have been made up.

The court of appeal had occasion to deal with the issue of the medical examination of a penetrator of a sexual offene, or the lack of it, in **Dennis Osoro OBIRI v Republic (2014)eKLR** and held as follows:

> **“ The appellant secondly contends that there was no medical evidence adduced to link him with the defilement of PW1. In our view, such evidence was not necessary the moment the trial court found that there was sufficient medical evidence to prove that the appellant had been defiled and that the appellant`s evidence was trustworthy as to the identity of the person who had defiled her....”**

The court referred to another of its decisions in **Geoffrey Kioji V. Republic Criminal Appeal NO. 270 of 2010 (Nyeri**) where it was stated:

> **“ where available medical evidence arising from examination of the accused linking him to the defilement would be welcome. We however, hasten to add that such medical;**

evidence is not mandatory or even the only evidence upon which as accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person. Indeed, under the proviso to section 124 of the Evidence Act, cap 50 laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."

As I have stated that complainant`s evidence was so vivid as to have been made up and hence the reasons I believed her. It was sufficient to form the basis of the appellant`s conviction and this settles his submission that there was no medical evidence either to prove that the complainant was defiled or that he was the perpetrator of the offence.

As for the charge sheet I admit that it could have been framed in a better manner by insertion of the words" as read with between **section 8(i) and 8(3**). However, that defect does not render it fatally defective. As submitted by prosecution counsel the defect is curable under **section 382 of the Criminal Procedure Code**. The omission to state the Occurance Book number does not render the charge sheet fatally defective either and on the whole I am satisfied that the appellant was properly convicted of the offence of defilement. This appeal has no merit and is accordingly dismissed.

E.N. MAINA

JUDGE

Signed, dated and delivered in Kisumu this 12th day of March, 2015.

In the presence of:

Mr. Ketoo for state

Appellant in person

Moses Okumu- court clerk