



**REPUBLIC OF KENYA**

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

**HCCRA 40 OF 2014**

*(From original conviction and sentence in Criminal Case number 55 of 2013 of the Principal Magistrate`s court at Ukwala – Hon. R.M. Oanda-Ag PM)*

**WALTER WANDAI OSIMBO .....APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

**JUDGEMENT**

1. On 27/2/2013 the appellant was arraigned before the Principal Magistrate`s court at Ukwala and charged with defilement contrary to section 8(i) of the sexual offences Act or in the alternative committing an indecent Act with a child contrary to section 11(i) of the sexual offences Act.

2. The particulars on the main count were that on 16th February, 2013 at [particulars withheld] sublocation in Ugunja District within Siaya County, the appellant intentionally caused his penis to penetrate the vagina of L A O a child aged 13 years. Those of the alternative charge were that on 16th February, 2013 at [particulars withheld] sublocation in Ugunja District within Siaya County, he intentionally touched the vagina of L A O a child aged 13 years with his penis.

3. The appellant denied the charges and a trial in which the prosecution called a total of five witnesses ensued. On his part the appellant gave sworn evidence and called two witnesses. The court upon considering and evaluating the evidence by both sides found the appellant guilty on the charge of defilement, convicted him and sentenced him to 20 years imprisonment and being aggrieved he filed this appeal.

4. His petition contains only one ground which is:

**“ That the Learned trial Magistrate erred both in law and facts by failing to consider that the medical examination report was defective in the circumstances of the case”**

He also sought to be allowed to adduce further grounds at the hearing of the appeal.

5. In his submissions (written) he stated that PW1 never shed enough light to the prosecution case and that her evidence lacked merit as it was incomplete. He pointed out that the complainant`s mother only stated what she was told as she was not a witness to the crime. He submitted that this was hearsay and was of no value. He further contended that the investigation officer never carried out any investigations as he did not go to the scene to collect samples. He wondered why it took two weeks to arrest him. He also took issue with the medical evidence tendered saying that it did not specify the numerous pus cells found in the complainant`s urine and that it did not connect him to the commission of the offence but

only confirmed that the complainant was defiled. He also took issue with the fact that he himself was never examined and further submitted that his defence was overlooked.

6. The state opposed the appeal. Prosecution counsel Miss Muriu submitted that whereas the accused called two witnesses they did not dislodge the evidence of the prosecution witnesses. She disputed that the medical evidence was defective and stated that it was conclusive that the complainant had been defiled. She contended that the appellant did not challenge the evidence of the clinical officer and did not shake his credibility in cross-examination. She admitted that the age of the complainant was duly proved and that having been identified as the perpetrator the appellant was properly convicted. On the contention that he was himself not examined she submitted that that is neither here nor there. She contended that the child's evidence was corroborated by her mother and the medical evidence and that this appeal should be dismissed.

7. In reply the appellant stated that he would not have gone to the chief when summoned had it been true that he committed this offence. He also submitted that this matter arises from land disputes at home.

8. As the first appellate court, I have reconsidered and evaluated the evidence in the lower court while bearing in mind that I did not see the witnesses testify. I have also considered the submissions by the appellant and the state.

9. It has been held severally that given the proviso to **section 124** of the Evidence Act the evidence of the victim of a sexual offence does not require corroboration. See for instance **Dennis Osoro Obiri V. Republic [2014] eKLR** when the court of appeal stated:-

**“ 20. The effect of the proviso to section 124 is to create in cases of sexual offences, an exception to the general rule that an accused person cannot be convicted on the uncorroborated evidence of a child of tender years.....”**

In the same case the court dealt with the issue of examination of the accused person raised by the appellant in this appeal and held as follows:-

**“ 24. 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 complainant had been defiled and that the appellant's evidence was trustworthy as to the identity of the person who had defiled her. In *Kassim Ali V. Republic Cr. App No. 84 of 2005 ( Mombasa* this court upheld the same view in the following terms: ....The absence of the medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence”.**

We do not see the reason why the principle should be different in charge of defilement .....

10. As for the evidence of PW2 it is contended that the same was hearsay as she did not witness the offence. It is my finding that this is not the case. PW2 did not repeat what she had heard from a third party but what the complainant told her hence but tressing the credibility of the complainant. However, it is my finding that the trial of the appellant was less than satisfactory. The record shows that before receiving the evidence of the complainant the court declared her a vulnerable witness and proceeded to appoint one Mr. Morris Ochieng Okoth, a teacher, as her intermediary. This he was perfectly entitled to do under **section 31(i)** of the sexual offences Act. The record does not however, show what role this intermediary played. It only shows that he was sworn and that “ PW1; Anyango unsworn/Dholuo stated that the accused strangled her and defiled her and pointed at the appellant as the person who did it.

After that, her mother PW2 was put on the stand and her testimony was that she had on the material day at 4p.m sent the complainant to the river to fetch water. She delayed in return and so she decided to go look for her but found her behind the house crying. She had been injured and when she (PW2) asked her what had happened she said the appellant had defiled her. From this evidence it would appear that the

complainant was capable of some form of communication albeit through an intermediary. **Section 31 and 32** of the sexual offences Act and now the Sexual offences Act Rules 2014 are very elaborate on what should happen once a witness is declared vulnerable and section **31(7)** of the act sets out the role of the intermediary one of which is to convey the general purport of any question to the relevant witness, which in our case was the complainant. It is not clear whether the intermediary played this role yet it would be expected that it was him who repeated the complainant's answers to the court. Indeed **section 31(10)** makes this expectation live when by providing that a court should not convict an accused person solely on the uncorroborated evidence of an intermediary in this case it is even difficult to understand how the trial magistrate understood the complainant to mean that the appellant had strangled and defiled her. It is also evidence that the appellant was not allowed to test the evidence of the complainant through cross-examination yet **section 31(13)** of the Act requires that he be given an opportunity to put questions to the complainant albeit through the intermediary.

11. Given the aforesaid reasons, I find that this is a case that ought to go for retrial. The appellant has only served **1 ½** years of the twenty years imposed and shall therefore not be prejudiced. To the contrary, his right to a fair trial shall have been secured.

12. Accordingly the conviction herein is quashed and the sentenced is set aside. The appellant be taken to the Ukwala Court within seven(7) days of this judgment for an expeditious retrial by a magistrate other than the one who conducted this trial. In the meantime, he shall be remanded in prison custody.

**E.N. MAINA**

**Judge**

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

**In the presence:-**

Mr. Ruto for state

Appellant in person

Court Clerk-Moses

ENM/aar