REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 111 OF 2012

W.O.O.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of the Senior Principal Magistrate's Court at Siaya (Hon. R. B. Ngetich SPM) dated the 31st October 2012 in Siaya SPMCCR. No. 109 of 2012)

JUDGMENT

The appellant was charged with defilement contrary to section 8(1) as read with 8(2) of the Sexual Offences Act the particulars being that on 10th January 2011 at [particulars withheld] village, in Siaya District within Nyanza Province he intentionally caused his penis to penetrate the vagina of S A A aged 9 years.

He faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act in that on 10th January 2011 at [particulars withheld] village, in Siaya District within Nyanza Province he intentionally touched the breasts and vagina of S A a child aged 9 years.

He pleaded not guilty to the charges and a trial ensued.

Briefly the facts of the case were that on the material day M A A (PW1), the complainant's grandmother and guardian, since the death of her parents, left her playing with her cousins and went for a meeting. It was while they were so playing that the appellant who is her uncle called her and held her then took her to a bush where after undressing her he inserted his penis into her vagina. When he left she crawled home in pain. When her grandmother returned home at about 6.30PM and found her sleeping under a tree while in tears she inquired what had happened. The complainant did not tell her. The next day she was reluctant to go to school but she went all the same. After two days she became more sick and that is when she revealed what her uncle had done to her. She was then taken to Ambira Health Center where she was examined. The clinical officer (PW3) stated that there was tenderness of the labia majora but the hymen was intact. He concluded that there was attempted defilement. The matter was then reported to Siaya Police Station and the appellant was subsequently arrested and charged.

In his defence the appellant denied that he was home on the material day. He testified that he was at a place called Rang'ala and that he left for Rang'ala at 3.30PM and left the complainant playing with his children at home. They were not there when he returned home. He called three witnesses. D O O (DW1) a teacher at [particulars withheld] Primary School in Bondo testified that on the material day he went to the appellant's house at around 11AM to return a hoe he had borrowed. He stayed there until 3.30PM when they left together. He stated that the appellant boarded a motor cycle to go to Rang'ala. He confirmed that the complainant was at the appellant's house on that day.

F A O (DW2) the appellant's wife stated that on the material day she left at 7AM to take a child to the clinic. She returned at 1 O'clock and found her husband with his friend and the children. She cooked at 2PM and fed the children including the complainant. At 3.30PM the appellant left with a motor cycle. She later learnt that the complainant had left with a child called A. She testified that the appellant went back at 6PM. She could not however tell where he was between 3.30PM and 6.00PM.

The last witness J A (DW3) was the appellant's daughter. Apart from confirming that she knew the complainant she knew nothing else about the charges facing the appellant.

After evaluating this evidence the trial Magistrate concluded that the evidence pointed to partial penetration which nevertheless amounts to defilement. She therefore found the appellant guilty on the principal charge and sentenced him to life imprisonment. Being aggrieved he has appealed.

At the hearing his advocate, Mr. Oguso, relied on the supplementary petition of appeal which is premised on the following grounds:-

1. **The trial court erred both in law and fact in totally misunderstanding and or failing to appreciate the accused person's defence thereby coming to a wrong conclusion.**

2. **The trial Court failed to appreciate the background of the matter and likehood of fabrication of evidence by complainant and their witnesses.**

3. **The learned trial Magistrate erred in both law and fact in failing to appreciate the glaring contradictions in the evidence by the prosecution witnesses.**

4. **The trial Court erred in both law and fact capitalizing on the weakness in the defence case to buttress an otherwise weak prosecution case.**

5. **The learned trial Magistrate erred in law in lowering to the prejudice of the accused person the standard of proof in a criminal case.**

6. **The learned trial Magistrate did not comply with section 169 of the Criminal Procedure Code in writing the Judgment herein.**

7. **The judgment of the subordinate Court is against the weight of evidence on record.**

8. **The sentence imposed on the Appellant is manifestly harsh and excessive in the circumstances.**

Mr. Oguso urged this Court to consider the issues of fact and law. He contended that the trial Court completely misapprehended the facts; That it was clear from the evidence that there was no defilement which fact was confirmed by the medical report and treatment notes. He also submitted that the trial Court failed to appreciate the defence; that the appellant was categorical that he was not home at the time of the alleged offence a fact confirmed by DW2. He contended that the judgment was at variance with the evidence and urged this Court not to uphold it. He wondered whether the conviction was for defilement or indecent act with a child and reiterated that the evidence on record does not disclose defilement. He expressed dismay that the appellant would turn on a child he calls his own. He further submitted that the age of the complainant was unknown as the medical records stated she was 9 years while the medical report stated she was 11 years old. He concluded by stating that the trial Court misdirected itself; that it acted on a wrong principle of law. Further that it ignored the defence and put too much reliance on evidence that cannot be supported by law or facts. He urged this Court to allow the appeal, quash the conviction, set aside the sentence and set the appellant free.

Miss Wakio, Learned Prosecution Counsel, opposed the appeal. After summarizing the evidence of the witnesses she submitted that the trial Magistrate evaluated this evidence as well as that of the defence. She contended that as this offence occurred in broad day light the complainant positively identified the

appellant and further that the evidence of one witness is sufficient to prove a sexual offence and that the trial Magistrate properly warned herself. She urged this Court to exercise its powers under section 354 of the Criminal Procedure Code to see that justice is served by dismissing this appeal.

In reply Mr. Oguso submitted that the trial Magistrate did not warn herself as alleged by Prosecution Counsel. He contented that the appellant called three witnesses who clearly indicated what happened whereas PW1 was not at the scene. He contended that partial or full penetration can only be proved by medical evidence and the trial Court cannot fish for such evidence. He contended that the evidence on record showed that no such thing happened and that it was not the duty of the appellant to prove his innocence. He contented that serious doubt was created and the same ought to be exercised in the appellant's favour.

I have considered these rival submissions but as I am required to do as the first appellate Court I have also reconsidered and evaluated the evidence so as to arrive at my own conclusion. I have done so bearing in mind that I did not see the witnesses give evidence. The evidence clearly points to defilement. The complainant though young vividly and consistently narrated what was done to her. She told the Court how the appellant led her into a bush and after removing her skirt and blouse removed his penis and entered her vagina. The provision to Section 124 of the Evidence Act provides that the evidence of the victim of a Sexual Offence is sufficient to found a conviction provided the Court believes the complainant. There need be no corroboration. Indeed in **Mohamed V. R [2006]2KLR 138** the Court of appeal held:-

"It is now settled that the Courts shall no longer be hamstrung by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful."

In this case I was impressed by the forthrightness of the complainant. She told the Court exactly what the assailant did to her. I believed her. To begin with she knew the appellant. He is her uncle a fact which was confirmed even by the appellant's witnesses. The offence occurred in broad day light and he was seen getting hold of her by W.A. (PW3) one of the children she was playing with. The other reason I believed her is because her grandmother confirmed that when she went home the complainant did not immediately tell her what had happened and that she was in tears. The complainant did not state exactly what time the offence occurred but from the evidence of the defence witnesses it could have been between 3.30PM and 6PM when he left saying he was going to Rang'ala. Neither his friend DW1 nor his wife DW2 could say for sure that he went to Rang'ala. They only repeated what he told them and his wife even conceded that she did not know where he was between 3.30PM and 6PM.

As for the medical evidence it just goes to confirm that the complainant was truthful and credible. It was the clinical officer's testimony that the girl's genitalia was tender/swollen. The trial Court had a right to conclude as she did that although there was penetration it was partial. This conclusion was based on the clinical officer's finding that the complainant's hymen was not broken. Partial penetration also amounts to defilement. The trial Magistrate was clear that she found the appellant guilty and convicted him on the charge of defilement but not indecent act with a child. I am not convinced that she misdirected herself or acted on a wrong principle of the law. It is also clear in her judgment that she considered the appellant's defence and the evidence of his witnesses.

It is correct as submitted by Mr. Oguso, Learned Advocate for the appellant, that the age of the appellant differed in the P3 form and the age assessment report. Indeed even her grandmother said she was born in 1999 which would make her 11 years old when this offence was committed. In his report the person who assessed her age concluded that she was below 13 years and more approximately 11 years old. The important thing for purposes of this offence is that she was below 11 years old. In so saying I am fortified by the decision of the Court of appeal in **Dennis Osoro Obiri V. Republic [2014)eKR** where it was held that:

"On the appellant's complaint that the age of the appellant was not proved, we do think much turns on that. Section 8(2) of the Sexual Offences Act under which the appellant was charged relates to

defilement of a child aged eleven years or less. To that extent, it did not matter whether PW1 was 9 or 10 years old. The critical issue is that she was less than eleven years old. On that basis, it is not surprising that the trial Court did not consider the issue material or fatal to the prosecution. This ground of appeal too, lacks merit.''

Accordingly I find no merit in this appeal and the same is dismissed and as the sentence imposed is the minimum provided it is confirmed.

Signed, dated and delivered at Kisumu this 21st day of July 2015.

E. N. MAINA

JUDGE

In the presence of:-

Mr. Ruto for the state

Mr. Olel for Oguso for the appellant

CC: Moses Okumu