YUVENALIS MOCHACHE OCHORA ……..…… APPELLANT

AND

REPUBLIC ……. RESPONDENT

(Being an appeal from the original conviction and sentence dated 29th July 2011 by

Hon. Phyllis Shinyada, RM, in Kisii CMCR Case No.438 of 2010)

JUDGMENT

1. The appellant herein was arraigned before the CM's court at Kisii on one count of defilement contrary to **section 8 (1)** as read with **section 8 (2)** of the **Sexual Offences Act, No. 3 of 2006**. The particulars are that on the 20th February 2010 at 9.30 a.m. at [particulars withheld], Kisii Central District within Nyanza Province intentionally and unlawfully penetrated to the genital organ of L.N., a girl aged 8 years with his genital organ, namely penis. In the alternative, the appellant was charged with indecent act contrary to **section 11 (1)** of the **Sexual Offences Act No.3 of 2006**. It was alleged that the appellant committed the offence of indecent assault in the same place and at the same time by touching L.N's genital organ using his genital organ. The appellant pleaded not guilty and the case proceeded to trial.

2. The prosecution called 5 witnesses. PW1 was Omurwa Dennis, a clinical officer attached to Kisii Level 5 Hospital. He examined the complainant, L.N. on 20th February 2010. The complainant who was aged 8 years was found to have no external physical injuries on her body but an examination of her genitalia revealed that there was swelling on the external genital organ as well as a ruptured hymen. Her vaginal canal was also found to be unusually wide open with tender vaginal walls. There was no discharge or wetness. A laboratory examination done by way of high vaginal swab revealed the presence of numerous pus and epithelial cells. This was an indication of inflammation though no sperms were seen.

3. The complainant testified (recorded as PW1) and recalled how on the 20th February 2010, while she was at the house of her grandmother A.K, the appellant who was at the said home of K. When she got to where he was, the appellant pretended to send her for a spoon in one of the rooms and the moment she entered the said room, the appellant also entered, held her by force and removed her underpant. He then lifted her, patted her legs and inserted his penis into her vagina. While the appellant was engaged in that act, some other children entered the house and saw what the appellant was doing to the complainant. Those children among them N K(not called as a witness) ran and reported the matter to A.K., who came immediately but found when the appellant was zipping up his trouser.

4. A.K. (K) who testified as PW2 stated that at about 10.00 a.m. on 20th February 2010, while she was at the shamba, she received information from N.K. that the appellant herein was strangling the complainant herein. K. had left the appellant at her home where he was making some seats for her. On receiving the information from N.K, K. rushed home only to find the appellant inside the house in the process of fastening his trousers. L. was then in the same room lying on the floor, crying. L. reported to K. that the appellant had defiled her and that he had threatened to harm her if she screamed. K. screamed on hearing what the appellant had done to L.

5. The complainant was taken to Kisii Level 5 Hospital for treatment where she was seen and examined by Omurwa Dennis, PW1. The clinical officer filled the P3 form which was produced in evidence as **P. Exhibit 1**. Meantime K, together with her husband had reported the matter to Kisii police station. The appellant was arrested and taken to Kisii police station on the same day. K. testified that she had asked the appellant to come to her home so he could repair her seats. She also said that before she took the complainant to hospital, it was evident that the girl had been defiled. She also stated that the appellant had admitted the offence, but said that he had been tempted by the devil.

6. When cross examined, K. denied that she was quarrelling with the appellant over any money she had paid to him. She also denied that she was quarrelling with her son E. She said she had no differences with the appellant.

7. PW4 was Charles Moegi Ombonyo, Assistant Chief of Nyanguru sub location. On 20th February 2010, he received a report about the incident involving the appellant and the complainant. The appellant was later taken to the office of PW4 by members of the public. PW4 escorted the appellant to Kisii police station. PW4 stated that he knew the appellant as a carpenter.

8. The report to the police was received by No.75181 Cpl. Judith Kiprotich who testified as PW5. The appellant was escorted to the police station by PW4. The complainant who was also present at the police station was interrogated by Cpl. Kiprotich and she reiterated to PW5 what she told the court in her evidence in chief. PW5 issued a P3 form and took complainant to hospital for age assessment. The appellant was never taken to hospital saying that it was not mandatory to take him to hospital. No exhibits were availed to PW5.

9. At the close of the prosecution case, the appellant was called upon to defend himself. He gave an unsworn statement and also called one witness. The appellant stated that he makes and repairs furniture and that at times he works in peoples' homes. He denied committing the offence but admitted that on the day in question, he was doing some work for K. who then started complaining that he was working at a slow pace. While he thus worked K. all of a sudden started alleging that he had defiled the complainant. That she had been telling people that she would fix him with an offence. He was then arrested and taken to the police. He said he was never taken to hospital for examination.

10. DW2 was Charles Mabeya Mose. He told the court that on the day in question he passed by where the accused was working and found when appellant had been arrested on allegations that he had defiled the complainant. DW2 stated that he knew the appellant well and that the appellant was not an offender and that the charges against the appellant were fabricated.

11. On cross examination, DW2 stated that he passed by K.'s home at around 8.00 a.m., but appellant was arrested at 9.00 a.m. DW2 stated further that he could not say whether or not the appellant had committed the offence; and that he never saw him commit the offence.

12. After carefully considering the evidence that was placed before her, the learned trial magistrate was satisfied that the prosecution had proved its case beyond any reasonable doubt on the main count. The court proceeded to find the appellant guilty as charged and convicted him accordingly. The appellant was sentenced to serve 20 years' imprisonment.

13. Being aggrieved by the said conviction and sentence, the appellant has appealed. The appeal is predicated on the following 6 grounds:-

1. The trial magistrate erred in law and fact in convicting and sentencing the appellant as she did even when the case against the appellant was not proved beyond reasonable doubt.

2. The trial magistrate erred in law and fact in failing to appreciate that there was no medical assessment of the age of the alleged victim LN which evidence is crucial in proving a case under section 8 (1) as read with section 8 (2) of the Sexual Offences Act No. 3 of 2006.

3. The minor N K who allegedly witnessed the defilement of LN was not called to testify to corroborate the victim's evidence, the evidence of PW3 Agnes Kwamboka on the report made to her by the foresaid N K on the defilement ordeal is thereby rendered hearsay evidence.

4. The investigation conducted was shoddy and inconclusive as the appellant was not medically tested to ascertain whether he too had pus and epithelial cells that were noted from the complainant's high vaginal swab.

5. The learned trial magistrate erred in law and fact in failing to enter a finding that the evidence of the prosecution's witnesses was full of contradictions and inconsistencies and thereby acquit the appellant.

6. The sentence of 20 years imposed was illegal in light of the fact that the age of the alleged minor victim was not ascertained for the honourable court to be guided under what section of the Sexual Offences Act to sentence the appellant.

14. The appellant prays that the appeal be allowed, conviction quashed and the sentence set aside.

15. At the hearing of this appeal, I heard submissions from counsel for the appellant and counsel for the respondent. As this is a first appeal, this court is under a duty to reconsider and evaluate the evidence afresh with a view to reaching its own conclusions in this matter. This first appeal is like rehearing the appellant's case, only remembering that this court has no opportunity of seeing and hearing the witnesses who testified in the court below. In exercising the jurisdiction to reconsider and evaluate the evidence afresh, provision has to be made for this fact: that this court has no opportunity of seeing and hearing the witnesses who appeared and testified before the trial court. This duty of the first appellate court was set out for it in such cases as **Pandya –vs- R. [1957] EA 336**; **Okeno –vs- Republic [1972] EA 32** and **Mwangi –vs- Republic [2004] 2 KLR 28**.

16. After analyzing and reconsidering the evidence afresh, the issue that arises for determination is whether the evidence that was placed before the lower court was sufficient to establish the prosecution case against the appellant beyond any reasonable doubt. During the submissions counsel for the appellant collapsed the 6 grounds of appeal into 3 comprising grounds 1, 2, 4 and 5 as ground 1; grounds 2 and 6 each by itself. In ground 1, it was argued that no *prima facie* case was made out against the appellant and in particular that the evidence of PW1 did not establish that there had been sexual penetration as required by **section 8 (1)** of the **Sexual Offences Act**. Counsel also submitted that the allegation that other children saw the appellant in the act was not practically possible because according to the complainant, the appellant closed the door behind him after he entered the room where he allegedly defiled the complainant. It was also contended that N.K. who allegedly saw the appellant in the act and ran to inform K. was not called as a witness to tell the court what she saw. In the circumstances, counsel contended that K's evidence was mere hearsay which was of no probative value to the prosecution's case, and that in the absence of an eye witness account of what is alleged to have happened, the appellant should be given the benefit of the doubt.

17. Finally in regard to this ground 1, counsel submitted that the charge sheet was not supported by the evidence before the court and that the trial court should not have taken it upon itself to assess the age of the complainant without a proper age assessment being done.

18. In response to the issues raised under ground 1 of the appeal, counsel for the respondent, Mr. Mutua, submitted that the medical evidence clearly showed that the complainant had a ruptured hymen and an unusually wide vaginal canal and the walls of the vagina were also tender. He submitted that such vaginal characteristics were not normal for an 8 year old girl.

19. Regarding the issue of penetration, counsel submitted that the findings of the clinical officer vide the P3 form supported this fact and further that it is not correct to say that K's evidence was hearsay because K. testified that when she got to the house, she found the complainant lying on the floor crying while the appellant was zipping up.

20. I have myself revisited the evidence and in my considered view, the said evidence supports the prosecution case against the appellant beyond any reasonable doubt. The P3 form shows clearly that the complainant was aged between 6 and 8 years. It also shows that the complainant's hymen was ruptured, the external walls of the vagina were swollen and there was presence of pus and epithelial cells, the presence of the latter being an indication of penetration.

21. As regards the evidence of the complainant, I am satisfied that her testimony that the appellant grabbed her, lifted her up and parted her legs and inserted his penis into her vagina remained uncontroverted throughout the hearing of the case. The evidence of the P3 form corroborates the complainant's testimony that there was penetration. Although it is true that N.K. was not called as a witness, I am satisfied with the testimony of the complainant as supported by K's and Omurwa's testimonies and documentary evidence in the nature of the P3 form.

22. Regarding sentence, counsel for the appellant submitted that because the age of the complainant was not medically proved, the trial court should have dismissed the case and set the appellant free. **Section 8**of the **Sexual Offences Act, No. 3 of 2006** reads:-

"8 (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(2) A person who commits an offence of defilement with a child eleven years or less shall upon conviction be sentenced to imprisonment for life.

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

(5) It is a defence ……
(a) ----------
(b) ----------

23. The appellant's complaint is that because the complainant was not said to be of a specific age, then the appellant should have been acquitted. I disagree. The complainant was a child in the age bracket **"eleven years or less"** as stipulated under **section 8 (2)** of the **Sexual Offences Act**, so that the complainant's age having been shown as 6-8 years was not fatal to the prosecution's case.

24. I have considered the appellant's defence and the testimony of his witness and all I can say is that the said evidence does not in any way shake the evidence of the prosecution.

25. As for the sentence, it is clear that the trial court meted out a sentence that was provided for a conviction under **section 8 (3)** of the **Sexual Offences Act** instead of the prescribed sentence of life imprisonment. That in itself does not mean that the sentence is illegal. I have also said that the conviction was well founded under **section 8 (2)** of the **Sexual Offences Act**.

26. Even if I were to interfere with the said sentence, the principle upon which I would do so is what was stated by the Court of Appeal in the case of **Macharia –vs- Republic [2003] KLR 115 at P. 117, 118** where the court said:-

"The principle upon which this court will act in exercising its

jurisdiction to review or alter a sentence imposed by the trial court have been firmly settled as far back as 1954 in the case of Ogalo s/o Owuor [1954] EACA at page 270 wherein the predecessor of this court stated:-

"The court does not alter a sentence on the mere ground that

if the member of the Court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless as was said in James –vs- R.[1950] 18 EACA 147 "It is evident that the judge has acted upon some wrong principle or overlooked some material factors." To this we would like to add third criterion namely, that the sentence is manifestly excessive in view of the circumstances of the case. R.-vs- Shershewsk [1912] CCA 28 TLR 364."

27. After carefully considering the facts of this case, the conviction and the sentence that was imposed upon the appellant was the sentence prescribed under **section 8 (2)** of the **Sexual Offences Act**, namely a life sentence upon conviction of where the victim is aged eleven years or less. I am however, not persuaded that I should interfere with the said sentence for there was nothing illegal about it. The trial court exercised its discretion in sentencing the appellant as it did. The offence committed by the appellant in this case is to be abhorred by all, especially when the age of the complainant was such that the complainant was like the appellant's own daughter. Other members of society who have minds similar to that of the appellant must be stopped in their tracks otherwise young girls like the complainant in this case would not be safe anywhere.

28. In the circumstances of this case, I find no merit in this appeal on both conviction and sentence. The same is therefore dismissed.

29. It is so ordered.

Dated and delivered at Kisii this 12th day of September, 2012

RUTH NEKOYE SITATI

JUDGE
In the presence of:

Present in person for Appellant

Mr. Mutai (present) for Respondent

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.