



**IN THE COURT OF APPEAL**

**AT KISUMU**

**CORAM: MARAGA, AZANGALALA & KANTAI JJA**

**CRIMINAL APPEAL NO. 246 OF 2012**

**BETWEEN**

**PETER OSANYA alias MASUMBUKO.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Appeal from a judgment of the High Court of Kenya at Kakamega (Lenaola, J) dated 29<sup>th</sup> November, 2011*

**in**

**H.C.CR.A. NO. 88 OF 2010)**

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**JUDGMENT OF THE COURT**

**Section 361(1)(a)** of the Criminal Procedure Code limits our jurisdiction in second appeals like this one to only matters of law. That provision has received judicial interpretation in numerous decisions of this Court such as **CHEMOGONG V. REPUBLIC [1984] KLR 611**, **OGETO V REPUBLIC [2004] KLR 14** and **KOINGO V REPUBLIC [1982] KLR 213** amongst others. In the latter case, it was pronounced:-

***"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless it is based on no evidence. The test to be applied on a second appeal is whether there was any evidence on which the trial court could find as it did (REUBEN KARASI s/o KARANJA V. R. [1956] 17 E.A.C.A 146)"***

The appellant in this appeal, **PETER OSANYA alias MASUMBUKO** was charged before the Senior Magistrate Court, Butere, with defilement contrary to Section 8(1) and (3) of the Sexual Offences Act, being that on diverse dates between 24<sup>th</sup> December, 2008 and 19<sup>th</sup> February, 2009 in Butere District, he intentionally and unlawfully had carnal knowledge of "M.S.", a child aged 13 years. There was an alternative charge of committing an indecent act with a child contrary to **Section 11(1)** of the said Act, particulars being that on the same day same place, he indecently and unlawfully assaulted the said girl by touching her private parts namely, her breasts and vagina.

The appellant was tried before the learned Senior Resident Magistrate (B.O. Ochieng), convicted on the

main charge and sentenced to serve 20 years imprisonment. Those findings provoked an appeal to the High Court of Kenya, Kakamega, and the appeal was heard by *Lenaola, J.*, who in a judgment pronounced by *B. Thurairaja Jaden, J.* on 29<sup>th</sup> November, 2011 dismissed the appeal. The appellant thereafter preferred this appeal which is premised on a home-made memorandum of appeal filed in this Court on 17<sup>th</sup> March, 2015 where four grounds are set out. Those grounds are in essence that the trial court relied on the evidence of a single witness, that the charges preferred lacked probative value; that the defence of the appellant was ignored and that there was no age assessment of the complainant as no birth certificate was produced to prove the age of the complainant.

In a brief address to us when the appeal came up for hearing on 17<sup>th</sup> March, 2015, the appellant who appeared in person complained that the evidence of the complainant and that of her mother was contradictory because the two named two different schools attended by the complainant. For this, he thought he should have a retrial.

*Mr. L.K Sirtuy*, the learned Principal Prosecutions Counsel in opposing the appeal submitted that there was no legal requirement for many witnesses to be called on proof of a fact. He further submitted that both courts below had found that the complainant was 13 years of age and that it was not necessary to prove the exact age as those courts could rely on the appellant's apparent age. The prosecution case was through the evidence of five witnesses and appeared rather straight-forward. **"M.S.", (PW1)**, as the complainant testified that she was sent by her mother **'W.S.'** (PW2) on 24<sup>th</sup> December, 2008 to Sabatia to get sugar. On the way she met the appellant who she knew before; who told her that he wanted her to be his wife. He bought her soap for washing clothes which she took home and hid from her mother. Two days later she met the appellant again while going to the river to draw water. The appellant took her to his house, locked the door, removed her clothes and:-

***"...he put his penis into me..."***

He then kept her in his house until evening when she went home but did not report the matter to her mother. The next morning the appellant and the complainant met again and:-

***"...he bought me soap. He told me he was in love with me. He gave me Kshs.501=... I never showed them to my mother..."***

"W.S." eventually found the bars of soap and after some punishment was imposed on the complainant she revealed to her mother what had been going on. The mother reported the matter at Butere Police Station and the appellant was arrested. *No. 61210 Police Constable Inviolata Lunabi* received the complaint and investigated the case.

*Robert Wanyonyi*, a Clinical Officer at Butere Hospital testified that the complainant, who was 13 years old had engaged in sexual activity several times and that penetration had indeed taken place.

That was the case made out by the prosecution, which the appellant was called upon to answer.

The appellant, in an unsworn statement stated that he was a mason who was arrested on framed up charges. He also stated that the prosecution evidence was contradictory because the complainant and her mother gave the complainant's age as 12 years while the Clinical Officer gave her age 13 years. The learned trial magistrate believed the evidence presented by the prosecution and convicted the appellant.

The learned Judge, on first appeal re-evaluated the evidence as it was his duty to do and found that both conviction and sentence were based on sound footing in law.

We have considered the record of appeal, memorandum of appeal, submissions made before us and the law; On whether the courts below were entitled to rely on the evidence of a single witness, the simple answer is that they were entitled to do so. **Section 124** of the Evidence Act provides that:

***“Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.***

***Provided that where in a criminal case involving a sexual offence the only evidence is that of alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”***

So that the trial court in Sexual Offence cases is entitled to convict an accused person on the sole evidence of the victim provided that the court believes that for reasons to be recorded, the victim was telling the truth. In the instant case, the trial magistrate believed that the complainant was telling the truth. He expressed himself in the judgment thus:-

***“... I noted keenly the child's testimony. The child appeared to be mature and of right normal (sic) despite the fact that she was 13 years old. The child explained the relationship they had including the details of how the accused defiled her 4 times and used to tell her that he was to marry her...”***

The appellant also complained that the age of the complainant was not properly ascertained. The age of a complainant is significant in offences under The Sexual Offences Act No. 3 of 2006. This is because that Act segments the sentences to be awarded to offenders into age brackets which is dependent upon the age of the complainant. For instance under **Section 8(2)** of that Act, a person who commits an offence of defilement with a child aged eleven years or less is liable to imprisonment for life while it is provided in **Section 8(3)** of that Act that a person who commits a similar offence with a child aged between twelve and fifteen years is liable to a term of not less than twenty years.

The complainant was not led in evidence on her age but her mother testified that she was 12 years old. The Clinical Officer testified that the complainant was 13 years old. The offence the appellant was charged with fell within the age bracket in **Section 8(3)** of the said Act which is an age between twelve and fifteen.

We reviewed the position on age assessment in PAUL ODHIAMBO MBOLA V. REPUBLIC (Kisumu) Criminal Appeal No. 16 of 2014 (UR) where we found that the Sexual Offences Act adopts a definition of a child in the Children's Act and by Section 2 thereof, "age" is defined as":-

***“... where actual age is not known means apparent age...”***

Therefore, actual age need not be proved. What is important is that the court believes the apparent age which is proved.

In this case, there was evidence by the Clinical Officer that the complainant was 13 years old. Her mother had testified that she was 12 years old.

So, as we have stated, the age of the complainant fell within the age bracket defined by **Section 8(3)** of the Sexual offences Act which bracket carries a minimum sentence of 20 years imprisonment that was meted out to the appellant. In the circumstances, the complaint by the appellant in that regard has no basis at all.

This appeal has no merit and we accordingly dismiss it.

***DATED and DELIVERED at KISUMU this 14<sup>th</sup> day of May 2015.***

**D.K MARAGA**

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**JUDGE OF APPEAL**

**F. AZANGALALA**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

I certify that this is

a true copy of original

**DEPUTY REGISTRAR**