IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, MUSINGA & MURGOR, JJ.A)

CRIMINAL APPEAL NO. 20 OF 2014

BETWEEN

DAVID NTABO ONDIEKI …….. APPELLANT

AND

REPUBLIC ……..…….. DEFENDANT

(An Appeal from a Judgment of the High Court of Kenya at Kisii,

(Sitati, J.) dated 15th November, 2013

in

H.C.CR.A. NO. 31 OF 2011)

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JUDGMENT OF THE COURT

1. David Ntabo Ondieki was, upon trial, before the Resident Magistrate at Kisii for the offence of defilement of a girl contrary to **Section 8(1)** as read with **Section 8(2)** of the Sexual Offences Act, convicted and sentenced to life imprisonment. His appeal to the High Court having been dismissed he has come to this Court on a second appeal.

2. Arguing the two grounds on the appellant's memorandum of appeal, Mr. Soire, learned counsel for the appellant, submitted that, as is clear from the record of this appeal, the trial court's proceedings of 26th October 2010 were not interpreted into a language that the appellant understood. In the circumstances, counsel said that violated the appellant's constitutional right to a fair trial and vitiated the proceedings.

3. On the second ground, counsel argued that the appellant was convicted on uncorroborated and insufficient evidence. He particularly emphasized that contrary to the prosecution case that the complainant was defiled at 8.00 pm, the record, particularly that of the medical documents and the complainant's mother's evidence, shows that at that time the victim was at home. He concluded that the complainant having been declared a vulnerable witness, in the absence of any eye witness' testimony, the trial court erred in relying on hearsay evidence to convict the appellant. He therefore urged us to allow his appeal.

4. Opposing the appeal, Mr. Ketoo, learned Prosecution Counsel, submitted that save for the 26th October 2010, the record shows that the rest of the proceedings were interpreted to Kiswahili language which the appellant understood. On ground two, he argued that besides the proviso to **Section 124** of the Evidence Act that the evidence of a victim of a sexual offence can, without corroboration, found a conviction, in this case the complainant's testimony was amply corroborated by medical evidence. He therefore urged us to dismiss this appeal.

5. **Section 361(1)** of the Criminal Procedure Code limits the jurisdiction of a second appellate court to consideration of matters of law only. Having carefully read the record and considered the submissions by counsel on both sides, two points of law arise for our determination in this appeal. They are, whether or not the appellant was accorded a fair trial and whether or not the complainant was defiled by the appellant.

6. On the first issue, we agree with counsel for the appellant the record does not show that the proceedings for 26th October 2010 were ever interpreted into a language that the appellant understood. However, upon perusal of the original record of the trial court, it is clear that the proceedings for that day were indeed translated from English to Kiswahili language. Upon being shown that record, Mr. Soire for the appellant did not wish to press that point. That ground of appeal therefore fails.

7. The second ground of appeal has also no basis and must fail. Mr. Soire emphatically submitted that at 8.00 pm when the offence, according to the P3 form and the medical records, was allegedly committed, the complainant, according to her mother (PW2) was at home. We have perused the P3 form and the medical record in the Post Rape Care Form. The latter, on the basis of which the P3 form was completed, states that the sexual assault upon the complainant was committed "*at around 8 pm*". The charge sheet and the rest of the record does not state the exact time when the offence was committed. The time of 8.00 pm is when Virginia, the appellant's sister, dumped the complainant on a chair in her parents ' house. In the circumstances we cannot accept Mr. Soire's argument about the time when the offence was committed.

8. The other point Mr. Soire raised was on the evidence the trial court relied upon to convict the appellant. True, the complainant did not complete her testimony. The record shows that during *voire dire* examination the victim was unable to answer questions put to her on account of her tender age and her mental inability to coherently answer them. In the circumstances and quite properly, in our view, the learned trial magistrate invoked the provisions of **Section 31**of the Sexual Offences Act and declared the complainant a vulnerable witness and appointed her mother as her intermediary. When the prosecutor tried to lead evidence from the complainant, after identifying the appellant by the name "Bara", which PW2 said is the other name for the appellant, she was unable to continue with her testimony. After naming the appellant as her assailant she thereafter uncontrollably cried. The learned trial magistrate recorded her demeanor in the following words:

"The victim V has cried uncontrollably during her examination. Not even the efforts of her mother to console her made her calm down. She did not sit still on her chair and at some point lay down on the floor moaning as her mother put the questions the prosecutor was asking. It appeared painful and even as though she was being tormented when answering the questions."

9. What other evidence did the trial court require to see the trauma it caused the child to recall the beastly sexual assault on her by the appellant? In our view, pursuant to the proviso to **Section 124** of the Evidence Act, that statement by the complainant, which the trial magistrate believed, sufficed to found a conviction against the appellant.

10. That notwithstanding, however, we agree with the Prosecution Counsel that there was ample corroboration of the complainant's testimony. The investigating officer, Chrispinus Juma (PW4), testified that when the complainant was taken to the police station she was in shock and refused to talk to any male person. The Post Rape Care Form which was completed a day after the

defilement shows that the complainant was not able to walk properly and her hymen had been torn which is clear evidence of vaginal penetration. There were also bruises noted on her vulva and she had pus cells which was not normal for a child of three years.

11. Do we need to flog this horse any further? We find no merit in this appeal and we accordingly dismiss it.

DATED and delivered at Kisumu this 23rd day of October, 2015.

D.K. MARAGA

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR