**IN THE COURT OF APPEAL**
**AT KISUMU**

**(CORAM: NAMBUYE.AZANGALALA& KANTAI. JJ.A)**

**CRIMINAL APPEAL NO. 296 OF 2011**

**BETWEEN**

**SAMMY OLARO EKIRAPA.....APPELLANT**

**AND**

**REPUBLIC……..…….RESPONDENT**

(Appeal from Judgement of the High Court of Kenya at Kisumu (Aroni, J.)

dated 30th September, 2011

in

**HCCRA. NO. 141 OF 2010)**

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**JUDGEMENT OF THE COURT**

***Sammy Olaro Ekirapa***, the appellant, was convicted by the Banda Resident Magistrate ***(Onchuru)*** for the offence of defilement contrary to ***section 8 (1)*** as read with section 8 (3) of the Sexual Offences Act No.***3 of 2006*** (the Act). It had been alleged, in the charge sheet, that on 30th December, 2009 at about 4.00 p.m., at [particulars withheld] in Rarieda District within Nyanza Province, the appellant, unlawfully and intentionally, committed an act which caused penetration with ***W A O***, a child aged 13 years. The appellant also faced an alternative count of indecent act with a child contrary to ***section 11 (1)*** of the same Act. Upon his conviction, the appellant was sentenced to serve twenty (20) years imprisonment. His appeal to the High Court ***(Aii-Aroni, J.)*** was dismissed. That decision triggered this second appeal premised upon for (4) ground which raise the following issues: the failure to find that he too ought to have been medically examined to prove that he defiled the complainant; that his defence of being framed was not considered and that the evidence of a single witness was accepted without corroboration.

In view of ***section 361 (1) (a)*** of the Criminal Procedure Code, only issues of law may be raised for consideration as this Court has stated times without number that it will not interfere with concurrent findings of fact by the courts below unless such findings were made on no evidence at all or on a misapprehension of the evidence or if no tribunal, properly directing itself on .the evidence, would make such findings which would be the same thing as saying that the decision is bad in law. (*See for example the case of* ***M'Riungu -Vs- Republic [1983] KLR 455.)***

The issues we have identified above, in our view, raise points of law. The appellant, who appeared in person in his address before us, alleged that there were contradictions in the evidence of the prosecution witnesses and that the complainant and her parents ***B A B*** (PW3) (Anyango) and ***S O B*** (PW4) (O) had framed him when he demanded his salary arrears of five (5) months.

Mr. ***Abele***, the learned Assistant Director of Public Prosecutions, opposed the appeal against both conviction and sentence. In his view, the medical evidence demonstrated defilement which had occurred in broad daylight and was further corroborated by the testimonies of A and O. It was also learned counsel's view that there was no evidence of a witch hunt as alleged by the appellant which allegation, according to counsel, was an afterthought. With regard to sentence, learned counsel submitted that the same was lawful as the age of the complainant was demonstrated to be 13 years.

The facts of the case were briefly as follows:- The complainant, who was aged 13 years and was in class 6 when she testified, was, on 30th December, 2009 at 4.00 p.m., sweeping the kitchen in her home when she claimed the appellant who used the kitchen as his sleeping quarters and was also in the kitchen held her by the neck and knocked her on his bed, tore her pant and had sexual intercourse with her. She felt pain but was unable to scream because the appellant held her mouth. When he was done, he warned her not to tell anyone promising to give her money. At the time both A and O were not at home.

When A and O returned, it would appear that the complainant did not immediately report the defilement. We say so, because both of them testified that it was when they were asleep that the complainant who, according to them, was traumatised informed them of the appellant's sexual attack upon her. A examined her private parts and saw a white discharge oozing therefrom. Early the. next morning, on 31st December, 2009 at 5.00 a.m., O reported the defilement to Administration Police Officers at Manyuanda AP camp and was given Administration Police officers, including ***APC Susan Apondi*** (PW6), who arrested the appellant. The complainant was taken to Bondo District Hospital on 31st December, 2009 where she was examined and treated by ***Kipkurui Ngeno*** (PW2) (Clinical Officer) who later completed and signed a P3 form in respect of the complainant's injuries which P3 was produced at the trial. The Clinical Officer found that the complainant's hymen was perforated, and there was a foul smelling whitish discharge which oozed from her private parts. A vaginal swab, on examination, revealed live spermatozoa and numerous bacteria. All these findings were documented in the said P3 form.

PC ***James Ledama*** of Arum Police station on 31st December, 2009 rearrested the appellant from APC Susan Apondi of Manyuanda AP camp and then charged him as already stated.

Put on his defence, the appellant, in a sworn statement, denied committing the offence. He contended that on the material date he performed his duties as assigned to him by Onyango but was arrested the next morning for defilement an offence he knew nothing about.

The learned Resident Magistrate, in his judgment, summarized the evidence adduced before him, analysed the same and concluded as follows:-

> ***"PWl remained consistent both in examination in chief and cross examination. She maintained that Sammy tore her pant and penetrated her twice. It was painful but would not scream as he held her mouth but she cried. She looked at her private parts and saw whitish discharge after he had left her. This was confirmed by PW2 the clinical officer who examined her. PW2 found the hymen perforated. There were live spermatozoa, a sign of sexual intercourse.....***
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> ***PW1 though a young girl of 13 years according to the birth certificate produced in court her evidence appeared credible and honest I have no reason to doubt her.***
>
> ***The defence of the accused that he had requested money to go to his rural home appears an afterthought. He did not raise the issue with PW4.....***

***The upshot is that I find the prosecution case proved.***

***The evidence adduced is overwhelming to prove the accused defiled the complainant PW1.***

***I find him guilty"***

The High Court (Ali-Aroni, J.) upon evaluation of the evidence came to its own independent conclusion as follows:-

> ***"The question for consideration is whether there was evidence to the required standard linking the offence to the appellant. There is danger in relying on the evidence of a single witness who happens to be 13 years old. I warn myself of this danger as her evidence is against the appellant's denial. I remind myself of the need to have corroboration, however I haye also considered that in the absence of corroboration I must be convicted (convinced) that the complainant is truthful.***
>
> ***The appellant did not- controvert the fact that complainant and himself were left at home on their own. I find when PW1 reported to her mother she gave the name of the appellant as the defiler. She was consistent in all her subsequent reports to PW4 and 6..... Indeed PW2 corroborated her (sic) complainant. PW1 appeared as was observed by the trial court "credible and honest" and the court believed her. I have no reason to doubt the trial court's finding and hereby concur with her. "***

The learned Judge of the High Court proceeded to dismiss the appellant's appeal.

The appellant was still aggrieved and has come before us and raised the issues we have already identified above.

Mr. ***Abele***, the learned Assistant Director of Public Prosecutions, opposed the appeal against both conviction and sentenced. It was his view that the evidence against the appellant was overwhelming and it did not matter that the appellant was not medically examined. On the allegation that the appellant was framed, Mr. Abele submitted that there was no evidence of a witchhunt and the allegation was in any event an afterthought. On sentence, learned counsel submitted that the same was lawful as the age of the complainant was proved beyond reasonable doubt.

Having considered the record, the grounds of appeal, the submissions made to us and the law, we agree with the learned Assistant Director of Public Prosecutions that the failure to medically examine the appellant was not fatal to the case presented by the prosecution. In our view even if such evidence had been availed it would only have fortified the prosecution case.

The appellant also complained that he was convicted on the basis of a single identifying witness whose evidence was not corroborated. True, the complainant as the victim was the only eye witness to the commission of the offence. However, the circumstances were not difficult as it was in broad day light and the appellant was known to the complainant. Besides, there was the evidence of the Clinical officer who examined and treated the complainant. He confirmed that the complainant's vagina had been penetrated and there were live spermatozoa in her private parts. He also found that the complainant's hymen was perforated. The complainant also complained to A, her mother about the defilement. Her mother herself examined her and indeed saw the complaint's vagina discharging a whitish substance. The injuries sustained by the complainant were documented in the P3 which was produced at the trial. AII those pieces of evidence were corroborative of the evidence of the complainant.

In any event even without corroboration, the complainants evidence was sufficient to found a conviction against the appellant by dint of the provisions of the proviso to ***section 124*** of the Evidence Act. The section reads:-

> ***"124. 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 the 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 the 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."***

The record shows that the complainant in this case was believed by the two court's below. We have hereinabove referred to the relevant parts of the findings of the two courts which confirm that position.

In the event, even if corroboration was not furnished, conviction of the appellant would still stand on the evidence of the complainant.

On the complaint that the appellant's defence of having been framed was not considered, we think nothing much should tum on the same. We are of that view because such a defence was not raised at the trial. All the appellant stated in his defence was that on the material date he asked to go home but received no response from his employer, Onyango. He did not suggest to any of the witnesses that he was framed. Like the two courts below, we think the allegation of being framed had no basis and the appellant's defence was rightly rejected as it was not an answer to the case put forward by the prosecution.

The appellant has not complained about the legality of the sentence which was meted out to him. Even if he had, the complaint would not have succeeded as, in our view, the sentence was lawful.

The upshot is that, this appeal cannot succeed as it is without merit.

It is dismissed in its entirety.

**DATED AND DELIVERED AT KISUMU THIS 18TH DAY OF JULY, 2014**

**R.N. NAMBUYE**

**JUDGE OF APPEAL**

**F. AZANGALALA**

**JUDGE OF APPEAL**

**S. ole KANTAI**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**