REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 92 OF 2018

GEORGE OCHIENG ARIKA .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence of the Principal Magistrate's Court at Winam (Hon. J. Mitey RM) dated the 14th September 2018 in Winam PMCRC No. 10 of 2016)

JUDGMENT

The Appellant, **GEORGE OCHIENG ARIKA**, was convicted for the offence of **Defilement** Contrary to **Section 8 (1)** as read with **Section 8 (3)** of the **Sexual Offences Act**. He was then sentenced to 20 years imprisonment.

1. In his appeal he asserted that his constitutional rights were violated. In particular, the Appellant complained of a delay in taking him to court.

2. In his written submissions, he said that he had been arrested on 21st May 2016, and that there was an unexplained delay in taking him to court. The said delay was described as constituting a great violation of the Appellant's constitutional rights, and a miscarriage of justice.

3. However, a perusal of the record of the proceedings shows that on the Charge Sheet, the date when the Appellant was arrested 21st August 2016.

4. Secondly, when the Appellant was putting forward his Defence, he expressly stated that he was arrested on 20th August 2016.

5. Whether the Appellant was arrested on 20th or on 21st August 2016, I find that there is no basis for the Appellant's complaint about an alleged delay in taking him to court.

6. The second ground that was canvassed by the Appellant was to the effect that the evidence adduced by the prosecution did not prove penetration.

7. The Appellant reasoned that the absence of the Complainant's hymen was insufficient proof of penetration. As far as he was concerned, the prosecution ought to have produced evidence to prove the circumstances under which the hymen was broken.

8. When re-evaluating the evidence on record, I noted that the Complainant had testified that prior to the incident which gave rise to the charges against the Appellant, she had never had sex. The Complainant felt pain on her vagina. She then felt wet, as if a gell had been smeared on her vagina.

9. In my understanding, the evidence of the Complainant provided a detailed and graphic picture of the circumstances in which her hymen was broken.

10. The Appellant appears to have appreciated that explanation. But he submitted that it was not possible for a mature man to defile a 13 years old girl, without causing her any injury to her genital organ.

11. The Appellant's said submission was premised on the medical evidence tendered by **Dr. KEVIN OCHIENG (PW3)** and **Ms. ELIDA NYATICHI (PW4)**. The doctor and the Clinical Officer both testified that there was no laceration or tear on the Complainant's vagina.

12. I have carefully perused the evidence on record and noted the following words of Dr. Ochieng;

> ***"Absence of tears may also not rule out a sexual activity. A forceful sexual intercourse may result in tears."***

13. I therefore find that just because there were no tears to the Complainant's vagina is not inconsistent with a finding that the Complainant had been defiled.

14. The absence of tears would only appear to indicate that the sexual intercourse was not forceful.

15. Both the doctor and the Clinical Officer noted the epithelial cells on the Complainant. The doctor said;

> ***Epithelial cells are cells of mucous inner lining of the vagina. When they are increased, there is a possibility of infection."***

16. On her part, the Clinical Officer testified thus;

> ***"On the vagina introitus there was a whitish per-vaginal discharge. There was no laceration or tear."***

17. In my considered opinion, the totality of the evidence obtained when the Complainant was examined by medical personnel, coupled with the evidence tendered by the Complainant, provided sufficient proof of penetration.

18. The Appellant submitted that the evidence of any witness may only be believed if the said witness did not create an impression that he/she was not a straightforward person.

19. In that respect, the Appellant correctly restated the legal position.

20. When a witness causes the court to form an impression that he/she was anything but straightforward, his/her evidence ought not to form the foundation for a conviction.

21. In this case the prosecution did not lead evidence to prove that the Complainant failed to attend school for the period when she was allegedly staying in the Appellant's house.

22. I find that although the prosecution did not prove the Complainant's failure to attend school during the time she was in the Appellant's house, that did not lead to the insinuation that the Complainant was not a straight forward person.

23. The failure by the prosecution to prove that the bar operator or attendants who had allegedly served the Complainant, at a bar, had had action taken against them, could not diminish the evidence which proved all the ingredients of the offence for which the Appellant was convicted.

24. Incidentally, although the Appellant talked about the Complainant having been served *"drinks"* at a public bar, the evidence on record indicates that the Complainant was served with a soda.

25. I also note that when the Complainant testified she said that the Appellant had said;

> ***"Hivyo ndio unataka tuishi na wewe?";***

26. She made it clear that that took place in the morning hours, after the Complainant had rebuffed the Appellant's attempt to have sex with her during the night.

27. When the Clinical Officer received the medical history from the Complainant, she recalled that the Complainant told her that the Appellant had told her;

> ***"Nipakulia."***

28. A careful consideration of that piece of the evidence led me to conclude that the Appellant made that statement at night, when he wanted to persuade the Complainant to have sex with him.

29. I have found no contradictions or inconsistencies between the 2 pieces of evidence.

30. The Appellant's other submission was that his rights had been prejudiced when the trial court permitted the prosecution to produce further evidence after the Appellant had put forward his defence.

31. The defence case was put forward on 24th October 2017.

32. After the Appellant had been re-examined, he said;

> ***"I was examined on 23/8/2016 at JOOTRH by Doctor Ochieng. I wish that he be called to attend and state the findings during my examination and produce the P3 Form."***

33. Ultimately, it is Dr. Eve Koile who gave evidence. She testified that the name of the Appellant was not in the **P3** Filing Book Record which was maintained at the **JOOTRH**.

34. At that stage, the Appellant said;

> ***"I have no question for the doctor. I know the matter has taken long and the doctor is saying that she cannot trace my P3. I do not wish to go further. I seek to close the defence case."***

35. In other words, when the doctor testified after the Appellant had given evidence, she had done so as a witness for the Appellant.

36. I find that no prosecution witness adduced further evidence after the Appellant had put forward his defence.

37. In conclusion I find that the conviction of the Appellant was founded upon consistent and corroboratory evidence, which proved all the requisite ingredients of the offence of defilement.

38. I further hold the considered view that the defence did not cast any doubt on the formidable case which had been mounted by the prosecution.

39. The appeal is unmeritorious, and is therefore dismissed.

FRED A. OCHIENG

JUDGE

DATED, SIGNED and **DELIVERED** at **KISUMU**

This **29th** day of **January** 2020

T. W. CHERERE

JUDGE