

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CORAM: D.S MAJANJA J.

CRIMINAL APPEAL NO. 8 OF 2017

BETWEEN

ERIC OSANO OGEGAAPPELLANT

AND

REPUBLICRESPONDENT

(Appeal from the original conviction and sentence of Hon. J. Mwaniki – SPM dated 27th February 2017 at the Principal Magistrate’s Court at Keroka in Criminal Case No. 25 of 2016)

JUDGMENT

1. The appellant, ERIC OSANO OGEGA, was charged with the offence of defilement contrary to **section 8(1)** as read with **section 8(4)** of the Sexual Offences Act. It was alleged that on diverse dates between 1st January 2016 and 14th February 2016 within Nyamira County, he intentionally and unlawfully caused his penis to penetrate the vagina of JKM, a girl aged 16 years. He was convicted and sentenced to 15 years imprisonment.
2. During the trial, the prosecution called two witnesses. The complainant (PW 1) and her mother (PW 2). PW 1 told the court that on 1st January 2016 she had gone to deposit money for school fees at a Sacco in Borabu but found the place closed. She met her friend and that they were forced to go to the appellant’s house where she was locked up until 14th February 2016. During this time the appellant engaged in sexual intercourse with her. When the appellant told her to go home, she refused. He removed his household items from his house and burnt them whereupon she reported the incident to the police causing him to be arrested.
3. PW 2 confirmed that PW 1 had been missing since 1st January 2016 until she was informed that PW 1 was at the DC’s Office on 15th February 2016. She also confirmed that the appellant had been arrested.
4. The prosecution did not call any other witness. I find this conviction unsafe for that reason for while it is correct that the prosecution did not require to call all or any witnesses, the police recorded statements of several witnesses and the accused is entitled to test all the evidence which may include exculpatory material. I also note that the prosecution case was closed even though the appellant did not object to the prosecution being granted an adjournment yet the investigating officer was in court on that day.
5. I find the conviction unsafe and I allow the appeal and set aside the conviction and sentence. The appellant is set free unless otherwise lawfully held.

Dated and delivered at Kisii this 30th day of November 2018.

D.S MAJANJA

JUDGE

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions.

Appellant in person.