

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 49 OF 2012

VINCENT OKELLO APPELLANT

V E R S U S

REPUBLIC RESPONDENT

(Appeal against conviction and sentence arising from the judgment of [S.N. ABUYA, P.M.] dated 22.2.12 in the Principal Magistrate's Court at Butali in Criminal Case No. 302 of 2011)

J U D G M E N T

The appellant was charged with 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 particulars of the offence were that the appellant *on the 1.6.2011 at [particulars withheld] in Kakamega North district within Western Province intentionally and unlawfully inserted his genital organ namely penis to the genital organ namely vagina of E M a child aged 15 years.*

The appellant was convicted and sentenced to serve 20 years' imprisonment. The grounds of appeal are that he did not plead guilty to the charge, the conviction is based on the evidence of a single witness, the charge sheet was defective, he stayed at the police station for 6 days before he was charged and the age of the complainant was not proved.

The appellant filed written submissions. It is contended in those submissions that the complainant's age was not known. The complainant said that she was born in 1994 and was therefore 17 years and not 15 years. The medical officer referred to the object used as a blunt object. No treatment notes were produced. The incident purportedly took place in the house of one J who was not called to testify. The complainant testified that she called her dad but the dad was not called to testify. The prosecution evidence had contradictions and his alibi defence was ignored.

Miss Opiyo, State Counsel, opposed the appeal. Counsel submitted that two witnesses testified and the evidence shows that there was defilement. The police had to do investigation and the complainant testified that it is the appellant who defiled her.

The record of the trial court shows that only two witnesses testified, namely the complainant and the clinical officer. The complainant's evidence was that on the 1.6.2011 at 3.00 p.m. she went to collect her dress from her friend by the name J. She waited for J inside her house as J had gone to buy tomatoes and onions. J went back at about 7.00 p.m. together with the appellant. The appellant told her that he wanted to be her friend but she refused. The appellant then carried her and placed her on a mattress and defiled her. She then asked for a phone from a visitor and called her father. It was about 8.00 p.m. and her father went there at 9.00 p.m. and took her to the police. The matter was also reported at her school. The appellant and J were arrested and kept in the cells. She was taken to Malava district hospital and treated. She did not know the appellant. She had never had sex before and she bled.

PW2, DR. KIZITO SIFUNA was based at the Malava district hospital. He attended to the complainant and assessed the injuries. He concluded that the complainant had been defiled and filled in the P3 form on 2.6.2011 that was produced in court.

The appellant was put on his defence and gave sworn testimony. His evidence was that on the 2.6.2011 at about 7.30 p.m. he was heading home from his place of work when he was arrested by police officers and

taken to Malava AP Camp. He was not told the reason of his arrest and was brought to court on the 6.6.2011. He further testified he was born in Mumias but his father bought land in Matete and there is a dispute over the title deed of the land. When he was arrested the police had also arrested other people and they were all taken to the police station.

I have looked at the record of the trial court and it is established that the father of the complainant used to attend court and was ready to testify. The record of the trial court of 4.1.2012 indicates that PW3 was sworn but nobody testified. The prosecutor had informed the court on 7.12.2011 that the complainant's father was in court but had left important documents at home. The prosecutor sought adjournment for that reason. Although the evidence adduced confirms that the complainant was defiled, it is not clear why investigating officer and the father of the complainant did not testify. The incident occurred in 2011 and there was not good reason as to why the investigating officer was not called to testify. The case was hurriedly closed without even indicating whether the other witnesses had been bonded. I will attribute that anomaly to both the prosecution and the trial court. Sexual offences carry serious sentences and one should be kept in prison after all the necessary evidence and witnesses are brought to court. Although the courts do not conduct cases for the prosecution, it is harmless for a presiding officer to inquire the whereabouts of the investigating officer and why the case is being closed without calling some witnesses.

It is indicated in the evidence of PW1 that she was born in 1994. That would mean that by 2011 when the offence occurred she was 17 years old. Had the father of the complainant testified that issue could have been clarified. I do find that the case was not properly prosecuted and there was no justice to both the complainant and the appellant. Since the complainant is still in school and the witnesses are available, I do find that this is a case that is fit for a re-trial. I do allow the appeal and set aside the conviction imposed by the trial court. I do order that the appellant be re-tried before the Kakamega Law Court. The OCS Kabras police station to ensure that this matter is prosecuted and witnesses are bonded. The appellant shall stay in custody until when the plea is taken before the Chief Magistrate's Court at Kakamega.

Delivered, dated and signed at Kakamega this 17th day of February 2014

SAID J. CHITEMBWE

J U D G E