REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 25 OF 2014

ERICK OJWANG ONONO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No. 290 of 2011 in the Principal Magistrate's

at Bondo)

J U D G M E N T

1). The appellant was charged with the offence of Defilement contrary to section 8 (1) of the Sexual Offences Act No. 3 of 2006. The particulars were that on the diverse dates of 24th/29th October 2012 at [particulars withheld] beach in Bondo District Within Siaya County intentionally and unlawfully caused his penis to penetrate the vagina of R N O a child aged 11 years.

2). He was also charged with at alternative count of committing an indecent act with a child contrary to section 11 (2) of the Sexual Offences Act No. 3 of 2006.

The particulars were that on diverse dates between 14th day of October 2012 and 29th October 2012 at [particulars withheld] beach in Bondo District within Siaya County intentionally and unlawfully touched the private parts namely vagina of R N O a child aged 11 years.

3). The appellant was convicted and sentenced to life imprisonment hence this appeal. The appellant has filed 5 grounds in support of his appeal.

4). Briefly, the prosecution case was that PW1 the complainant on diverse dates was lured by the appellant into a bush near the shopping centre. He then forcefully defiled her and later gave her Kshs. 5/=. During this time the complainant was staying with her sister but she did not tell her. The school teacher PW3 became suspicious as the complainant bought Juice Cola, a soft drink, which was contrary to the school rules. On being asked she told the teacher that she was given money by her sister. The teacher was not satisfied and she inquired from PW2 the complainant's sister who denied having given her the money.

5). While this inquiry about the money was going on PW2 and PW3 saw that the complainant was walking with difficulty and upon further probing she told them that the appellant had been having sexual intercourse with her and would in return be given money, Kshs. 5/=.

6). The said witnesses PW2 and PW3 reported the incident to the police who gave them the P3 form and later arrested the complainant. PW4 who filled the P3 form did not find anything significant only that

there was no hymen and that there were no visible injuries. He concluded that the incident if at all it had taken place was now too later to record any significant findings. In other words there were no injuries in the vagina to ascertain that there was any recent penetration.

7). The appellant offered unsworn testimony in his defence. He however told the court that he chose to remain silent.

8). In the 5 grounds of appeal alluded to above the appellant argues that there was no medical test carried out against him so as to corroborate that of the complainant; no exhibit presented to the court and that the complainant was coached to testify against him.

9). The duty of this court is to reexamine and reevaluate the evidence afresh and come up with an independent finding See **Okeno -VS- Republic [1972] EA. 32.** On the evidence on record the only eye witness to the incident is the minor. There was no other eye witness. There is nothing to suggest that the appellant and the minor did not know each other. The appellant had a barbershop nearby, an issue which he did not dispute.

10). But did the appellant defile the minor? Although there was no eye witness I find reading wholesomely the minor's testimony to be believable. The idea that the minor pinpointed to the appellant as the source of the money she used to buy the soft drink and take it to school was not controverted. Why would the minor tell the teacher and her sister that the source of her recently acquired finance was the appellant if indeed it came from her sister? Further I do not find any difficulty for the sister to admit to the teacher PW3 that indeed she is the one who gave the money to the child.

11). Equally, it was incumbent upon the appellant to shed light on this issue. The right to remain silent was still a good defence known and recognised in law but where direct allegations are made against him, it was perhaps necessary that he shed some light on the allegations.

12). It is not true that no exhibit were produced as he alleges. The P3 form and the treatment notes were produced as well as the minor's birth certificate to show her age. Again the appellant never bothered to question the integrity of the said exhibits which I find credible.

Section 124 of the Evidence Act is worth mentioning here. The same at the provisal states that:

> **".....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".**

13). A close analysis of the evidence on record does not indicate in any way that the appellant as well as the complainant and her sister had any bad blood. The minor simply stated what happened and not once but severally. Although there was no significant finding by PW4 save the fact that there was no hymen, there was no direct evidence to suggest recent defilement. However the entire evidence does not exonerate the appellant. Neither did he offer any explanation as to whether or not the implication was malicious.

14). Consequently, I do not find any merit in the appeal and the same is hereby dismissed.

Dated, signed and delivered at Kisumu this 27th day of November, 2014.

H.K. CHEMITEI
JUDGE