



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

H.C. CRIMINAL APPEAL NO.69 OF 2011

(AN APPEAL ARISING OUT OF THE CONVICTION AND SENTENCE OF **E.H. KEAGO – SRM**
DELIVERED ON 12TH FEBRUARY 2010 IN BUSIA CM.C.CR.C.NO.1220 OF 2008)

VINCENT ORAMISI..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

J U D G M E N T

The Appellant, Vincent Oramisi was charged with the offence of defilement of a child contrary to **Section 8(1) & (3)** of the **Sexual Offences Act**. The particulars of the offence were that on 9th December 2008 at **[particulars withheld]** Village, [particulars withheld] of Bungoma District, the Appellant unlawfully and intentionally caused his penis to penetrate the vagina of F N W, a child aged fourteen (14) years without her consent. He was alternatively charged with the offence of Indecent Act contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars of the offence were that on the same day and in the same place, the Appellant intentionally committed an indecent act by rubbing his penis against the vagina of the said F N W, a child aged fourteen (14) years. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial he was convicted of the main charge of defilement and sentenced to serve twenty (20) years imprisonment. The Appellant was aggrieved by his conviction and sentence and duly filed an appeal to this court.

In his petition for appeal, the Appellant raised several grounds of appeal challenging this conviction and sentence. He was aggrieved that he had been convicted on the basis of the evidence of the complainant which was not credible. He took issues with the medical evidence that was presented by the prosecution which in his view did not establish the fact that he had defiled the complainant. He was aggrieved that the trial magistrate had failed to consider the evidence that there existed a grudge between him and the family of the complainant. This fact could therefore have influenced the complainant to make the false allegation against him. He faulted the trial magistrate for failure to take into consideration his defence before arriving at the decision to convict him. He complained that the trial magistrate had failed to consider the totality of the evidence adduced which infact established his innocence. In the premises therefore, the Appellant urge the court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, the Appellant presented to the court written submission in support of his appeal. He also made oral submission urging the court to allow his appeal. He submitted that the trial court had put undue weight to the prosecution's case. He stated that the complainant had not properly identified him as the person who committed the offence. He took issue with the fact that the complainant had not described the clothes that he had allegedly worn on the material day. He stated that the medical evidence did not establish that the complainant had been defiled or that she had been infected with a

venereal disease. The Appellant submitted that it was not clear from the evidence of the complainant and the prosecution witnesses when the offence was committed. This was because there was conflicting evidence whether the incident occurred on 9th December 2008 or on 12th December 2008. He explained that there was no forensic evidence linking him to the offence. This was because he was not medically examined nor was photographic evidence taken to ascertain the injuries that the complainant is alleged to have suffered. He was emphatic that the court should have demanded that the prosecution establishes its claim that the complainant was stitched after the defilement incident. The Appellant told the court that the trial court failed to take into account his alibi defence which was to the effect that he was in Eldoret at the time it was alleged that he had committed the offence. He therefore urged the court to allow the appeal.

In response, Mr. Kelwon for the State submitted that the prosecution had established its case to the required standard of proof. He stated that the Appellant was a neighbour of the complainant and was therefore well known to the complainant prior to the incident. He submitted that the complainant had narrated how the Appellant had held her as she was walking home from her aunt's house. The Appellant pulled her into a sugarcane plantation before defiling her for about ten (10) minutes. To prevent the complainant from raising alarm, the Appellant held her by the mouth and neck. In the process, the complainant was injured. After the incident, the complainant was taken to [particulars withheld] and then to Busia District Hospital where she was stitched on account of the injuries that she had sustained in her vagina. Mr. Kelwon submitted that the prosecution had adduced evidence, including medical evidence, which proved that it was the Appellant who defiled the complainant. As to the issue of dates, he stated that the complainant was first medically examined at [particulars withheld] before she was attended at Busia District Hospital. This explained why the medical report is dated 12th December 2008 when the complainant sought further treatment and not 9th December 2008 when the offence was committed. He urged the court to disallow the appeal and confirm the conviction and sentence of the trial court.

This being a first appeal, it is the duty of this court to reconsider and to reevaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. In doing so, this court is required to take into account the fact that it neither saw nor heard the witnesses as they testified and therefore cannot make any comment regarding the demeanour of the witnesses (see **Njoroge –Vs- Republic [1987] KLR19**). In this appeal, the issue for determination by this court is whether the prosecution proved its case on the charge of defilement to the required standard of proof beyond any reasonable doubt.

This court has reevaluated the facts of this case. According to the complainant, the Appellant accosted her as she was walking back to her home after visiting her aunt. The complainant was fourteen (14) years old at the time. She produced her birth certificate into evidence. The birth certificate indicated that she was born on 12th September 1994. She told the court that the Appellant was known to her prior to the incident. The Appellant was their neighbour. He lived about five (500) hundred metres from their home. For added emphasis, she stated that she had known the Appellant since her birth. She told the court that the Appellant held her by both her hands and then pulled her into a sugarcane farm. She screamed but the Appellant overcame her by holding her neck and mouth. He then tripped onto the ground, raised her black skirt, used his right hand to remove her pants, opened her legs and then used his penis to penetrate her vagina. She recalled that it was painful. The Appellant ejaculated inside her vagina and then released her. The complainant testified that she started bleeding from her vagina. Her mouth and neck were swollen. She walked home and informed her mother. She was taken to [particulars withheld] and was treated. The bleeding did not stop. She was taken to Busia District Hospital where she was admitted. She was stitched and the bleeding stopped. She produced her pink pant, white blouse, black petticoat and black skirt into evidence. All these items of clothing were blood stained.

The complainant's testimony in regard to the circumstance surrounding her visit to her aunt and the subsequent hospitalization was corroborated by PW3 H M, the mother of the complainant and PW4 Constance S W, a neighbour of the complainant. PW5 Dr. James Kisilu, produced the P3 Form which he had filled when he saw the complainant. He testified that when he saw the complainant, her clothes were blood stained, the external genitalia was normal, the posterior vaginal wall tissue was torn. The hymen was torn. The labia bleeding had been controlled. He formed the opinion that indeed the complainant had been defiled. The P3 form was produced into evidence by the prosecution.

When the Appellant was put on his defence, he denied having committed the offence. He adduced alibi defence. He testified that on the material day that he was alleged to have defiled the complainant, he was in Matayos visiting his friend. He later travelled to Eldoret to pursue his business. In this regard, the Appellant's testimony was corroborated by DW2 Martin BarazaJomo. However, DW2 was not certain of the date that the Appellant actually visited him. He could not tell if the date was on the specific day that the complainant testified that she was defiled.

This court is convinced beyond any reasonable doubt that indeed the prosecution established that it was the Appellant who defiled the complainant. The claim by the complainant that he was not positively identified by the complainant does not hold. This is because the complainant knew the Appellant well before the incident. The complainant was at the time a fourteen (14) year old girl. It cannot be said that she was too young not to be in a position to identify the Appellant. No evidence was placed before the court to establish the existence of any grudge between the family of the complainant and the Appellant. The complainant narrated in graphic detail how she was accosted, tackled to the ground and then defiled. The medical evidence proved that indeed the complainant had been defiled. In fact, she was injured to the extent that she required stitching in her vagina to stem the bleeding. The alibi defence adduced by the Appellant was unconvincing. In fact, it did not dent the otherwise strong evidence adduced against him by the prosecution.

In the premises therefore, this court holds that the prosecution proved its case to the required standard of proof beyond any reasonable doubt. The trial magistrate properly analyzed the evidence and reached the proper determination finding the Appellant guilty as charged. This court, having reevaluated the evidence, has reached the same conclusion. The appeal filed by the Appellant against conviction is hereby dismissed.

As regard sentence, the complainant was fourteen (14) years of age at the time that she was defiled by the Appellant. Under **Section 8(3)** of the **Sexual Offences Act**, the Appellant was liable to be sentenced, upon conviction, to a term of not less than twenty (20) years. The Appellant was sentenced to serve twenty (20) years imprisonment. This was the minimum sentence prescribed by the law. This court will not interfere with it. It was lawful. The appeal against sentence is similarly dismissed. It is so ordered.

L. KIMARU

JUDGE

DATED, COUNTERSIGNED AND DELIVERED AT BUSIA THIS 21ST DAY OF JUNE 2013.

F.TUIYOT

JUDGE