REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 9 OF 2011

FRANCIS KIPTANUI SITIENEI:::::::::::::::::::::::::: APPELLANT

VERSUS

REPUBLIC:::RESPONDENT

JUDGEMENT

Having been convicted for the offence of Defilement Contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act, the appellant, **FRANICS KIPTANUI SITIENEI**, was jailed for fifteen (15) years.

He now submits that he ought not to have been convicted as the age of the victim was never proved by the prosecution.

The appellant also submitted that the learned trial magistrate was wrong to have held that the hymen of the complainant was raptured at the time when the offence was committed. In his view, if the hymen had been raptured at the alleged time, the medical officer of health who examined the appellant, would have found blood. However, there was no bleeding. All that was found was pus.

Meanwhile, the examination conducted on the appellant showed that his penis had no bruises. Therefore, the appellant submitted that that examination exonerated him. In his view, if there had been a struggle between him and the complainant, his penis would have had bruises.

The appellant also submitted that the only reason for his arrest and prosecution was the report made by the mother of the complainant.

Mr. Marube, the Learned Advocate for the appellant, submitted that the mother of the complainant was the **"engine of his prosecution"**.

The complainant is said to have failed to make any report to the police.

Meanwhile, because the complainant's brother failed to knock the door, behind which he had heard his sister crying, the appellant describes that evidence as incapable of belief.

In answer to the appeal, Mr. Mulati, learned state counsel, submitted that the age of the complainant was proved by the clinical officer.

As regards penetration, the Respondent submitted that the rapture of the complainant's hymen constituted sufficient proof.

Although it is the mother of the complainant who reported to the police about the incident, the Respondent saw nothing wrong with that.

And even though the penis of the appellant did not have bruises, the Respondent believes that that did not exonerate the appellant.

As the first appellate court, I have re-evaluated all the evidence on record, and drawn my own conclusions. In the process, I made an allowance for the fact that I did not observe any of the witnesses when they testified. Therefore, if there should instances in which the learned trial magistrate formed an opinion about the credibility of a witness, on the basis of the demeanour of such a witness, this appellate court would not deviate from such opinion, unless it is satisfied that the opinion is not supported by the evidence tendered.

In the case of **HILLARY NYONGESA -VS- REPUBLIC, (ELD) CRIMINAL APPEAL NO. 123 OF 2009, MWILU J.** (as she then was), held as follows:-

"Age is such a critical aspect in Sexual Offences that it has to be proved conclusively. Anything else is not good at all. It will not suffice. And it becomes more important because punishment (sentence) under the Sexual Offences Act is determined by the age of the victim."

In that case, the victim's age was cited as 15 years old, in the charge sheet. And when the victim was being examined by a doctor, she told him that she was 15 years old.

However, the charge was brought under Section 8(1) as read with Section 8(2) of the Sexual Offences Act, which deals with offences committed against persons who were less than 11 years of age.

Clearly therefore, the evidence led by the prosecution did not support the charge. That prompted the learned judge to hold as follows:-

"This framing of the charge by the prosecution, and the failure by the trial court to note it and have it amended are fatal to the charge."

In my considered view, that case is wholly distinguishable from the one before me.

In this case the complainant, E, testified that she was 16 years old, and that was the age specified in the charge sheet.

That age also falls within the provisions of Section 8(4) of the Sexual Offences Act. Therefore, the evidence tendered by the complainant supported the particulars of the charge. There was never, therefore, any need to amend the charge sheet herein, as had been the case in the authority relied upon by the appellant.

The complainant testified that she had gone to the appellant's house, to buy tomatoes. He grabbed her, threw her on the bed and defiled her. Before doing so, the appellant removed the complainant's panty, and also closed the door.

When the complainant screamed, the appellant covered her mouth with palm of his hand.

After the complainant testified, the appellant did not cross-examine her at all.

PW2 is the mother of the complainant. When she got back to her house, she found her daughter who told her that the appellant had defiled her.

PW2 examined the daughter, and saw a whitish discharge from her vaginal opening. She then took the complainant to the hospital.

PW3 is a brother to the complainant. At the material time, he was walking towards the shops when he heard some screams coming from the appellant's house.

Soon thereafter, PW3 saw the appellant come out of his house. The appellant closed the door.

A little while later, the appellant returned and opened the door. It is then that PW3 saw the complainant coming out of the appellant's house. The complainant was crying, and she told PW3 that the appellant had defiled her.

During cross-examination, PW3 said that he did not knock on the appellant's door because he feared that the appellant might accuse him that he (PW3) wanted to steal from him.

PW5 is a Clinical Officer. He produced the complainant's P3 form, which had been filled by his colleague. The said colleague had indicated that the complainant was **"approximately 16 years old."**

On examination, the complainant was found to have pain on her left elbow joint; with her labia inflamed and swollen. The complainant's hymen had been raptured, and she had a whitish discharge from her vagina.

Pus cells and epithelial cells were revealed. But there was no spermatozoa.

PW5 also produced the P3 Form for the appellant, who was 21 years old. He was of sound mind and had no bruises on his penis.

PW6 was the Investigating Officer. His investigations revealed that the appellant had defiled the complainant.

After the appellant was put to his defence, the appellant denied committing the offence. He attributed the evidence against him to the fact that the witnesses hated him.

I have come to the inescapable conclusion that the prosecution established beyond any reasonable doubt, that the complainant was defiled. That conclusion is premised on the medical evidence, coupled with the complainant's evidence.

The age of the victim was proved through the evidence of the complainant and the evidence of the clinical officer.

The identity of the assailant was proved through the direct evidence of the complainant, who saw him clearly. There can have been no error in the identification, as the offence was committed in broad daylight, at about 12:00noon; the assailant's identity was not concealed by anything; and the complainant's ability to see her assailant was not curtailed.

In the result, the evidence tendered by the prosecution proved the case against the appellant beyond any reasonable doubt.

The appeal has no merits, and is therefore dismissed.

DATED, SIGNED and DELIVERED AT ELDORET THIS 14TH DAY OF NOVEMBER, 2013

FRED A. OCHIENG

JUDGE