



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUSIA**  
**CRIMINAL APPEAL NO. 61 OF 2010**

**EVANS WANDERA OUMA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(From the conviction and sentence of M. Munyekenye, Senior Resident Magistrate in Busia CR. CASE NO. 1316 OF 2009)***

**J U D G E M E N T**

The appellant was convicted by Busia Resident Magistrate of the offence of defilement contrary to section 8 (1) of the Sexual Offences Act, Act No. 3 of 2006 and sentenced to life imprisonment. This appeal is against conviction and sentence.

The grounds set out in the petition precisely are that the court failed to evaluate all the evidence on record that there were glaring irregularities in the prosecution's case and that the defence of the appellant was not considered by the trial court. Mr. Jumba argued the appeal on behalf of the appellant. He submitted that the date of the offence was not clear; that there was contradictory evidence on the date of reporting the offence; the medical evidence was not properly prepared and presented and that the age of the child was not established.

The appeal was opposed by the state counsel Mr. Okeyo who submitted that the issues raised were clear in the evidence of PW1, PW2, PW3, PW4 and PW5. According to the state the case was proved to the standards require in criminal cases.

The facts of the case were that on the 5<sup>th</sup> July, 2009 the complainant PW1 aged eleven (11) years was called by the appellant who is a neighbour to fetch water for him. After fetching and delivering water to the appellant's house, PW1 was held and forced into the appellant's bedroom. The appellant defiled the complainant and then chased her away from his house. PW1 reported the matter to her step mother PW3. She was taken for treatment and later the matter was reported to the police. The appellant was arrested later and charged with the offence.

It was PW1's testimony that the appellant tricked her to go and fetch water for him. When she brought the water into the house, the appellant held her hand and forced her to his bedroom where he lay her on the bed and removed her pants. He also undressed and lay on top of her. He had sexual intercourse with her. PW1 testified that she was terrified by the ordeal and she felt pain and cried out. Her mother PW2 was away from home. She returned two days later and assisted PW3 to take PW1 for medical examination.

PW3 testified that PW2 had left home at the material time. The appellant came to PW3's home in the morning hours around 8.00 a.m. and asked that PW1 be allowed to go to his place and fetch water for

him. PW3 left home and went to church. From church, PW3 went to attend to her business away from home. It was in the course of day that PW1 went to fetch water for the appellant. When PW3 returned home at 8.00 p.m., PW1 told her what the appellant had done to her. The girl fell sick and was only taken to hospital when her biological mother PW2 returned home. PW3 checked the girl's private parts and had reason to believe that the girl's had been sexually assaulted.

PW4 the father of PW1 was away from home. He had gone to his other home and returned on 13/07/09. While he was away his wife PW2 called him and reported to him that PW1 had been defiled by Evans who is the appellant herein. He went to the police station at Busia on 25/7/09 and reported the matter.

The matter was investigated by PW5 P.C Woman Veronica Vincent who later charged the appellant with the offence.

PW6 Dr Njau filed the P3 form using the notes made by the clinical officer who had treated PW1 at Alupe District Hospital. The doctor also did physical examination on PW1 on 27/07/09. He found her hymen was torn.

The appellant in defence denied committing the offence. The appellant testified that he knows PW1 and her family who are her neighbours and that these two families had a land dispute concerning the land the appellant lives on. The appellant went on to say that complainant had worked for him while he was in jail looking after his two children of tender age. The parents of PW1 had demanded from him Sh. 10,000/- for the job which he refused to pay. He also alleged that the same families of PW1 made his (appellant's) wife run away with the intention of making her marry another man. The appellant further said that when he learnt that the parents of PW1 had reported the matter to the police, he went there and made a report that he had been framed in the matter.

The appellant called two (2) witnesses. DW 2 was the Health Records Officer of Busia District Hospital who confirmed that the complainant was treated at the hospital on 8/07/09 and got the O.P.D number on 10/07/10. DW 2 also confirmed that it is in order to call a doctor to treat a patient or to fill a P3 away from his place of work.

DW3 a police officer from Busia police station confirmed that the appellant reported at the station that the father of PW1 was alleging that the appellant had sexually assaulted PW1 and transmitted a sexually transmitted disease.

The defence argued that the age of the complainant was not established. The prosecution relied on the immunization card of PW1 to prove that PW1 was born on 20/04/1998. The other evidence was adduced by PW1 herself and her parent on the year she was born. The defence submitted that it is only a birth certificate or an age assessment report that may prove age of a person. The birth certificate is processed by the Registrar of Births and Deaths using the birth notification and the immunization card. Both documents bear the dates of birth of the infant or child concerned. Any of these two documents if authentic is sufficient as far as the date of birth is concerned. The registrar uses the dates in the two documents to process the birth certificate. Before a birth certificate is issued the court would be acting senselessly to reject the documents available as evidence of birth of a victim. This would cause grave injustice to victims whose parents have not processed the birth certificate. I come to a conclusion that the immunization card corroborated by her evidence adduced is sufficient to establish the age of the complainant.

On the date of the offence, the charge sheet gives it as 5<sup>th</sup> July, 2009. The complainant testified that it was on 05/07/09 when the appellant asked for her to go and fetch water for him. The appellant defiled her after taking the water to his house. This was confirmed by PW3 who said that the accused came personally to her house to make the request for assistance on 05/07/09 around 8.00 a.m. As for the time of the offence PW1 testified that the appellant came to their home at 2.00 p.m. when he made the request. She went fetched the water and was subsequently sexually assaulted. The exact time of the offence did not come out in evidence. However, the prosecution has established that it was between 8.00 a.m. and

4.00 p.m. on the 05/07/09 the complainant was a minor and may not have been well-versed or accurate on the issue of time.

Dr. Njau (PW6) did not only produce the P3 form but also examined the complainant personally and conducted the repeat HIV test. The P3 was filled using the clinical notes from the clinical officer who had earlier examined and treated the complainant. It is procedural for a doctor to use notes of the examining clinical officer whether in that hospital or not to fill a P3 form. DW 2 the Health Records Officer Busia District Hospital confirmed this. The qualifications of Dr. Njau to fill the P3 form were not in doubt. The defence challenged the action of the doctor of filling the P3 form arguing that the treatment and initial examination was done by a clinical officer from a different hospital. Dr. Njau was at that time attached to Alupe District. The request for the 2<sup>nd</sup> HIV test was directed to medical officer of Health Busia District Hospital. The doctor explained that he was requested by the investigating officer to fill in the P3 forms and also to conduct the test. The police have a duty to have P3 forms filled for victims of sexual offences. Both Busia District Hospital and Alupe Hospital are situated within Busia Municipality. The police have a choice to request a doctor from any nearby hospital to serve them. DW 2 said that what was done by the police in regard to the medical evidence was in order. Dr Njau was therefore legally qualified to re-examine the complainant and to produce the P3 form.

The substantial evidence on the offence was basically that of PW1. She gave a candid testimony on what the appellant did to her. Her parents PW2 and PW3 physically examined her at home and noticed she had been defiled. This was after she had told PW3 what the appellant had done to her. The two witnesses also testified that the victim fell sick and was taken for examination and treatment. Dr. Njau (PW6) confirmed that her hymen was not intact which was as a result of forced penetration. The medical documents in support were produced. It was not necessary to produce the treatment notes since the P3 form was filled using the said notes.

The defence of the appellant was that the case was framed against him by the family of the complainant. The issue of the alleged land dispute did not feature at all during the cross – examination of the key witnesses. The family of PW1 agreed that the wife of the appellant had ran away and left her things at their home. The appellant did not explain how this incident caused friction between the two families. The appellant alleged that the complainant looked after his two young children when his wife ran away and that her parents demanded Kshs. 10,000/- which he refused to pay. During cross examination the appellant did not put this issue about his wife to the parents of PW1. PW4 denied that he had planned to marry off PW1 to the appellant. It should be noted that the victim was a minor and had no capacity to make a decision on marriage.

On the date of reporting to the police, PW5 said she came across the case in the O.B on 25/07/09. The evidence of PW1, PW2 and PW3 indicates that they had reported the matter to the police earlier as they took the victim to hospital when PW4 went to the police station on 27/07/09; PW5 was already investigating the case. PW1 said in her evidence that she went with her mother to the police the next day. She was taken to hospital on 08/07/09. I come to conclusion that the matter was reported to the police between 6<sup>th</sup> and 8<sup>th</sup> July, 2009.

PW4 was not at home when the incident took place. He was informed about the incident on phone by his wife. The evidence of PW1 and PW3 is clear that PW4 had taken his son to hospital and gone to his other home in Bondo. He returned home on 13/07/09.

The judgment of the trial magistrate addressed all the issues raised herein and found them untenable. I agree with her that the appellant's defence did not challenge the prosecution's evidence. The prosecution established that the complainant was eleven (11) years at the time of the offence. All the ingredients of the offence were proved and it is my finding that the conviction was safe.

On the sentence, section 8(2) provides for a life imprisonment where the victim is aged eleven (11) years and below. The sentence was therefore within the law.

The appeal therefore fails and is hereby dismissed.

The conviction and sentence are hereby upheld.

**F.N. MUCHEMI**

Judgment dated and delivered on the **13<sup>th</sup>** day of **February 2012** in the presence of the appellant, Mr. Okeyo the state counsel and the defence counsel Mr Jumba.

**F. N. MUCHEMI**  
**JUDGE**