

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL NO.54 OF 2011

(Being appeal from the conviction and sentence by the Resident Magistrate at Webuye in Cr. Case no.1472 of 2010)

REPUBLIC

.....

APPELLANT

~VRS~

ANTONY WAFULA WAMALWA

RESPONDENT

JUDGMENT

This is an appeal against the acquittal of the Respondent by the Resident Magistrate at Webuye. The Respondent had been charged with defilement contrary to section 8(1) and (3) of the Sexual Offences Act no.3 of 2006, that on 14th to 17th November 2010 in M[...] location of Bungoma East District in Western Province he intentionally penetrated the sexual organ of A.G.M (PW1) a child aged 15 years. He faced the alternative charge of indecent assault contrary to section 11 (1) of the Act that during the time he committed an indecent act against the complainant.

The evidence of PW1 was that she had gone to fetch water for Doreen Barasa (PW7) on 14/11/2010. While there, PW7 took her to the house of the Respondent who had sexual intercourse with her for the whole night. She was 15 years old and was going to school at (*particulars withheld*) Primary School in class seven. She woke up the following morning and went to school. She returned to the Respondent's house and slept for two more nights having sexual intercourse with him. She would go to school in the morning. Her father J.L.M (PW2) was all the time looking for her and had reported to the local administration that she was missing. On 17/11/2010 he went to the girl's school to report that she was missing. He found the girl in school. On being interrogated, she said that the Respondent had detained her in his house for three nights and defiled her. She was taken to Webuye District Hospital. The examination revealed that she had no labia minora and her hymen was broken. She had pus cells in her urine. The Respondent was arrested and examined. He was found to have pus cells in his urine.

PW1 testified that she had had sexual intercourse before this incident and that is how she had broken her hymen.

In defence, the Respondent denied that he had slept with or defiled PW1. He gave unsworn testimony.

The trial court did not believe the evidence of PW1 that she had been sexually assaulted or defiled by the Respondent. The court considered that the medical evidence had not provided corroboration. This was because the medical examination revealed that she had had sexual intercourse before and that is how she had broken her hymen. It was not indicated how long prior to her meeting the Respondent that she had had sexual intercourse. The presence of pus cells in her urine indicated that she had an infection. It was not established that the infection was from the Respondent, and not from her previous encounters. Her pus cells and the pus cells in the Respondent's urine were not scientifically matched. Of greater importance, PW7 who had allegedly led her to the Respondent disowned that evidence. In short, the trial court correctly analyzed the evidence and came to the conclusion that the prosecution had not established the charges beyond doubt.

Mrs. Leting for the State relied on section 75 of the Children's Act 2001 to say that the provision was flouted because the court was not cleared before PW1 testified. The record does not show whether or

not the court was clear when PW1 came to testify. There is no indication that the prosecution requested the court to clear the public. It should be noted that it is for the trial court to form the opinion under section 75 that it is desirable, in any proceedings in relation to an offence against or by a child who is under 18 years, that any members of the public be excluded from the court. There is no indication that there was improper exercise of the direction. The record shows that PW1 stopped testifying at some point. The matter was adjourned and when the court resumed, she testified to conclusion. There is no indication that she stopped testifying because she feared the presence of the members of the public.

In conclusion, I find that the decision to acquit the Respondent was borne out of the evidence that the prosecution called. The appeal has no merit and is hereby dismissed.

Dated, signed and delivered at Bungoma this 22nd day of March 2012.

A. O. MUCHELULE

JUDGE