GEOFFREY CHEMONGIR NAIBEI::::::::::::::::::::::::::::::::::: APPELLANT

~VRS~

REPUBLIC ::RESPONDENT

(Appeal from the judgment of the Senior Resident Magistrate Hon. R. O. Oigara in Kimilili court in cr. case no.128 of 2010)

JUDGMENT

The Appellant was convicted on two counts of defilement of a child contrary to section 8 (1) as read with section 8 (2) of the Sexual offences Act no.3 of 2006 and sentenced to serve 15 years in jail on each count. The particulars of count 1 were that on 7/1/2010 at [particulars withheld] sub location in Mt. Elgon District of the Western Province he committed an act which caused penetration against DN (PW1) a child aged 11 years. In count 2 it was alleged that during the incident he penetrated another child called SN (PW2) aged nine (9) years old. He was aggrieved by the conviction and sentence and preferred this appeal.

The prosecution evidence on which the Appellant was convicted was as follows. PW1 and PW2 were on 17/1/2010 at about 9 p.m. or 10 p.m. sleeping on the floor in the house of the latter's mother CN (PW4) who was away in [particulars withheld] . They were aged 11 and 9 ½, respectively. PW1's brother [particulars withheld] (PW3) was sleeping in bed in the same room. The door was held closed using a nail and a stone. The Appellant pushed the door open and entered. He held a knife. He threatened to kill whoever made noise. He joined the girls where they were sleeping. He removed PW1's underpant and slept with her. She felt pain. He said he was going to do it slowly. He stayed in her for about three minutes before doing the same to PW2. He thereafter returned to PW1. He gave the girls Ksh.20/= and promised to buy them Kangumu. PW3 was seeing all this. After that he left. Next morning PW4 returned home but the girls were afraid to tell her. They went to school. PW3, aged 8, told his mother (PW4) what had happened. PW4 beat up the girls before taking them to police. They were taken to Mt. Elgon District Hospital and examined. PW1 was found with no laceration or tear on labia minora but had inflamed labia majora which was indicative of friction and cortus. She had numerous epithelial cells but no discharge. PW2 had no tear and no laceration of her genitalia. The genitalia was externally normal. She had no discharge or infection.

The Appellant made unsworn statement in defence in which he denied defiling the girls. He stated that he had been framed by PW4 with whom he was doing chang'aa business but she had refused to share in the proceeds or profits. When he asked for these she threatened to plant bhang on him. She also complained that he had got her husband another wife. She has a co-wife. The Appellant called his wife [particulars withheld] (DW2) who testified that he had been framed by PW4.

The trial court accepted the prosecution evidence and rejected the defence. It found that it had been proved beyond doubt that the Appellant had defiled the complainants. It is this finding that the Appellant has challenged in this appeal. In the grounds of appeal he contended that the analysis of the evidence was impartial, the defence evidence was disregarded and he had not been medically examined to connect him with the defilement of the girls. In the written submissions he stated that the prosecution evidence was not only insufficient but was also contradictory, unreliable and inconsistent.

The State was represented by State Counsel Mr. Ogoti who opposed the appeal, but asked the court to impose an appropriate sentence given the ages of the complainants and in view of section 8 (2) of the Act which has a mandatory life imprisonment for defiling a child aged 11 years or below.

The duty of this court is to subject the entire evidence tendered before the trial court to fresh and exhaustive scrutiny to be able to independently determine whether the conviction was properly arrived at, while bearing in mind that the trial court had the advantage of seeing and hearing the witnesses **(Okeno v.**

Republic [1972] EA 32).

The Appellant was convicted on the evidence of PW1, PW2 and PW3 who were children of tender years and who were neither sworn not affirmed. Under sections 124 of the Evidence Act and section 19 (1) of the Oaths and Statutory Declarations Act (Cap.15) the trial court was required to convict solely on the evidence of the witnesses if, for reasons to be recorded in the proceedings, it was satisfied that the witnesses told the truth, and was to seek the corroboration of the testimonies. The court did not consider these requirements.

PW1 testified that the Appellant wanted to penetrate her but could not because of the size of his genital organ. The rest of her evidence says that he had "sex" with her, saying he was going to do it slowly. PW2 stated that the Appellant "f***ed" her for about 4 minutes. PW3 stated that he saw the Appellant "f***ing" the girls. The P3 forms, however, did not show that the girls were penetrated. PW1 had inflamed labia majora. It is my considered view that if PW1, PW2 and PW3 are to be believed, then the actions of the Appellant on each of PW1 and PW2 amounted to attempted defilement under sections 9 (1) and 9 (2) of the Act.

The Appellant claimed that he had been framed by PW4 because of some business dispute. He cross-examined PW4. He did not make the allegation for her to dispute or admit. The allegation was not put to the children. His wife (DW2) repeated the claim. The trial court did not accept it. I have considered it and find it was an afterthought.

PW1, PW2 and PW3 each said the attack was at night, the Appellant forced himself into the house and that the house was lit by a candle which they say had sufficient light. According to the children the Appellant was from the village. If the Appellant says he was doing business with PW4 then he was familiar in the home. I agree with the trial court that the evidence of the children was believable. They recognized the Appellant this night.

In conclusion, I quash the conviction against the Appellant on each charge and in its place find him guilty of attempted rape on each charge and convict him accordingly. The sentence of 15 years on each charge is set aside. Under section 9(2) the minimum penalty is 10 years. Given the gravity of the offence, the fact that the Appellant was a first offender, who lost his father and his wife had recently delivered, I ask that he serves 12 years on each count and to run concurrently.

To that extend, therefore, the appeal is allowed.

Dated, signed and delivered at Bungoma this 24th day of July, 2012.

A. O. MUCHELULE
JUDGE