

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

Criminal Appeal 225 of 2011

PHILLIP SIMIYU NYONGESA :::APPELLANT

~VRS~

REPUBLIC ::: RESPONDENT

(Being appeal from the conviction and sentence by the Senior Resident Magistrate Hon. R. O. Oigara at
Kimilili in Cr. Case No.310 of 2007)

JUDGMENT

The Appellant was convicted of defilement of a girl under sections 8 (1) and 8 (2) of the Sexual Offences Act no.3 of 2006 whose particulars were that on 14/5/2007 at [particulars withheld] village in [particulars withheld] location of Bungoma North District of the Western Province he unlawfully committed an act which caused the penetration with [particulars withheld] (PW1) aged 11 years. He was sentenced to serve life imprisonment. He appealed against the conviction and sentence.

The prosecution evidence was that PW1 was a pupil at [particulars withheld] Primary School and at 2.00 p.m on 14/5/2007 she was at home alone when the Appellant came to the house where she was and carried her to her father's bed, removed her underpant and had sex with her. Her mouth was covered so that she could not make noise. Her father [particulars withheld] (PW3) found them in the act. The appellant ran out. A neighbor [particulars withheld] (PW2) came and PW3 asked her to check the girl. She noticed sperms at her vagina. The incident was reported to police and PW1 examined at [particulars withheld] District Hospital by clinical officer Beatrice Akisa PW5 who found her hymen was not intact. There was laceration of the genitalia. The vagina was normal with blood clots. Laboratory test showed may pus cells, but there was no spermatozoa.

The Appellant gave unsworn defence and denied he had defiled the girl. He stated that he had come here to pick a padlock. He found PW1 whom he asked for the padlock. She replied she knew where it was but could not give it to him. She ran to the bedroom and he followed her there. This is when PW3 found him as he was asking for the padlock. When he was leaving he heard PW1 crying behind her. PW3 was beating her. It is at this point that it was alleged he had defiled her. She was taken to hospital. Subsequently, Ksh.3,000/= was sought from him to abandon the claim. He declined.

The trial court accepted the prosecution evidence and discounted the defence version and found the charge had been proved beyond doubt and returned the conviction verdict. It is this finding that has been challenged on this appeal. It is the duty of this court to assess all the evidence afresh and reach an independent determination on whether the conviction was based on cogent evidence (**Okeno v. Republic [1972] EA 32**). It is appreciated that the trial court had the benefit of seeing and hearing the witnesses.

The charge indicated that PW1 was aged 11 years at the time of the offence. During *voire dire* inquiry before she was asked to give affirmed evidence, the girl stated that she was aged 15 and in class five. After being affirmed she stated that she was in class two at the time. The clinical officer who examined her opined that she was 11. PW3 did not say how old the girl was, or when it is that she was born. It is certain that by the conclusion of the prosecution case the age of PW1 had not been proved beyond doubt.

Secondly, PW1 testified that her father (PW3) found the Appellant in the act of defiling her. PW3 testified to say he found the Appellant in the house and that he was standing. The two versions were not reconciled. The Appellant agreed that he was found in the house, not in the act but had followed PW1 here to get his padlock. It is notable that PW3 testified that when he found the Appellant in the house he asked him what he was doing here. The Appellant replied that he had come to get his padlock.

Thirdly, the evidence of PW2 was that she checked PW1's vagina and saw sperms. PW1 was taken for medical examination the same day. She had no evidence of spermatozoa. Her hymen was not intact and she was not bleeding. There was laceration around introitus, but the vagina was normal. She had blood clots in the vagina. She had many pus cells. The court did not appear to have considered the medical evidence to see if it conclusively indicated that she had been defiled. If, for instance, she was not bleeding why the blood clots? Why was the clinical officer saying the vagina was normal and talk about laceration at the same time. The hymen was said not to be intact, but had the vagina been penetrated? The girl testified that she was in pain during the act. Was this borne out by the results of the examination? These were issues that the court expected to seek them to be clarified by PW5, but it did not.

In all, I have considered all the evidence and find that the Appellant was convicted on evidence that was not entirely safe or conclusive. This is why I quash the conviction and set aside the sentence.

Dated, Signed and delivered this 24th day of July 2012.

A. O. MUCHELULE
JUDGE