No. 327
REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL APPEAL NO. 68 OF 2010
E.O.A…….……..…….. APPELLANT
-VERSUS-

REPUBLIC ……..……....……. RESPONDENT

JUDGMENT

From the original conviction and sentence of the Resident Magistrate's court at Ndhiwa, B. O Omwansa in Criminal Case No. 17 of 2010 delivered on 18th March, 2010.

The appellant, **E.O.A** was charged before the Resident Magistrate's court at Ndhiwa with incest by male contrary to section 20 (1) of the **Sexual Offences Act**. The particulars stated in the charge sheet were that on 6th January, 2010 in Ndhiwa district within Nyanza Province, the appellant committed an act which caused penetration of his penis into the vagina of **I.O**, a child of 11 years who was to his knowledge a niece. The appellant denied the charge and he was tried.

Briefly, the prosecution case was that, PW1 **I.A,** hereinafter ***"the complainant"***, was on 6th January, 2010 at Home alone at about 7.00p.m. Her paternal uncle who turned out to be the appellant came and told her that he wanted to sent her to O market. When she asked for money, the appellant told her that he was to collect the same from another person on the way. As they walked along and reached a sugar cane plantation, the appellant suddenly grabbed the complainant's hand, knocked her down and pulled her into the sugarcane plantation 20 metres away from the footpath. He then sexually assaulted her severally. She could not resist nor raise alarm as the appellant had covered her mouth with his hands. When done, he left. She collected herself and walked home in pain. When her mother PW3, **H.A.O** came back from her parents home at Rusinga Island at about 8.00p.m, she immediately told her what had happened. PW3 then reported the incident to the area chief who in turn advised her to report the matter to Ndhiwa Police Station. She did so. At Ndhiwa police station she was received by PW4, **P.C Edna Kimalwa** who listened to the complainant. She then took the complainant to Ndhiwa hospital for treatment. Subsequently, the P3 form which she had issued to the complainant was filled by PW2, **Jared Obiero**, a clinical officer at the same hospital. His examination revealed bruises on the vagina wall. Samples taken for further investigations indicated that she was HIV positive. He concluded that penetration and coitus had been achieved. However, he was not clear whether the HIV infection occurred on that day.

Armed with this information, PW4 issued an arrest order for the appellant. He was duly arrested on 9th January, 2010 and brought to the police station. On 12th January, 2010, he was also examined by PW2. Samples of blood taken from him revealed that he was HIV positive. He then concluded that the appellant was HIV positive and had also urinary track infection. Under cross-examination, PW2 stated that he was not sure whether it was the appellant who had infected the complainant with HIV.

Put on his defence, the appellant elected to give a sworn statement of defence and called one witness, his wife. He testified that on 6th January, 2010, whilst at home at night, he was arrested by the police and

taken to Ndhiwa police station and was subsequently arraigned in court over a charge he knew nothing about. As far as he was concerned the case was a frame up by his sister in law over a long standing dispute over a parcel of land. DW1, **C.A** testified that on 6th January, 2010, whilst at home her husband, the appellant was arrested. Otherwise she knew nothing about the case.

The learned magistrate having carefully evaluated and analyzed the evidence tendered both by the prosecution and defence was satisfied that the prosecution had proved its case against the appellant. He accordingly convicted the appellant and sentenced him to 20 years imprisonment. However it does appear that this sentence was illegal since the proviso to section 20 (1) of the **Sexual Offences Act** under which the appellant was charged is in terms that if the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life. I shall revert to this issue later in this judgment.

The appellant was aggrieved by the conviction and sentence. Hence this appeal. In his petition of appeal, the appellant faults the learned magistrate for convicting him in the absence of any evidence of an eye witnesses, the evidence tendered was not collaborative and that the learned magistrate failed to appreciate that the case was a frame up due to family dispute over land and or boundary.

When the appeal came up for hearing before me on 23rd November, 2010, the appellant offered to argue the appeal by way of written submissions. I have carefully read and considered them.

Mr. Mutuku, learned Senior Principal State counsel opposed the appeal. He submitted that given the evidence on record the conviction was safe. There was no evidence of a grudge and that even if there was, it could not have led to such frame-up.

I have analyzed the evidence that was adduced in the trial court and evaluated it independently as I must do, this being a first appeal – See the case of **Okeno –vs- Republic (1972) E. A 32**. I do find just like the trial court the fact that the complainant was sexually assaulted is not in dispute. Indeed in his written submissions the appellant agrees that much. The clinical officer (PW2) also confirmed the fact. What the appellant wants discounted is the fact that he was the culprit. From the evidence on record, it is very difficult to discount the appellant's culpability. The offence was committed in broad daylight. According to the complainant it was committed on her by the appellant, who is her paternal uncle. He is a brother to her father. He is therefore a person she knew very well. The question of mistaken identity does not therefore arise. The appellant has argued that since the offence was committed in broad daylight there must have been eyewitnesses. Such witnesses should have been called to testify. The response to these submissions is that sexual offences are committed in secrecy. Rarely will there be any eyewitnesses. In any event where could such eyewitnesses have been if according to the complainant, the appellant held her hand and pulled her deep into the sugar cane plantation 20 metres from the footpath they had been walking on.

The appellant advanced the defence of a grudge between himself and his sister-in-law, the mother to the complainant. However from the narration of the events leading to and after the incident, by the complainant, it is difficult to discern any such frame up. They are so detailed and consistent such that it cannot be a case of being tutored on what to say. In any event and as correctly observed by the learned magistrate, at the time of the alleged offence, PW3, whom the appellant accuses for framing him with the case was away from the matrimonial home. She was infact at her parents' home in Rusinga Island when the incident happenned. Further and if indeed there was such grudge or that the case was a frame up, the appellant's own wife, who testified on his behalf would be in the know. However, when she testified she never alluded to any such differences. If anything she was categorical that she knew nothing about the case.

It is also instructive that both the appellant and the complainant were soon after the incident tested for HIV and were all found to be positive. This cannot be a mere coincidence. The complainant could not have infected herself with such deadly virus merely to frame the appellant on behalf of her mother. The clinical officer was not sure as between the complainant and the appellant who infected who. To my mind and for purposes of this case, that consideration is irrelevant. What matters is that there was perhaps coitus between the two which could have resulted in the infection.

Given the overwhelming prosecution evidence, the defence advanced by the appellant melts into thin air. There is no dispute at all that the complainant was a niece of the appellant. The appellant himself agrees that much. There is also no dispute that the complainant was a female aged below 18 years. Indeed PW2 confirmed that he carried out age assessment of the complainant and found her to be aged 11 years. Thus all the ingredients of the offence were met. The conviction of the appellant was no doubt safe.

The appellant was charged under section 20(1) of the **Sexual Offences Act**. Upon conviction, the section provides for varying sentences depending on the age of the victim. If the victim is above 18 years, then the culprit is liable to imprisonment for a term of not less than 10 years. However in the event that the female person is under the age of eighteen years, the accused is liable to imprisonment for life. The evidence on record shows that the complainant was aged 11 years. The appellant ought therefore upon conviction to have been sentenced to life imprisonment according to the proviso. I will therefore correct that omission on the part of the learned magistrate. I therefore set aside the sentence of 20 years imprisonment and substitute therefore with a sentence of life imprisonment. Save for that correction, the appeal is otherwise dismissed.

Judgment dated, signed and **delivered** at Kisii this 17th day of January, 2011.

ASIKE-MAKHANDIA

JUDGE