REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 38 OF 2008

GEORGE OCHIENG OOKO …….…..…..…….. APPELLANT

VERSUS

REPUBLIC ……..…… RESPONDENT

(Being an Appeal from the Judgment/Sentence of HON. A. B. MONG'ARE (Resident Magistrate) in Eldoret Criminal Case No. 9749 of 2007 delivered on the 18th June 2008)

JUDGMENT

The appellant, **GEORGE OCHIENG OOKO**, appeared before the Resident Magistrate at Eldoret charged with the offence of defilement contrary to S. 8 (1) as read with subsection 2 of the Sexual Offences Act, 2006. It was alleged that on the 2nd November 2007 at K[....]Uasin Gishu District, the appellant defiled J. R , a child aged eight (8) years. There was an alternative charge of indecent act with a child contrary to S. 11 (1) of the Sexual Offence, Act. The appellant denied both counts but after trial, was found guilty, convicted and sentenced to life imprisonment on the main count.

Being dissatisfied with conviction and sentence, the appellant filed this appeal on the basis of the grounds contained in the petition of appeal filed herein on the 28th January 2010 in which he complains that he was convicted on uncorroborated and contradictory evidence by PW 1 and PW 3 with regard to the date of the offence. He challenges the medical evidence and contends that it was doubtful. We also contends that the exhibits were "planted" on him and that there was no proof that they belonged to him as they were found in a house occupied by three people. Also, contrary to what PW 3 and PW 6 stated, the investigating officer (PW 4) said that the exhibits were collected from the scene. The appellant further contends that he was held in police custody for a period longer than that prescribed under S. 72 (3) (b) of the then Constitution.

At the hearing of the appeal, the appellant represented himself.

MR. KABAKA, learned State Counsel, appeared for the respondent and opposed the appeal. In his submission, the learned State Counsel briefly went through the evidence adduced by the prosecution witnesses and more so, by Pw 1, PW 3, PW 5 and PW 7 and contended that the appellant was identified by recognition as the person who committed the offence of defilement against the complainant.

The learned State Counsel noted that the appellant did not deny that blood stained clothes were recovered in his house and that he did not call any witness to show that he was framed as alleged. With regard to the alleged violation of the appellant's constitutional right under S. 72 (3) (b) of the old

Constitution, the learned State Counsel drew the attention of the Court to an affidavit by one Cpl. Beatrice Langat filed herein on 31st March 2010 and urged the Court to dismiss the appeal for want of merit. In response to the foregoing submission, the appellant contended that there was no proof that the blood stains on the clothes belonged to the complainant or himself. He contended that the complainant did not speak the truth and that PW 5 could not give any explanation as to what happened to the complainant.

Having considered the arguments presented for and against the appeal, it now falls upon this Court, as the first appellate Court, to re-consider the evidence adduced at the trial Court and draw its own conclusions bearing in mind that the trial Court had the advantage of seeing and hearing the witnesses. In that regard, the prosecution case was briefly that on the material date at about 8.00 p.m., the complainant **J.R (PW 1)**, aged eight (8) years old and a primary school pupil went outside their house at C[...] and proceeded to a forest to relieve herself. In the process, the appellant appeared at the scene and grabbed her by the neck. She saw and recognized him as there was enough light from a nearby posho -mill. She knew him as her neighbour called George. He took her to his house, laid her on a mattress and defiled her. He wore a trouser and a shirt which were soaked in blood. After the incident, she went to her house but did not inform her mother what had happened. She feared to do so because the appellant had threatened to kill her. She disclosed what had happened only after her mother called a neighbour who interviewed her. The police were then notified of the incident by her mother.

The complainant's mother **E.M (PW 2)** realized that the complainant was sitting and walking with difficulty. She called her neighbour **M.A (PW 5)** and both examined the complainant. They noted that the complainant's panties had blood stains and sweat. They also noted that there was blood and semen in the complainant's private parts. They were then told by the complainant that George (appellant) was responsible for the sexual assault.

The complainant's father **D.N.M (PW 3)** reported the matter to the Police. The report was received by **CPL. BEATRICE LAGAT (PW 4)** of Eldoret Police Station. In the course of her investigations, Cpl. Lagat visited the scene of the offence on 7th November 2007. She collected the complainant's panties and shorts which were stained with blood and semen. She also found and collected from the appellant's house, blood stained shirt and trouser. After the conclusion of her investigations, she charged the appellant with the present offences.

OSEKO NYAKUNDI (PW 6), a trader, confirmed that the blood stained clothes were found on the ground in the appellant's house. He also confirmed that the appellant and the complainant's parents were his tenants.

DR. JOSEPH EMBENZI (PW 7) of the Moi Teaching and Referral Hospital examined the complainant three days after the offence and confirmed that she had been defiled. He completed and signed the necessary P3 form.

In his defence, the appellant denied the offence and stated that he left his house for duty on the morning of 2nd December 2007 and on the way heard people shouting. He approached the scene of the shouts and found the complainant's father. The complainant's father told him that he (appellant) was not a good man. At 9.00 p.m. he went to a friend's house to watch News. He stayed there upto 10.00 p.m. Thereafter, he proceeded to his house which he shared with two other people. He maintained that he did not commit the offence and contended that he was implicated as a revenge for his failure to marry the complainant's aunt.

The foregoing defence was considered by the learned trial Magistrate alongside the evidence adduced by the prosecution and the conclusion reached was that not only had the complainant been defiled, the appellant was the person responsible for the offence.

A fresh examination of the evidence adduced before the trial Court reveals to this Court that indeed the complainant was defiled as proved and confirmed by her own evidence coupled with that of her mother (PW 2) and her neighbour (PW 5) and most importantly by that of the doctor (PW 7). Indeed, the commission of the offence was not disputed at all.

The dispute centered on the identification of the appellant as the culprit. He denied responsibility and attributed his predicament to a revenge mission by the complainant's family for his failure to marry the complainant's aunt. However, the defence was unsustainable considering that he was seen and recognized by the complainant under circumstances which were favourable for positive identification. The complainant clearly stated that the scene of the offence was lit by lights from a posho mill. The appellant was not a stranger to the complainant. He was a neighbour very well known to her. The possibility of mistaken identification was therefore remote. The complainant's evidence was sufficient and credible enough to establish that the appellant and no other person was the offender. The recovery of blood stained clothes from the appellant's house could have provided vital incriminating evidence if only the prosecution had subjected the same to forensic examination to determine the origin of the blood stains. This was not done. Therefore, the recovery of the clothes was of no essence. Besides, the obligation to prove that the blood stains belonged to the complainant and/or the appellant lay with the prosecution and not the appellant.

All in all, it is this Court's opinion that the evidence against the appellant was cogent and credible for a sound conviction.

In that regard, this Court finds no good reason to interfere with the conviction of the appellant by the learned trial Magistrate. As regards the sentence, S. 8 (2) of the Sexual Offences Act provides for a mandatory sentence of life imprisonment if the victim is a child aged eleven years or less. The complainant herein was at the material time aged eight (8) years. The sentence imposed by the learned trial Magistrate was lawful.

With regard to the alleged violation of the appellant's constitutional rights under S. 72 (3) (b) of the Old Constitution, it is evident from the Charge Sheet that the appellant was arrested on 5th November 2007 and taken to Court on the 8th November 2007. This was beyond the prescribed period. However, the explanation for the delay is contained in the affidavit filed herein by the investigating officer (PW 4). The same is in the opinion of this Court, reasonable and satisfactory.

In sum, this appeal lacks merit and is hereby dismissed.

J. R. KARANJA
JUDGE

[Delivered and signed this 12th day of May 2011]