



REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL APPEAL NO.66 OF 2009

(Appeal from original WBY CR. NO.1217 of 2008)

NICHOLAS MISIKO ALFAYO.....APPELLANT

~VRS~

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant Nicholas Misiko Alfayo was convicted of defilement contrary to section 8 (1) of the Sexual Offences Act, 2006 by Senior Resident Magistrate, Webuye. He was sentenced to life imprisonment. This appeal was lodged against both conviction and sentence.

The petition of appeal raises several issues. Firstly, that the evidence was not sufficient to sustain a conviction; that the trial magistrate relied on hearsay evidence and failed to consider the family differences between the complainant and the Appellant.

The state opposed the appeal on grounds that the offence was proved to the standards required. Mr. Okeyo for Ogoti submitted that there was proof of age and medical evidence on penetration was positive. The evidence of the prosecution was corroborated in all material particulars. The state concluded by submitting that sentence imposed was in accordance with the law.

The facts of the case are that the complainant aged eight (8) years went to the family's land to harvest sweet potatoes accompanied by her elder sister PW2. The Appellant who is their step brother joined the two girls at the shamba. He offered to help the complainant harvest the potatoes and asked her elder sister to leave and go back home to attend to other duties. The Appellant later led the complainant to his house and laid her on his bed. He defiled the complainant until her elder sister (PW2) came looking for her in the house of the Appellant. PW2 found the complainant bleeding from her private parts. She was unable to walk. PW2 helped her sister to reach home by carrying her on her back. The matter was reported by PW2 to her father PW3 who made the report to the police and helped the arrest of the Appellant. PW4 the clinical officer who examined the complainant produced the medical examination form and the age assessment report.

In defence the Appellant gave an unsworn statement. He said that the complainant's father PW3 framed the case against him because the two men had a land dispute. PW3 sold his land and moved away from home earlier. At the material time, PW3 had returned home and wanted to grab the land of the Appellant.

PW1 the complainant was aged eight years. The magistrate conducted the *voire dire* test and formed the opinion that the child could testify on affirmation. PW1 explained to the court how she went with her sister to the shamba. The two girls were digging or harvesting potatoes. The Appellant persuaded PW2 to leave and return to their home. The absence of PW2 gave the Appellant the opportunity to take the child to his house and defile her. The complainant even at her tender age was very candid and clear on how the Appellant committed the offence. She said that the Appellant covered her mouth to prevent her cry for help from being heard. PW2 explained that she stayed at home waiting for her sister who took too long to return. This delay prompted PW2 to go to the house of the Appellant to look for her sister. She found the victim on the bed of Appellant with her legs apart and bleeding from her vagina. The girl was crying with pain. PW1's underpants was removed by the Appellant before the sexual assault took place. PW2 carried the complainant on her back. PW1 was incapacitated as a result of the sexual assault. The underpants of PW1 were taken from the Appellant's house by PW2 and later handed over to the police.

The Appellant in his defence claimed that PW3 framed him due to a land dispute between him and the Appellant. At the time the incident took place, PW3 was not at home. The witness denied in cross-examination that there was such a dispute. He told the court that the Appellant had never wronged him before the incident. PW2 also told the court that she had never heard the Appellant quarrel with his father. The Appellant was found with PW1 in his house having already defiled her. She was in a poor state of health bleeding from her genitalia and unable to walk. PW2 is the one who left PW1 at the shamba with the Appellant who convinced her to go away. The Appellant was left with the child and no one else came into the house or touched the complainant except the Appellant.

PW4 produced the P.3 form which is evident of bruised and injured labia marjora, broken hymen, bleeding and a poor walking gait. He produced the age assessment report showing that the victim was eight (8) years old.

The trial magistrate found PW1 and PW2 credible witnesses. PW4 corroborated the evidence of PW1 and PW2 on defilement. The defence of the Appellant that he was framed due to a land dispute proved to be untrue. The trial magistrate did not believe it to which extent I support the finding.

I agree with the trial magistrate that the evidence of the prosecution was overwhelming. It was not rebutted by the Appellant's defence. The age of the complainant was assessed and report produced. The conviction was safe and must be upheld.

The sentence of life imprisonment in a case of defilement where the child is eleven (11) years and below is provided for by section 8 (2) of the Act. The sentence imposed was in compliance with the law.

I find that the appeal has no merit and dismiss it accordingly. The conviction and sentence are upheld. I hereby so order.

F. N. MUCHEMI
JUDGE

Judgment dated and delivered on the 26th day of July, 2011 in the presence of the Appellant and the state counsel Mr. Ogoti.

F. N. MUCHEMI
JUDGE