REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO.99 OF 2010

(From original BGM CM CR. NO.1678 of 2009)

GEORGE ODHIAMBO OPUR :: APPELLANT

~VRS~

REPUBLIC :: RESPONDENT

JUDGMENT

The Appellant George Odhiambo Opur was convicted by Bungoma Chief Magistrate of the offence of defilement of a child contrary to section 8 (3) of the Sexual Offences Act and sentenced to serve 15 years imprisonment. He lodged this appeal against conviction and sentence. Mr. Ateya represented the Appellant and argued the appeal.

The issues raised by Mr. Ateya were that there was no sufficient evidence to convict the Appellant of the offence of defilement. The medical evidence was not positive and that the Appellant was not medically examined in order to connect him with the offence.

The state counsel Mr. Okeyo conceded to the appeal. The complainant is the one who took herself to the house of the Appellant following a request that came through her brother one Maxwell. The state submitted that Maxwell was never called to give his evidence. Later on the chairman of the market community PW5 led PW2 and PW3 to where the complainant was. The complainant opened the door for PW5 as the Appellant was working at the shop.

I have looked at the evidence on record. The complainant PW1 testified that she was aged 16 years in July and August 2009 when she moved to stay with the Appellant whom she called her husband. PW1 went on to say that she had not resumed school because she had gotten married. The elder brother was involved in facilitating the complainant PW1 to go to the house of the Appellant. The complainant was a child of sixteen years. The clinical officer confirmed through the age assessment report that she was aged 16 years. PW1 also told the court that she was under 18 years. The Appellant in his defence did not support the evidence of the complainant that he was staying with her as his wife. He denied that he had sexual intercourse with her on the night she spent there or at all. However, the clinical officer PW6 testified that there was evidence of penetration when he examined the complainant. There was evidence that PW2 and PW3 recovered blood stained skirt and petticoat from the house of the Appellant. The

state counsel said it was not known when PW1 wore the said clothes. He also argued that the clothes were not taken to the Government Chemist for analysis. In my considered opinion, the evidence of the clinical officer and that of PW1 and other witnesses was corroborative and proves that sexual intercourse had taken place between the Appellant and the complainant. The Appellant's counsel relied on the case of ***NGENO VRS REPUBLIC HC CRA NO.59 OF 2001*** where it was held that it is a defence in a case of defilement that the complainant was the wife of the accused as stipulated in the proviso of section 145 (1) of the Penal Code now repealed. The facts in the case before me are different from those of the ***NGENO VS REPUBLIC*** case. The accused did not give such a defence in this case. He completely denied that he intended to marry the girl or that he had sexual intercourse with her. The Appellant herein was charged with defilement under section 8 (3) of the Sexual Offences Act, 2006 which does not offer such a defence.

In the case of ***NGENO VRS REPUBLIC*** the charge was under the repealed law section 145 (1) of the Penal Code. The fact that the brother of the complainant did not testify does not affect the prosecution's case. The magistrate found that there was over whelming evidence that the complainant was found in the house of the Appellant and medical evidence corroborated PW1's evidence that sexual intercourse had taken place. The trial court did not believe the defence of the Appellant that he had nothing to do with the girl. The complainant was under 18 years and still a child. She lacked the capacity to consent to marry or have sexual intercourse with the Appellant. She was found in the house of the Appellant. The fact that the Appellant was not medically examined is not fatal to prosecution's case.

I beg to differ with the state counsel's submissions that there were some material contradictions in the evidence which made the conviction unsafe. These contradictions if any were not brought to the attention of the court during hearing. I have carefully evaluated the evidence of the prosecution. I do not find any material contradiction adverse to the conviction.

I agree with the trial magistrate that there was overwhelming evidence against the Appellant. The offence was proved against the Appellant beyond any reasonable doubt. I find that this appeal has no merit. I uphold the conviction and the sentence and dismiss the appeal accordingly.

F. N. MUCHEMI
JUDGE

Judgment delivered this 19th day of July, 2011 in the presence of the state counsel and the Appellant.

F. N. MUCHEMI
JUDGE