



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL APPEAL NO.55 OF 2009

NOAH OCHIENG

KUDADI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the conviction and sentence of E.H. Keago, SRM in Busia P.M.Cr.Case No.1082 of 2008)

J U D G E M E N T

The appellant Noah Ochieng Kudadi was convicted of defilement of a girl under the age of 14 years contrary to Section 8(1) (3) of the Sexual Offences Act, Act No 3 of 2006. He was sentenced to 20 years imprisonment. He appealed against both the conviction and sentence.

The prosecution in the lower court had called six witnesses besides the complainant who testified as PWI. Her name is M.O. and she was a pupil at S[...] Primary School in class five. She said she was 14 years old because she was born on 14.7.1995.

She narrated how on 9.11.2008 at 4.00p.m. she was sent by her grandmother to go and fetch water in company of L.A. and L.O., also young children. The water spring was about 100 metres away but they went through the home of the appellant to purchase some arrow roots. The three children found the appellant near the spring and told him to sell to them some arrow-roots which he agreed to do. He then requested the complainant to go with him to where the roots were in the shamba as the other two children waited where they had met him.

Some short distance ahead according to the complainant, the appellant held the complainant by the waist

and threatened her, telling her to do what he would tell her to do. She somehow released herself and started to run. Unfortunately, she tripped and fell into a trench, whereupon the appellant held her and closed her mouth and further threatened her with a panga which he carried, unless she kept silence. Without delay, he tore the child's underpant, removed his trouser and penetrated his penis into her vagina which made her scream, but no one came. It was her evidence that the appellant continued defiling her for about three minutes. When he had finished with what he had wanted to do, he released the complainant, gave her back the underpant, and released her. He then apparently went with her to the shamba nearby and gave her arrow roots. She left, looking for her colleagues but missed them.

Thereafter the complainant went home where she found L. and L. had arrived, but she did not inform them what the appellant had done to her. She decided to tell her grandmother, A.A., who testified as PW3. PW3 reported the matter to the Area Chief who ordered that the complainant be taken to hospital. On 10.11.2008, the complainant was taken to K[...] Health Centre where she was examined and treated before reporting the matter for action at B[...] Police Station. The latter recorded evidence statements and a P3 was issued to her, which later was filled and was produced as exhibit 2. At K[...] hospital the findings of the medical tests were recorded in a book which produced as exhibit 3.

The complainant further testified that after the appellant had defiled her, she bled from her vagina and saw a whitish discharge coming out. The discharge defiled her underpants after she wore it as she went home. She was asked to and she left the clothes with the Police at B[...]. The complainant who said that she knew the appellant well before the ordeal, identified him in the dock during the trial.

L. gave evidence as PW2. After the relevant court examination the trial Magistrate was satisfied that she was intelligent enough to testify under oath. She said she was 12 years old, having been born in 1986. She recalled that on 9.11.2008 at about 5p.m. she and the complainant were sent by their grandmother to fetch water from the spring. L. came along. They were also to pass through the home of the appellant to buy arrow-roots worth 20/=.

They went and fetched water and passed at the home of the appellant to buy arrow roots. She testified that they met the appellant Ochieng for the arrow-roots, and he suggested after walking out of the home, that she, and L. wait for the complainant on the way as the appellant and the complainant go and fetch the arrow-roots. He then left with the complainant while carrying a panga. It was PW2's further claim that after a while she heard the complainant scream, calling out their mother's name. This made them hurry away home in fear apparently without the water containers. Later she saw the complainant reach home and talk with their grandmother.

A.A., PW1's and PW2's grandmother, gave evidence as PW3. She said that on 9.11.2008 at about 4.00pm, she sent the complainant M. and another grand-daughter L., to fetch water from the spring, as well as buy arrow-roots from Ochieng Juma, the appellant herein. They went. Later when M. went back home, she reported to her that the appellant had defiled her. The complainant's clothes looked muddy from the back. The clothes included a blouse, a petticoat and a skirt. The blouse and petticoat were blood-stained.

It was her further testimony that at the time one B.O. visited their home and he was requested by PW3 to report the matter to the village elder and later to the hospital. PW3 could not remember properly who between M. and L. arrived home with arrow roots. She was however certain that M. told her that the appellant had defiled her on the material day.

B.O. gave evidence as PW4. He had visited the home of A.A. when the complainant came home crying, while her clothes were muddy. She reported to her grandmother that she had been defiled by one

Noah Ochieng, the appellant. He reported the matter to the clan elder and to B.A.W. PW5. He further stated that the complainant was taken to hospital at K[...] the next day after which the appellant was arrested and taken to B[...] A.P Camp.

B.A.W. gave evidence as PW5. He said that on 9.11.2008 evening, when PW3 and PW4 above reported to him that the complainant had been defiled by Noah Ochieng, he was advised to inform the complainant not to bathe until she is medically examined. The next day early morning, PW5, PW3 and PW4 went to the home of the appellant and arrested him and took him to B[...] A.P's Camp, after passing at the alleged scene of crime where they saw some signs of struggle.

Carolyn Soy a Clinical Officer attached to K[...] Hospital and who medically examined the complainant on the material date also gave evidence. She confirmed that a P3, exhibit 2, was in the name of the complainant M.A., aged 14 years. M.A. was examined on 10.11.2008 under a P3 filled on 12.11.2008 and ref. No.7628/08. M.A. appeared stable, well oriented in time and space. She had a bruise at the anterior neck. She complained of pains on her chest and had bruises on the back of left hand and shoulder. The injuries were assessed to be about 8 hours and were assessed as harm. Examination of the vagina revealed a tear on the lower part. There was a thick whitish discharge identified to be semen. The laboratory tests for H.I.V. turned negative. PW6 concluded that there had been sexual intercourse with the complainant who was penetrated in her vagina. The witness produced the treatment book as exhibit 3.

The last witness, PW7 was P.C. Moses Mogaka who was on duty, at B[...] Police Station. On 10.11.2008 at 6.30p.m. a girl called M.O. was taken to the station, by among others, her brother F.O. They reported a complaint of defilement, a day before at 4p.m. by one Noah Ochieng. It was alleged that the scene of crime was a shamba near the water spring. He visited the home of the complainant where he recovered the clothes he, complainant was wearing during the attack. They included a skirt, petticoat and a blouse, all of which were mud stained. On 25.5.2008 he took the complainant for age test when she was found to be 15 years old. A baptismal card showed she was born on 14.7.1995.

PW 7 who was the investigating officer, recorded evidence statement, collected and kept relevant exhibits, re arrested and charged the appellant. He produced the exhibits not produced by professional witnesses.

The appellant gave a sworn defence. He said that he had understood the charge facing him. He recalled the 9.11.2008 at 12.00 noon, two kids went to him and wanted to purchase green maize and yams. He told them to wait for him to go and get them the yams and the maize. He was with his brother and two of the brother's friends. He eventually went to the shamba, about 30 metres away. He came back with 20/= worth of maize which the girls paid. He also brought 60/= worth of yam but they did not have the money but they told him to collect the money from their grandmother later. It however started to rain and the girls went to shelter at appellant's brothers house.

He also said that the same evening he passed at the girls' grandmother's house to collect the 60/- but she told him to collect the money from his son. He decided to return to his home without the 60/=. The next morning people he does not name, collected him from his house as if to his uncles house, but on the way arrested him and beat him for allegedly employing youths without paying them. Members of the public joined and took him to Butula A.Ps camp where he was accused of having defiled the complainant. That he denied the same, but was taken to Bumala Police Patrol Base and later charged with this offence which he did not commit.

He denied asking the complainant alone to accompany him to the shamba to collect the yams, but agreed walking with a panga at the material time for the purpose of digging out the yams. He also said that when he was digging out the yams, the two girls were present and together, that there was no boy present. He also denied that when Maurice left the shamba her clothes were soiled. He denied defiling M.O.

The trial Magistrate felt that the evidence of sexual assault by the appellant on the complainant, came only from the complainant, a sole witness. After warning himself of relying on the sole evidence of the complainant to convict, as she was required by law to do, he examined other evidence and sequence of events, and found that they all fell in place, to support the claim of the complainant that the appellant defiled her.

This court has independently examined and considered the evidence. There is clear evidence that the complainant and L., PW2, knew the appellant who was a neighbour. They were sent to him to buy yams and maize cobs, apparently from a person known in the area to sell those items. The young girls went and met the appellant and sought to purchase. The complainant then narrates that the appellant separated the other children, from going to the shamba with the complainant. Then the complainant returns home to her grandmother and immediately complains of having been defiled by the appellant after he separated the children.

Could complainant's claim, that she was sexually assaulted, be a lie? No, it was not a lie. She was medically examined within 24 hours and found to have been sexually assaulted about the time she claimed that she was assaulted. The appellant's defence admits that the girls went to purchase the yams and maize cobs and that she sold the items to them. There was no evidence that the complainant was exposed to any other person who could have sexually assaulted her. And even if she were so exposed, there is no reason why she should name the appellant as the attacker, if someone else was responsible.

On the other hand, and despite the appellant's denial, the latter's story, fits in well with the complainant's story except only his denial of the actual act of the sexual intercourse. However, other corroborating evidence to the complainant's story exist. She claimed to have screamed when he sexually assaulted her and that was confirmed by PW2 who however in fear, proceeded home in a hurry as they could not do much to help. L. supported the complainant's story of separation of the girls before appellant attacked her. Although the appellant denied that point, his version does not fit in and is not in the circumstances, credible.

There is also the fact that the complainant reported the defilement to her grandmother immediately she arrived home and she named the appellant as the culprit. As earlier stated, there was no conceivable reason why she named the appellant rather than anybody else. Her report confirmed the consistence of her evidence all through.

The medical evidence confirmed that the complainant was indeed sexually assaulted. There were fresh bruises in her genitalia. There was also presence of spermatozoa in the vagina of the complainant. The young girls knew the appellant well as a neighbour and the question of mistaken identity by the complainant, did not arise.

Turning to other elements of the offence of defilement, there was clear evidence that the complainant was 15 years old which was not disputed. That being in the age bracket of 12 to 15 years, it attracted the minimum sentence of 20 years under the relevant law.

In summary then, this court finds that there was more than sufficient quality evidence on the record to convict the appellant and the trial Magistrate properly did so. He also gave the minimum sentence provided for the offence under the relevant law. The appeal accordingly has no merit. It is dismissed in entirety.

Orders accordingly.

Dated and delivered at Busia on the 14th day of July, 2011.

D.A. ONYANCHA

J U D G E