REPUBLIC OF KENYA

IN THE HIGH COURT OF KEYA

AT BUSIA

CRIMINAL APPEAL NO.49 OF 2008

CHRISTOPHER OCHIENG...APPELLANT

=VERSUS=

REPUBLIC...RESPONDENT

[From the conviction and sentence of E.H. Keago, Resident Magistrate in Busia P.M.C.Cr.Case No.1405 of 2007]

J U D G E M E N T

The appellant, Christopher Ochieng, was originally charged with the offence of defilement of a child, contrary to Section 8(1) (3) of the Sexual Offences Act, Act No.3 of 2006. He was after a full trial, convicted of the offence and sentenced to Life imprisonment. He appealed against the conviction and sentence.

The grounds of appeal in the Petition and Supplementary Petition of Appeal include the following:-

1. That the evidence on which conviction was based was insufficient, unreliable and discredited.

2. That the trial court shifted the burden of proof to the appellant and failed to properly consider the

appellant’s defence.

3. That the trial magistrate erred in law and fact in relying on and admitting two minors evidence without conducting *vior dire* examination contrary to Section 19(1) of the Oaths and Statutory Declaration Act Cap 15 of the Laws of Kenya.

4. That the sentence was manifestly harsh and excessive.

The particulars are that on 9.11.2007 at O [...] market, B[...] sub-location in Busia County, the appellant intentionally and unlawfully defiled M.O., a girl child aged 8 years.

The prosecution evidence on record shows that M.O. aged 8 years, was selling tomatoes at O[...] market at 6.00 p.m. She was in company of two other young girls – R.A. aged 12 years and C.O., aged 7 years. They were there, visited by the appellant who bought tomatoes worth 5/= but presented M.O. with a 100/= Kenya shilling note which the young girl and others present could not change. Then the appellant is said to have offered a solution. M.O. should accompany him on his boda boda bicycle to a place where he would get change and would come back. And that is what occurred according to M.O. and the other two young girls.

It was M.O.'s further evidence that the appellant then carried her on his bicycle to a place with sugar-cane where he stopped and pulled or pushed her into the sugar cane. He forcefully removed M.O.'s pants which he placed in his pocket but leaving dressed only in her skirt and blouse. The appellant who was dressed in a blue trouser and orange T-shirt, merely unzipped his trouser and pulled his penis out. He then, according to M.O.’s evidence, pushed and penetrated the penis into her vagina which made her scream due to pain. He slapped her and threatened her with death if she screamed again. He stayed on her for a long time before he moved her to another spot in the forest or thicket where he once more laid her and penetrated her. It is only after that when he escorted M.O. to her home after returning to her, her pants. She felt wet in her genitalia and realized that she was bleeding from her vagina. She produced in court her pants and skirt which showed blood stains.

In the meantime M.O.’s colleagues R.A. and C.O. had waited for M.O. to return to their selling spot at O[...] market but she did not return. When their mother came and got the story, she and the girls looked for her in the market but in vain. They, in the company of others, went to the two houses of the appellant but found neither M.O. nor the appellant. They then went home to sleep until M.O. was returned after 2.00 a.m at night.

Those who gave evidence and confirmed the above version of evidence were PW2, R.A. and PW4, C.O., both minors and sisters of the complaint. In particular P.W.W., PW3 who is M.O.’s father, testified that on 9.11.2007 he came back home at 7.00 p.m but found M.O. had not returned. He got the story from PW2 as to how the appellant had taken M.O. to get the 5/= for tomatoes but did not return her. He and his wife then in were led to the home of the appellant by C.O. who said that the appellant had also earlier taken her to this home before. When they reached appellant’s home, they reached that appellant had not returned.

They thereafter went to his second home at S[...], but also found that he had not gone there. PW3 and his family returned to their home after 12.00 midnight and went to sleep until 2.00 a.m when they heard M.O. outside at the gate, crying. PW3 brought her into the house and after questioning her, got information from her that the appellant had defiled her when he took her from the market. He observed that M.O.’s

skirt and pants were blood-stained. He at 5.00 a.m, took M.O. for medical tests and treatment after first once more passing through appellant's house and arresting him before handing him over to B[...] Administration Police. Later the complainant was issued with a P3.

PW5, P.J.A. was a cane cutter who being a friend to M.O.'s father Patrick W.W. got seriously concerned when he received the report about M.O. from him on 9.11.2007 at about 7.00 p.m. He accompanied P. to look for M.O. and visited the appellant's homes. He was present when Appellant was arrested at 5.00 a.m. at his house and taken to B[...] APs Camp.

PW6, APC No.90093491, Christopher Cleptoo attached to B[...] D.O's Office, received from PW3, a report of defilement at their office on 10.11.2007 Among them was the appellant and a young girl who allegedly had been defiled by the appellant. After listening to their story he formed the opinion that an offence may have been committed by the appellant. He re-arrested him and advised the parents of the young girl to take her to hospital. When they later came back with a medical report, he took the appellant to B[....] Police Post for charging.

At B[...] No.85219 PC Jane Wanjiru received the appellant and the complainant with her parents. She booked their report in the O.B and re-arrested the appellant. She took the appellant to hospital for tests and obtained a P3. She then later charged him with the offence of defilement after recording statements from PW1-PW6. She had received the clothes which the complainant and appellant worn at the relevant period. She produced the clothes and the P3. She noticed that the girls pants and skirt were blood-stained.

The Clinical Officer who had examined the complainant on 14.11.2007 was Thomas Ndiege. He got the story that the complainant had been defiled on 9.11.2007, five days earlier. He received a medical treatment book of a first hand treatment given at B[...] "B" Health centre. B[...] "B" Health Centres report became the basis of filling the P3 form by him. He noticed that the report stated that the complainants, hymen has been totally torn. The vaginal walls he noticed, were bruised and redish. He also noticed from the report that there was some whitish discharge which suggested presence of spermatozoa.

On his defence the appellant in an unsworn statement, had denied the charge of defilement. He said that he was not the one who penetrated the complainant's vagina with his penis. Had he done so, he urged, he would have run away.

In his analysis and consideration of the evidence, the trial magistrate accepted the complainant's evidence. He accepted that her story and the story of her two sisters, were credible and true. He then observed that the appellant had carried the complainant away on his bicycle. That the evidence of the complainant, a minor, to the effect that on the way the appellant removed her pants and penetrated his penis into her vagina was also credible and true. He accepted that the penis tore the complainant's hymen and bruised the walls of her vagina, thereby making them red and bleeding. The injuries in the vagina plus the presence of sperms and later pus cells, to the lower court, confirmed the activity of sexual intercourse with the child.

The honourable trial magistrate found corroboration not only in the medical evidence but also in the fact that the story of all the minor witnesses was one and same.

I have carefully considered the evidence. I am conscious of the fact that the fundamental or essential evidence is the one that came from the complainant who was a minor. She said that the appellant removed her pants and penetrated her vagina with his penis soon after taking her away from PW2 and PW4. She

added that the penetration was painful and it made her scream. She also said that she bled from her vagina as a result. The bleeding was confirmed not only by the complainant' parent (PW3) but also by the medical evidence. In my finding, the said piece of evidence, without doubt corroborated that someone had sexual molested the complainant after the appellant took her away. Every evidence, from the complainant to PW2 and PW4, pointed to the appellant as the person who before the event, not only took her away but was in her company before she was returned home while complaining and pointing a finger at him.

There was no reason why the young girl would firmly state that it was the appellant who penetrated her vagina with his penis, if he did not. Nor did the appellant try to explain out where he took the girl after openly removing her from the presence of the other girls. He did not deny that he brought the complainant back to her home after 2.00 a.m., over 8 hours after long after he took her. He did not even explain where he was and with whom, if not with the complainant, all the night long. His silence, even after listening to the evidence against him given by PW3 and his family and others even to the extent that they visited his home the same night after midnight, and found him absent, was not only strange but culpable.

I have not lost sight of the principle that the appellant had no obligation to explain anything since the whole burden of proving everything lay with the prosecution. However, where the prosecution's evidence has created a need on the accused to require him to explain it away or otherwise allow adverse common-sense conclusions to be logically or reasonably made against him, then it behoved him either to make those explanations or be damned.

In this case all the reasonable evidence except appellant's brief denial, pointed his guilt. The trial court and this court accept beyond a reasonable doubt that the prosecution evidence proved that it was the appellant who defiled the complainant.

The appellant however also, complained that the lower court did not conduct a *vior dire* examination of PW1 and PW2 before admitting and accepting their evidence. Clearly, however, the lower court found that the two to easily and clearly understood the meaning of the oath. Where he had a doubt, i.e in respect of PW4 who was 7 years, he conducted the relevant and important examination. He clearly, was also impressed with PW4's understanding and intelligence. The manner and clarity of the three children's evidence is clear from the way they testified without contradiction, even under cross-examination by the appellant. The failure by the Trial Magistrate to record a *vior dire* examination on PW1 and PW2, in my opinion, did not, if it became necessary, lead to any miscarriage of justice.

As to the adequacy and quality of evidence relied upon to enter a conviction by the trial court, I find that there was sufficient qualitative evidence on record to justify a conviction by the trial magistrate. In the circumstances this court sees no reason to interfere with the conviction.

The appellant also complained that the trial magistrate shifted the burden of proof on the appellant. He did not argue out how so. I on my part found no such shift.

Finally, the appellant urged this court to interfere with the life sentence meted out against the appellant. It is possible to note that the sentence was indeed the maximum provided under Section 8(2) of the Sexual Offences Act, Act No.3 of 2006. However, that is the only sentence provided. It is clear that the legislator did not wish to provide the sentence on sliding scale in respect of which the convicting court would have discretion to fix a suitable sentence commensurate with possible sliding aggrivating circumstances. It seems to me therefore, that the court's hands were tied as there was only one sentence to give, which it promptly did.

The upshot is that this appeal has no merit. It is dismissed as the conviction and sentence are upheld. Orders accordingly.

Dated and delivered at Busia this 11TH day of JULY 2011.

D.A. ONYANCHA

JUDGE.