



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA**

**AT KITALE.**

**CRIMINAL APPEAL NO. 151 OF 2010.**

**E. O.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT.**

*(Being an appeal from the original conviction and sentence by T.A. Odera – SRM in Kitale CMC CRC. No. 202 of 2009*

*delivered on 16<sup>th</sup> December, 2010 at Kitale)*

**J U D G M E N T .**

1. The appellant **E.O** was charged with the offence of defilement of a child contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge stated that on 1<sup>st</sup> of January, 2009 in Trans Nzoia West District within the Rift Valley province, by use of his genital organ namely penis, unlawfully caused penetration of the genital organ namely vagina of **D. N** a girl aged 10 years. The appellant pleaded not guilty to the charge and after trial, he was convicted and sentenced to life imprisonment.

2. Being aggrieved by the conviction and sentence, the appellant has appealed, he relied on the following grounds of the appeal.

*(1) THAT, the learned trial magistrate erred in law and fact in failing to take into consideration the evidence tendered by the defence in arriving at her conclusion.*

*(2) THAT, the learned trial magistrate erred in law and fact in reaching at a conclusion that the prosecution had proved its case beyond reasonable doubt when the prosecution case was self contradictory, incoherent and unable to sustain a conviction.*

*(3) THAT, the learned trial magistrate erred in law and fact in failing to appreciate the law with regard to sexual offences and hence arriving at an erroneous decision.*

(4) *THAT, the learned trial magistrate erred in law and fact in finding that the appellant was guilty of the offence of defilement when there was no evidence on record to sustain a conviction on the charge.*

(5) *THAT, the learned trial magistrate erred in law and fact in heavily relying on the evidence of prosecution witness number four when the same lacked credibility and justification whatsoever.*

(6) *THAT, the learned trial magistrate erred in law and fact in passing excessive sentence in the circumstances.*

(7) *THAT, the learned trial magistrate erred in law and fact in failing to consider the appellant's mitigation while arriving at the length of the sentence.*

3. In further arguments, **Mr. Wanjala**, learned counsel for the appellant submitted that the appellant was charged and tried as a minor. Throughout the proceedings he was referred to as a minor. Counsel referred to the evidence of **Reuben Bunyasi (PW4)** a clinical officer from Kitale District Hospital who testified that the appellant was aged 17 years old. However, during sentencing the appellant was not sentenced as a minor as provided for under the Children's Act. Counsel for the appellant also faulted the quality of the evidence which he argued consisted of very material inconsistencies which should have been resolved in favour of the appellant's acquittal.

4. The evidence by the complainant was categorical that PW2 who was her grandmother did not find her at the scene where she was defiled. On the other hand the evidence of **E.M PW2** was that she found the complainant in the house of the appellant, and her pants were soaked in blood and they took the child to the village elder. According to counsel for the appellant, the court should have resolved who was telling the truth. Counsel also challenged the documentary evidence produced by way of the P3 forms which he argued were not signed and they contained some discrepancies on the date when the P3 was issued. According to the evidence the P3 form was issued to the complainant on 3<sup>rd</sup> January, 2009. However the document was dated 1<sup>st</sup> January, 2009. The evidence also shows that the appellant was taken to hospital on 1<sup>st</sup> January, 2009 but he was arrested on 11<sup>th</sup> January, 2009. Due to all these inconsistencies **Mr. Wanjala** submitted that the learned trial magistrate also failed to consider the defence by the appellant which was plausible. He urged the court to allow the appeal.

5. The State conceded to this appeal, and rightly so as my analysis of the evidence will show. **Mr. Onderi**, learned Senior Principal State Counsel submitted that apart from the fact that there was no conclusive evidence of the age of the victim, it was clear from the record that the appellant was recorded and prosecuted as a minor. The trial court should have resolved the age of the appellant who produced a school card to show that he was aged 17 years. The learned trial magistrate noted that the appellant should be handled by the children's court. **Mr. Onderi** pointed out 7 times when the learned trial magistrate referred to the appellant as a minor. Surprisingly during conviction the appellant was convicted as an adult and was handed a life sentence. Further the contradictions found in the evidence of the complainant and her grandmother were material. There was also a gap left when PW2 said in her evidence that she was called to the scene by E who pushed the door of the appellant's house where in they found the complainant hiding under the bed, yet he was not called as a witness. For those contradictions and the material defects in the sentencing of the appellant, the State conceded to the appeal.

6. This being a first appeal, this court is mandated to reconsider and re-evaluate the evidence before the trial court so as to arrive at its own independent determination on whether or not to uphold the conviction and sentence by the trial court. In so doing the court should bear in mind that it never heard or saw the witnesses as they testified and give due allowance for that. I now wish to set out albeit briefly the evidence that was before the trial court which led to the conviction and sentence of the appellant.

7. After a *voire dire* examination, **D.N (PW1)**, a young girl aged 10 years was found to possess sufficient knowledge and understood the meaning of taking an oath. After she was sworn, she of how she had gone to church with her mother and sister at 9.00 p.m. At about 11.00 p.m. she walked out of the church to relieve herself, that is when the appellant carried her to his house, locked the door, placed her on the chair and defiled her. She raised an alarm and people came and pushed the door open, arrested the appellant and took him to a village elder. The next morning PW1 informed her grandmother of the incident and she was taken to Kitale police station. She was treated at Kitale District hospital and was issued with a P3 form. During cross examination, PW1 confirmed that it was the neighbours who found the appellant in the act of defilement. She denied that she was found under the bed. She further confirmed that her grandmother did not come to the scene and further her grandmother did not assault her that night.

**8. E.M**, PW2, the grandmother of the complainant testified that she went to church with the complainant. It was when she was leaving the church at about midnight that she discovered the complainant was missing. She and E went looking for complainant and they took different routes. Later PW1 was informed by E that the complainant was found in a certain house. She and E went to that house and found **D** under the bed crying. Her pantie was soaked in blood and she was bleeding from the vagina. PW2 took the complainant and the appellant to the house of a village elder and the next day she took the complainant to the hospital where she was treated. During cross examination, PW2 was categorical that she went to the house of the appellant with E and found the appellant with the complainant.

**9.** The other evidence was by **S.N PW3**, the mother of the complainant. She testified that on 27<sup>th</sup> December, 2008 she had gone to visit PW2 and left the complainant with her. Two days later, she got information that the complainant had been defiled and she took her to hospital for treatment. She confirmed that the complainant had injuries on her vagina and she was walking with difficulties. The complainant told her that she had been defiled by a neighbor. **Reuben Bunyasi, PW4** a clinical officer based at Kitale district Hospital examined the complainant on 1<sup>st</sup> January, 2009. The complainant said she was aged 10 years and complained of having been defiled by a boy known to her. PW1 complained of lower abdominal pain and pain when passing urine. On examination of the complainant, PW4 found the complainant had swollen vagina which was bruised on the left and right side of the labia majora. He took samples for testing HIV and syphilis which turned out negative. The complainant was treated with antibiotics and epitomizing tablets. PW4 also examined the appellant who was aged 17 years. He also had bruises on his penis and a test of HIV and syphilis were also negative. He was also put on antibiotics.

**10.** This matter was investigated by **PC Oduori** who left Kitale Police station and the matter was taken over by **PC William Adai**. There seems to have been no investigations that were carried on the scene of the crime. The police merely recorded the report by the complainant and her grandmother. Their statements were also recorded and the complainant was issued with a P3 form which she took to Kitale District Hospital and was completed by the clinical officer. There was even no evidence on how the appellant was arrested.

**11.** The appellant was put on his defence; he denied having committed the offence. He testified that on 31<sup>st</sup> December, 2008 he had gone to Joy Celebration Centre to celebrate the New Year's Eve. At about 11.00 p.m. he decided to go back home and went to Galilee Worship Centre to pick the house keys from his mother. That is when the complainant came with the 20/= and wanted to buy *sukari nguru* of Ksh. 1/= which the appellant used to sell. The appellant testified that he went to look for change and left the complainant sitting on the long seat that is when her family came looking for her and found her under the bed. They found the door locked with a nail and pushed it open. The appellant was beaten by the complainant's brothers and taken to the village elder.

**12.** The complainant was also beaten when she did not say anything to implicate the appellant. The appellant also relied on the evidence of **Tabian Ashuru**, a village elder. He confirmed that on 1<sup>st</sup> January, 2009, he was woken by **Patrick Wamalwa** and his wife and a child aged about 9 years. He was informed that the appellant had defiled the child. He asked them to return the next day because it was late at night. The following day it was only the appellant who came back to the elder and the complainant did not return.

**13.** The learned trial magistrate evaluated the above evidence and found the prosecution had proved its case to the required standard. The appellant was convicted and sentenced to life imprisonment. Upon re- evaluation of the above evidence especially the evidence of PW1 and PW2, it is difficult to arrive at the same conclusion with the learned trial magistrate. Firstly, the learned trial magistrate did not resolve the inconsistency regarding the evidence by PW1 and PW2. PW1 testified that she was dragged by the appellant from the church compound and taken to the appellant's house where he defiled her. PW1 raised an alarm and neighbors found the appellant in the act and arrested him. She was categorical that her grandmother did not come to the scene. She also testified that it was her mother who took her to the hospital.

**14.** Although the aspect of who took the complainant to the hospital is not material, the issue of the variance of the evidence of how PW2 found the complainant is material. That issue should have been resolved. The other fundamental issue is regarding the age of the appellant. I am of the view that the age of the complainant was not an issue. She told the court that she was born in 1998. The investigating officer produced the complainant's health card which confirmed that the complainant was born on 17<sup>th</sup> June, 1998. What concerns me is the fact that the appellant was tried as a minor and indeed the proceedings refer to him as a minor particularly the evidence of PW4 who stated as follows;

***"I also have another P3 form issued by OCS Kitale on 1/1/2009 to E.O aged 17 years old on allegations of defilement on 31/12/2005, he was in good condition and on the genitalia penis there were bruises. The HIV test was negative, syphilis was negative, urine showed some few pus cells. The immediate clinical result indicates friction at the private part of E. He was on antibiotics nomex tetracycline. I signed the P3 form on 1/1/2009. I produce it as exhibit herein (EXHIBIT 2)***

***produced.”***

**15.** The appellant having been tried as a minor aged 17 years, it was incumbent upon the learned trial magistrate to convict and sentence him as provided for in the Children’s Act. Finally the police did not carry out investigations. They did not even visit the scene of the offence to interview the neighbours who arrested the appellant. Even E helped PW2 trace the complainant was not called as a witness. There is no evidence on how the appellant was arrested and the scanty and contradictory evidence by PW1 and PW2 cannot certainly support a conviction.

**16.** For the above reasons, I agree with the State Counsel that the conviction and sentence of the appellant is not founded in law. It is hereby set aside unless the appellant is otherwise lawfully held; he is to be set at liberty forthwith.

**Judgment read and signed this 22<sup>nd</sup> day of September, 2011.**

**MARTHA KOOME.**

**JUDGE.**