



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

HC.CRIMINAL APPEAL NO.30 OF 2009

**ADRIANO OKIBET AREMEAPPELLANT
VERSUS**

REPUBLICRESPONDENT

**(From the conviction and sentence of E.H. Keago SRM
in Busia Principal Magistrate Court criminal case
No.107 of 2008)**

J U D G M E N T

The appellant, Adriano Okipit was charged with the offence of defilement contrary to section 8(1) (3) of the Sexual Offence Act No.3 of 2006. He was convicted and sentenced to life imprisonment as provided by the law. He appealed against the conviction and sentence.

The prosecution had called seven witnesses. The complainant, N.N, who testified as PWI, was a young girl of 9 years. She was going to A Primary School in Standard 3. She, her older sister D.N and her mother A.M, reside at A where in the market, A sold vegetables for a living.

N.N testified that on 10/2/2008 she was at her home in company of her older sister D.N, and her brother J.J. It was about to rain in the afternoon. That is when, as she testified, the appellant arrived at their house. He gave D Kshs.20/- and asked her to go and buy a cake for all of them. D went and came back with 4 pieces of cake.

While D was away however, the appellant Adriano Okipit Areme, tried to lure the complainant to the kitchen but she declined. He then successfully persuaded D and the complainant N to go to the garden under a mango tree. He himself carried the baby John. Under the mango, appellant is said to have told D to remove her underpant in return to his going to buy her new slippers and shoes. D went ahead and removed her underpants. It was the complainant testimony that the appellant then also removed or downed his trousers and having laid her down, removed his penis out and slept on top of D.

It was N's further testimony that thereafter D went to collect firewood leaving N and the appellant under the mango tree. Thereafter, the appellant is stated to have turned to N. He fell the young girl on the ground, removed her underpant and lowered his trouser. He once more removed his penis and lay on her, penetrating his penis into her vagina. The girl described the incident as painful and told the appellant to stop. He however ejaculated into her some milky stuff.

Thereafter the girl said she cleaned herself with leaves, put on her pants and entered the kitchen because it had then started to rain. That their mother entered the home at that time and found them there,

before appellant left the home. That mother was told what had happened, whereupon she reported the incident to the clan elder and later to the police. PW1 also said that she informed one John Mutlipili, and later her mother of what appellant had done to her.

D.N gave evidence as PW2. She said she was 11 years old, and went to A primary school. She repeated the same facts as PW1. She said that when she came back after buying four cakes and distributed them, the accused moved to the mango tree in company of the complainant. That when she soon followed them there, she found the appellant lying on top of N with his trousers removed. She at that time saw N's red pants hanging by the side of the mango tree. That they all went home and later when the appellant had gone and their mother had come, she told her what the appellant had done to N in the presence of one E, a colleague student at A school.

E.O.E who gave evidence as PW3 testified that he visited the complainant's home to fetch water on the material day of 10/2/2008, in the early afternoon. D told him that there was something to see and she took him and pointed to the appellant Adrian Okipit lying on top of N, near a mango tree. When the accused saw him, he moved away and pulled up his trouser while N stood up. He noticed that N was not crying at the time. Thereafter they moved to the house kitchen. He said he knew the appellant as a knife sharpener whose profession was renown around the area. He said that he later informed N's mother of what he had seen when he saw her and was taken to write a police station. He described what he saw appellant wearing as a T-shirt. He also described the appellant as appearing drunk. He said that the appellant's name was Adriano Okipit and that he was a neighbour. None of the children apparently revealed anything to their mother until later when she had gone to the market and come home in the evening.

N this time told her mother, PW4 what appellant had done to her. N explained how appellant had called her to the mango tree, removed her pants and penetrated her vagina with his penis after lowering his trousers.

PW4 said she immediately checked went to report to the assistant chief who informed the Local District Officer and she was advised to take N to hospital for medical examination. As she proceeded to hospital with N, she said, she identified the suspect to the D.O's Administrative Police and the Assistant Chief.

She said that at Alupe hospital, N was examined and admitted. The next day N was discharged and PW4 took N to Adungosi police station where they filed a complaint. That she was given a P3 form which was later filled. She further testified that N admitted to her that that incident was not the first one since earlier, the appellant had done the same thing to her after giving her ksh.20/-.

PW5 was the arresting officer, Cpt. Benjamin Juma, who on getting the report of defilement on 10/2/2008 with the name of the suspect from the local assistant chief, proceeded to the home of the appellant in company of Sgt Darenga and arrested appellant. They took him to Adungosi police station where he was charged with this offence. He said the mother of the complainant identified the appellant.

At the police station the appellant was received by PW6 PC Julius Kaireithia who placed him in cells. He visited the complainant in Alupe hospital where she had been admitted and she gave him the story of what had happened. He issued her with a P3 which was later filled on 13/2/2008. He then charged the appellant with this offence.

The last witness to testify was PW7, Benson Amukoa, the Clinical officer attached to Alupe hospital. He saw the complainant N.M aged 9 years, on 13/2/2008. The girl had been treated earlier on 10/2/2008 by another Clinical Officer called Khaemba. His findings were that on the genitalia the hymen was missing. No visible discharge could be seen on 13/2/2008. However, the laboratory test results revealed pus cells with red blood cells being seen. HIV was negative. The conclusion arrived was that the victim had been defiled. Medical treatment was then ordered for N of post exposure drugs and pain killers. N was admitted in the ward on 10/2/2008 and discharged the next day. The witness produced the P3 as exhibit 1 while the treatment notes dated 10/2/2008 were produced as exhibit 2.

Appellant was put in his defence. He said he was a mason and was well informed of the charges facing him. He recalled the 10/2/2008. He said he had gone to work as a mason in the morning until 4.00p.m. when he returned home. He slept until 5.00p.m. as it rained. Thereafter he woke and went to the market to buy kerosene. On the way he was arrested by some people who took him to Adungosi police station where he was kept for three days before being charged and taken to court for this offence. He denied the offence. He said that he did not know the complainant whom he saw for the first time, testifying in court against him.

The honourable trial magistrate found as a matter of fact that the complainant was defiled. He considered the evidence of the complainant, her sister D, E.O.E and that of the Clinical Officer. He concluded that the complainant's story of being defiled by the appellant at the stated time was true. He found sufficient corroboration in the medical evidence.

That the age of the complainant was below 12 years for the purpose of section 8(1) (3) of the Sexual Offences Act, was not in dispute. The eye witnesses evidence of PW2 and PW3 was not challenged and the trial court also had no difficulty in believing and accepting it. The identification of the appellant as the person who was seen lying on the complainant, was not challenged or disputed. In these circumstances the trial court believed and accepted the prosecution evidence, after also considering and rejecting the appellant's alibi defence.

I have, on my part, carefully considered the same evidence. I am satisfied that the same was straight forward, clear and credible. PW1, PW2, PW3 and PW4 knew the appellant and placed him at the complainant's home at the time. They knew him as a knives-sharpener for which the appellant was renown as the locality.

The children described, in great detail, what they saw the appellant do. PW1 described how appellant first defiled PW2 although the latter did not complain over it PW1 then described how after PW2 had left, appellant turned on her, removed her pants and penetrated his penis into her vagina, after removing or moving down his trousers. She described in details how the act pained her although she also admitted that this violation was not the first one to the young girls. They described how he used some money to buy them cakes and promised slippers to persuade the girls to give in.

The medical evidence showing that sexual intercourse had taken place with PW1, with hymen hymen having been broken and pus cells showing, merely corroborated the evidence that indeed the alleged act had been committed.

On the other hand, the weak denial of the appellant not being at he scene did not raise any reasonable doubt against the events narrated in evidence. The appellant had not challenged being in that home or doing what was alleged, in his cross examination on each testimony. He did not challenge the detailed story of how he went about defiling the complainant or even PW2. He did not challenge the fact that he was their neighbour and that they knew him well, and finally, the evidence of the girls mother that the appellant left her home after she arrived, confirmed the fact that the appellant was indeed in that home that afternoon. His denial that he knew the complainant and saw her for the first time in court, carried little weight and was properly rejected by the trial magistrate.

In the circumstances I am satisfied that the evidence upon which the appellant was convicted was both quantitative and qualitative. The conviction in my finding was sound and proper. The appeal shows little merit. It is hereby dismissed. Orders accordingly.

Dated and delivered at Busia this 19th day of September 2011

D.A. ONYANCHA
JUDGE