



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUSIA

Criminal Appeal 6 of 2003

TIMOHY OPUNYA BENJAMIN.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

(From one conviction and sentence of S.O. OMWEGA, SRM in Busia SRM CR.CASE NO.25 OF 2001)

J U D G M E N T

The Appellant, Timothy Opunya Benjamin, was charged with the offence of Defilement of a Girl under the age of 14 years contrary to Section 145 of the Penal Code. He was sentenced to fourteen years imprisonment. He has appealed against the conviction and sentence.

The facts of the case are as follows:

The appellant was uncle and neighbor to the complainant who was about 12 years old at the material time on 26.12.2000. On the said date at about 2 p.m, the complainant C A, went to the back of the home on their shamba to look for maize cobs. It was her testimony that the Appellant held her and pushed her into a sugar cane plantation where he had unlawful carnal knowledge of her and without her consent. She said she did not scream during the ordeal which lasted 2 hours. After the event, he gave her 10/= to induce her not to reveal what had happened to anybody.

It was her further testimony that when she arrived back home at her grandmother's house she told her of the incident, but that the grandmother told her not to reveal it. On 27.12.2000, she revealed the incident to her sister PW2, EA, when the latter asked her why she walked with difficulty. It was not until 31.12.2000 when E informed their father, PW4, P O. Meanwhile on the same day, 26.12.2000 the complainant is said to have given the 10/= she got from the appellant, to PW3 FO, to keep for her. The money was never given to the police as exhibit.

On 31.12.2000 when the father of the complainant got the report of defilement from E PW2, he reported the matter to clan elders who summoned an elders meeting and the appellant. It is alleged by the father PO that the appellant admitted before the elders that he had indeed defiled the complainant and that the elders decided that he pays a compensation of Kshs1500/= although he agreed himself to pay Kshs1000/=.

The evidence on record from P O further shows that when the appellant failed to produce the money, the father decided to report the matter to government authorities. He reported to Butula D.O'S Office and later to Busia Police Station. P O admitted in evidence that the complainant did not get examined by a doctor until after 2.1.2001.

A medical doctor P.W.5 – Dr. Charles Ochieng examined the complainant on 4.1.2001. He found that the complainant had a pelvic inflammatory disease caused by sexual intercourse. He did not identify the disease by name and he did not say that it was transmitted to her or whether it was transmittable at all. Meanwhile he confirmed that her private parts – the labia minora, labia majora and the vagina, and cervix were intact. It was only the hymen that was missing. The doctor also noticed that a whitish virulent discharge was coming out of the complainant's vagina. No further tests were ordered.

PW6, No.209178 A.P.C. Victor Apollo of Butula D.O' s office received the report of defilement from the complainant on 26.12.2000 according to his sworn testimony. On 1.1.2001 he went to accused's home where he arrested the appellant. He took him to Busia Police Station. However, PW7 NO.39903 P.C. George Otieno testified that A.P.C. Victor Appollo delivered the appellant to Busia Police Station not on 1.1.2001 but on 2.1.2001. He testified that the appellant was not medically examined. P.C. George Otieno was the Investigating Officer in this case.

The appellant who was put in his defence testified under oath. His defence was that on the material day he was attending a festival at the D.O's office, Butula from 12 a.m to 7 p.m in the evening. He could not therefore have been at the scene of crime to commit the alleged offence. He called a witness who confirmed the defence with a view to confirm the alibi.

The trial magistrate believed that complainant was defiled as complained. He found corroboration in the doctor's evidence which established sexual intercourse with the complainant, particularly the presence of the pelvic inflammatory disease which was said to be brought by sexual intercourse. He found overwhelming evidence proving that the appellant defiled the complainant as charged. He disbelieved the appellant's defence and went ahead to convict him and sentence him to 14 years imprisonment.

I have carefully considered the evidence upon which the conviction is grounded. I find I cannot uphold the conviction.

While it is possible that the complainant may have been defiled as alleged, there was no adequate evidence to establish that it was done by the appellant. The medical evidence which was critical in this case was done almost 8-9 days after the alleged defilement. The evidence found nothing the matter with the complainant's vagina, labia minora, labia majora or even the cervix. Only the hymen was missing and it is now common knowledge that a hymen can break even by riding a bicycle.

Furthermore, the crucial link between the appellant and the defilement of the complainant was the sexually transmitted disease found in the complainant. Had the prosecution wanted to get the link, all it could have done was to medically examine the appellant for the signs of the disease. If he would be found with the disease, it would inescapably be established that he gave the disease to the complainant or got it from her during the alleged sexual intercourse. On the other hand if he was not found with it, it would safely be concluded that he was not the one who defiled the complainant. More so because the absence of the hymen in her vagina also suggested that she had had sexual intercourse before examination date.

I am aware that the appellant admitted to pay ksh1500/= before clan elders. However, he denied that such

amounted to a confession since in any case he alleged coercion by elders. Further more the complainant's father's evidence also suggested that the amount raised by clan elders was supposed to be money for medical examination and possibly medical treatment.

In conclusion, I found no connecting link between the appellant and the defilement of the complainant. His alibi should not have been dismissed too easily. In these circumstances I have no alternative but to allow this appeal which I hereby do.

The conviction is hereby quashed and the sentence of 14 years imprisonment is set aside forthwith. The appellant is to be released immediately unless otherwise lawfully held in prison.

Orders Accordingly.

DATED and DELIVERED AT BUSIA this 21st day of June, 2010.

D.A. ONYANCHA

JUDGE.