

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

Criminal Appeal 75 of 2008

(Appeal against conviction and sentence from the original Criminal Case No.854 of 2007 in Mumias Senior Resident Magistrate' Court Judgment of [MR. E.K. MAKORI, AG. PM])

SALIM ALI ANZENZE..... APPELLANT

V E R S U S

REPUBLIC..... REPUBLIC

J U D G M E N T

1. Salim Ali Anzenze was charged and convicted of the offence of defilement contrary to **section 8 (1)** as read with **section 8 (3)** of the Sexual Offences Act, No[...]. It was alleged that on 29.6.2007 in Mumias District with Western Province, he unlawfully had carnal knowledge of S.O., a girl aged 14 years. In the alternative, that he indecently assaulted the said girl contrary to **section 11 (1)** of the Sexual Offences Act by touching her private parts namely her vagina. He denied the charges but was found guilty and sentenced to ten (10) years imprisonment on the main count.
2. The evidence of PW1, S.O. aforesaid was that on 29.6.2007 at 9 p.m. she had come home from school and the Appellant then found her reading and put off the lantern lamp she was using and told her that he wanted to “*sleep*” with her. That he then threatened to “*murder*” her if she made noise and beat her with his fists as he ordered her to move to the bedroom. He thereafter grabbed her by the neck to stop her from screaming and proceeded to defile her throughout the night. That the next day, she

reported to one M who took her to the headteacher, a Mr. W and she was taken to B Police Station where she made a report before being taken to Matungu for treatment.

3. **PW2, Z. O** stated that the Appellant was known to her as she was a tenant in his premises belonging to the Appellant or his relative. She received the incident report on 31.6.2007 and she took the minor to Matungu and later to St. Mary's Hospital where a P3 form was issued.
4. **PW3, Isaac Mukhwana**, a clinical officer stated that the minor was brought to him on 30.6.2007 at Matungu Health Centre. He noted that her vaginal wall was inflamed and tender. She was also on her menstrual periods and he did not detect any sperms in her.
5. **PW4, P.C. John Ogutu** investigated the matter and was also the one who received the initial report and later arrested and charged the Appellant.
6. In his defence, the Appellant denied the charge and said no more. He repeated the same assertion during the hearing of the Appeal and in the Petition of Appeal, the only substantive ground was that the evidence tendered was contradictory, unworthy of credit, incoherent, incredible and unreliable but he failed to state in what instances those assertions could be true.
7. In his response the learned State Counsel without either opposing or conceding the Appeal stated that the issue of penetration had not been conclusively determined.
8. I have read the evidence on record and the issue of penetration or lack of it will be considered in my analysis and evaluation of all the evidence in its totality.
9. In the instant case, the Appellant was well known to PW1 as apparently he was the landlord or related to the landlord/landlady of premises that PW2 had rented for her school going children. The issue of identification has not been contested and the evidence of PW1 as to what happened on that night went wholly unchallenged. In any event, like the trial court, I find her evidence credible, consistent and without any

contradictions whatsoever. I say so because upon being released from the overnight detention by the Appellant, she immediately informed her school teacher of her ordeal because no adult was living with her and her siblings at the time. That act is consistent with a person who did not fabricate her evidence.

10. Further, on examination by PW4, PW1 had her menstrual periods as she had said and had tenderness and bruising of the vaginal wall. Those facts indicate sexual activity and consistent with the fact of penetration as stated by PW1. The learned State Counsel's arguments are not borne by the P3 form which clearly states that "*penetration occurred.*"
11. The Appellant's defence that he knew nothing of the charge cannot be sustained in the face of such clear evidence and I can only but dismiss it.
12. No issue has been raised regarding sentence and to my mind, in fact it is lenient.
13. The above being my findings, the Appeal is without merit and is dismissed.
14. Orders accordingly.

*Delivered, dated and signed at Kakamega this 16th day of
June, 2010*

ISAAC LENAOLA

JUDGE