



*(Appeal against conviction and sentence
of [B. O. OCHIENG ESQ., SRM] dated
23.7.2008 in Butere Senior Resident
Magistrate's Court in Criminal Case
No. 393 of 2008)*

SAMUEL SHIKUKU APPELLANT
V E R S U S
REPUBLIC RESPONDENT

J U D G M E N T

1. The Appellant was charged with the offence of defilement contrary to **section 8 (1) and (2)** of the Sexual Offences Act. It was alleged that on 6.5.2008 in Butere District, he unlawfully had carnal knowledge of F.O., a girl aged Eleven (11) years. He denied the charge and upon the conclusion of the trial, he was sentenced to serve twenty five years imprisonment. The appeal is now against both the conviction and the sentence.
2. Before the trial court, it was the evidence of PW1, F. O. aforesaid that on 6.5.2008, she had been sent by her mother to go and buy some maize and kerosene in the local shops. She bought the maize but forgot to buy the kerosene and so she hurried back for it. She used a shorter path or in common parlance, a "short cut," and on her way home at about 8 p.m., she was suddenly accosted by the Appellant and pushed into a thicket where he proceeded to defile her. It was her further evidence that she recognized him as Shikuku, a local matatu tout, and she screamed as he penetrated her and shouted;

"Shikuku, leave me alone."

3. He threatened to "slaughter" her and upon finishing the alleged act, he left her and she went home. She was able to describe his clothing as being a white t-shirt and a black trouser.
4. It was PW1's further evidence that when she got home, she noted that the paraffin had spilt and she was afraid to tell her mother what had happened to her. She said that she was able to see the Appellant using moonlight and later, she was able to tell her mother what had happened. PW2, P.A, mother of PW1 stated that she had sent the latter to the local shops but she delayed in coming back and when she finally did, she looked afraid and had only half the paraffin she had gone to buy. The next day, she did not go to school and when asked why she said that she had pain in the groin. She was also walking with legs apart and her mother gave her "panadol", a pain killer. She got worse and PW2 called a lady who worked at a local hospital and when PW1 was examined, her private parts were swollen and blood and

pus were oozing out. PW2 took PW1 to hospital and then made a report to the police.

5. PW3, P.C. Inviolata received the report of defilement on 12.5.2008, observed that the minor walked with legs apart and saw the treatment booklet given out at the health centre and issued a P3 form. Later, she arrested the Appellant who was examined and found to have a sexually transmitted disease and also had the HIV virus. She then charged him with the offence of defilement.
6. PW4, one Masheti, a clinical officer, completed the PW3 form on the basis of the treatment notes earlier issued but he also examined the child, noted the lacerations and bruises in the vaginal orifice, and also noted that the hymen was broken. He saw pus-like discharge from the vagina and on conducting an examination of her urine, he found a sexually transmitted disease but the HIV virus results were negative. PW1 was treated for the sexually transmitted disease but was not put on ARVS as they would have been ineffective.
7. PW4, produced the medical treatment notes (Exh.2) and the P3 form (Exh.3).
8. On 15.5.2008, PW4 examined the Appellant and noted that he had a sexually transmitted disease and was also HIV positive. He produced the P3 form as Exh.6.
9. In his defence, the appellant stated that a certain lady, who was unnamed, threatened him and insulted him as a son of a whore without land and that he was going to see something he had never seen before. He said nothing of the charge and said nothing of all the allegations leveled against him. It matters not in any event as he had nothing to prove on his part.
10. For my part, the only issue raised in the appeal was whether the medical evidence was conclusive of the offence. The Appellant argued that although he was HIV positive, he had no sexually transmitted disease and so PW1 was infected by someone other than himself. I will address that issue in the contest of the entire evidence tendered as I am obliged to evaluate all evidence afresh and reach my own conclusion irrespective of the decision of the trial court - see Okeno vs R. [1972] E.A. 32.
11. In this case, there is the issue whether PW1 was able to identify the Appellant at night. Although the issue has not been contested in this Appeal and was not contested at the hearing, the evidence of PW1 on the subject was coherent and believable. She knew the Appellant by name and called him by his given name, "Shikuku". She had the temerity of mind to note the clothing he was wearing - the white t-shirt and black trouser. She also named him when her pain became unbearable.
12. Added to the above evidence are two other matters that are pertinent; the first is the fact that when PW1 was examined, she had a sexually transmitted disease as did the Appellant. His protestation in that regard cannot be taken seriously as apparently he forgot that Exh.6 was a P3 prepared after he was examined and he clearly had a sexually transmitted disease of the same genre as the one found in the victim.
13. Secondly, PW1 clearly had evidence in her vagina of sexual activity; the laceration and bruises in the vaginal orifice and connected with that evidence plus that of the clinical officer, there is no doubt that those injuries were forcefully made by the Appellant.
14. Lastly, on sentence, the victim of the Appellant was eleven years old. PW2 produced her birth certificate to

authenticate that fact. Section 8 (2) of the Sexual Offences Act, provides as follows;

8 “(1)

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”

15. In the present instance, the Appellant received the following sentences,
 - i) twenty five (25) years for an offence under **Section 8 (1)** and **(2)** of the Act.
 - ii) twenty five (25) years for the offence of transmission of threatening sexually transmitted disease contrary to **section 26 (1) (c)** of the Sexual Offences Act.
16. Whereas I have no issue with the sentence in the second count, I have a problem with the sentence in the first count. The proper sentence is life imprisonment and in the circumstances of this case, and noting the age of PW1, only that sentence would have been available.
17. While therefore the Appeal herein will be dismissed, the sentence will be altered as follows;
 - i) On Count 1 - life imprisonment
 - ii) On Count 2 - twenty five (25) years imprisonment
18. Both sentences to run concurrently.
19. Orders accordingly.

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

**ISAAC LENAOLA
J U D G E**