



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT KISII**

**Criminal Appeal 232 of 2009**

**(Being an appeal from original conviction and sentence of the SRM's court  
at Kilgoris in criminal case No. 1008 of 2006 – Mrs. R.A. Oganyo, S.R.M)**

**BETWEEN**

**GEOFFREY OGEYO ..... APPELLANT**

**AND**

**REPUBLIC ..... ACCUSED**

**JUDGMENT**

The appellant was charged with defilement of a girl contrary to **section 8 (1)** as read with **section 8 (3)** of the **Sexual Offences Act**. The particulars of the offence were that on the 26<sup>th</sup> day of November, 2006 in Transmara District of the Rift Valley province, he had unlawful carnal knowledge of B.O., a girl under the age of 15 years.

The appellant denied the charge. He was tried, convicted and sentenced to 20 years' imprisonment.

Being aggrieved by the said conviction and sentence, he appealed to this court.

In his home made petition of appeal, he stated that no medical examination was done on him to prove that he was the one who had defiled the girl. There was also no sufficient evidence that the complainant had been defiled. He further stated that there was insufficient evidence of identification. Lastly, he contended that his constitutional rights had been violated in that there was inordinate delay in arraigning him in court.

This being the first appellate court, it is enjoined to consider afresh the evidence that was tendered before the trial court, evaluate the same and reach its own conclusion. See **OKENO –VS- REPUBLIC** [1972] E.A. 32. The court must however take into account that, unlike the trial court, it did not have the benefit of seeing the witnesses when they testified and must therefore give due allowance for that.

The evidence that was adduced before the trial court may be summarized as hereunder:

The complainant, **PW1**, said that she was born in 1991. She was 15 years old when she testified. She did not know the appellant prior to the material day. She testified that on 26<sup>th</sup> November, 2006 she was sent by her uncle, **DO, PW3**, to chase away monkeys that were destroying crops in their farm. She was with **ED, PW2** and **AO**. When they got to the farm she saw a person approaching them. He was armed with a panga. He ordered the three of them to lie down. He threatened to cut them with the panga if they did not obey his orders. They all lay on the ground. The person ordered them not to look at him. The girls lay on their stomachs. He ordered PW1 to stand up and remove her under pant. She stood up but declined to remove her under pant. The person fell her down, tore the under pant and proceeded to defile her for about 20 minutes. Thereafter the assailant ordered the girls to leave without looking back. When they got home PW1 reported the incident

to her mother who in turn reported to the Chief. The chief wrote a letter and gave it to PW1 to take to Nyamaiya police station. On the same day the appellant was arrested by PW3. After his arrest he was taken to the home of PW3, and PW1 purported to positively identify him.

Thereafter the appellant was taken to Nyamaiya police station. Later on she was taken to Gucha District Hospital for examination.

In cross examination, PW1 said that she had not seen the appellant prior to the material day. She said that at the time of the assault the appellant was dressed in a black pair of short trousers and had no shoes. He also wore a white dirty T-shirt which had no buttons. But when he was arrested he wore a long pair of trousers and a white T-shirt. PW1 said that she identified the appellant because of a cut scar on his nose.

PW2, aged 13 years, corroborated the evidence of PW1 substantially. Regarding the assailant's dressing at the time he accosted them, she said he wore a black pair of short trousers and a green T-shirt and was in shoes. PW1 and PW2 gave sworn evidence but the trial court did not conduct any *voire dire* examination on them before they testified.

PW3 said that when the girls returned home at about 2.00 p.m. they told him that the complainant had been raped by a dark person who had a scar on the nose and face. They said he wore a white T-shirt with white stripes.

On the following morning PW3 decided to go to the farm where the alleged incident had taken place. He was accompanied by one Robert Kimonge and other people. On the way they found a person in a bush near the farm. They tried to talk to him in Ekegusii but the person said he was a massai. He was in a T-shirt resembling the one that had been described by PW1. He also had a scar on the face. PW3 deceived the person that there was a gazelle that had been trapped on the lower part of the land and requested him to assist them kill it. He wanted to lure him to a place where there were people so that they could arrest him. The person fell into the trap and was arrested. Members of the public tried to assault him but PW3 restrained them and frog marched the suspect to Nyamaiya Police station. The witness claimed that as a result of the defilement, PW1 became pregnant but a doctor procured an abortion.

**Police Constable Kennedy Selete, PW4**, then attached to Keiyan Patrol Base, testified that on 27<sup>th</sup> November, 2006 he received a report from PW1, whom he said was aged 16 years, that she had been defiled by one Geoffrey. On the same day he received a report from PW3 that the person who had defiled her had been arrested by members of the Public and taken to Nyamaiya Police Station.

**Nobert Ondiba Saboke, PW5**, is a Clinical Officer at Kisii District Hospital. He examined PW1 on 5<sup>th</sup> December, 2006. He said she was 14 years old. She said she had been sexually assaulted by a person known to her.

His examination revealed that there was excessive redness in the vaginal opening but there were no tears. A high vaginal swab revealed red blood cells. No spermatozoa or puss cells were visible. He concluded that the status of the girl's genital showed that there had been a sexual act. PW5 did not examine the appellant.

In his defence, the appellant said that he was arrested from his shamba by six people who had pangas. They took him to their home and then called PW1 and asked her if he was the one who had offended her. She answered in the affirmative. He was thereafter taken to Nyamaiya police station where he remained for 7 days before he was arraigned in court. He denied having committed the offence as charged.

The learned trial magistrate observed that the age of the complainant needed to be proved, which was not done.

The complainant said she was 15 years old but did not produce any documentary evidence to that effect. PW4 said that she was 16 years old and PW5 said she was aged 14 years. The learned trial magistrate held that her age bracket was under 15 years. There was no sufficient evidence to warrant such a conclusion. The trial court ought to have ordered that the complainant's age be medically assessed. This is

important because the sentence for the offence of defilement as per the provisions of **section 8** of the **Sexual Offences Act** is determined by the age of the victim. Where the child defiled is 11 years or less, the sentence is imprisonment for life; where the age of the defiled child is between 12 and 15 years, the sentence is not less than 20 years' imprisonment and where the child defiled is between the age of 16 and 18 years, the sentence is not less than 15 years.

Secondly, the learned magistrate erred in law by failing to conduct a **voire dire** examination on PW1 and PW2 before allowing them to give sworn evidence. The court was under an obligation to form an opinion, on a **voire dire** examination, whether they understood the nature of an oath. A child ought only to be sworn if she understands and appreciates the solemnity of the occasion and the responsibility to tell the truth. See **JOHNSON MUIRURI –VS- REPUBLIC** [1983] KLR 445.

There was insufficient evidence regarding identification of the appellant. Although the offence was committed in broad day light, the description given of the appellant by PW1 and PW2 was different. PW1 said that her assailant wore a black pair of short trousers and a white T-shirt which had buttons and had no shoes. She also said that he had a scar on his nose.

PW2 said that the assailant wore a black pair of short trousers and a green T-shirt and had shoes. The two said they did not know the appellant prior to the material day.

On the other hand, PW3 said that PW1 and PW2 told him that the assailant was a dark person with a scar on the nose and face, that he was in a white T-shirt with white and black stripes.

But when PW1 went to Keiyan Police Patrol Base, she told PW4 that she had been defiled by a person known as Geoffrey. All these discrepancies reveal that the person who defiled PW1 was not properly identified. The only reason why the appellant was arrested by PW3 and others was that he was found near the place where the offence was committed and he was dressed in a manner that almost fitted the description given by PW1 and PW2. That evidence was not watertight to sustain a conviction.

The evidence of PW1, PW2, PW3 and PW4 was heard before Kaberia, R.M. But the evidence of PW5 was taken before Oganyo S.R.M. The record does not show whether Oganyo SRM complied with the mandatory provisions of **section 200 (3)** of the **Criminal Procedure Code**. Failure to do so was prejudicial to the appellant and occasioned a miscarriage of justice.

The sum total of the foregoing is that the appellant's conviction was not based on sound evidence and was therefore unsafe. Consequently, I allow this appeal, quash the conviction and set aside the sentence that was passed by the trial court. The appellant is set at liberty unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED AT KISII THIS 12<sup>TH</sup> DAY OF JULY, 2010.**

**D. MUSINGA**

**JUDGE.**

**12/7/2010**

Before D. Musinga, J.

Mobisa – cc

Mr. Mutai for the state

Appellant present

Court: Judgment delivered in open court on 12<sup>th</sup> July, 2010.

**D. MUSINGA**

**JUDGE.**