REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL NO. 243 OF 2009

ONDITI ONSARE …………….……..……..………….. APPELLANT

-VERSUS-

REPUBLIC ……………………………....…………. RESPONDENT

JUDGMENT

From the original conviction and sentence of the Senior Resident Magistrate's court at Ogembo, R. K Koech in Criminal Case No. 1254 of 2008 delivered on 1st December, 2009.

The appellant was charged before the Senior Resident Magistrate's court at Ogembo with two counts. In count one, the appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the **Sexual Offences Act**. The particulars of the offence given were that on the 19th December, 2008 in Gucha South District within Nyanza Province, he intentionally and unlawfully had an act of penetration with his genital organ to a child namely **B.N** aged 10 years. In the second count which ideally ought to have been an alternative, to the first count, the appellant was charged with the offence of indecent act with a child contrary to section 11(1) (III) of the **Sexual Offences Act**. The particulars of the offence were that on the 19th day of December, 2008 in Gucha South District within Nyanza Province he intentionally and unlawfully contacted the private parts namely vagina of a child namely **B.N**. In his judgment the learned magistrate, opted to treat this second count as an alternative and that is how it should be.

The appellant pleaded not guilty to both counts and the case was set down for hearing. Due to the fact that the accused was deaf and dumb, the hearing was conducted with the aid of a sign interpreter. In the endevour to proof its case against the appellant the prosecution called a total of 6 witnesses. PW1 **B.N**, the complainant testified after the court had conducted a ***voire dire*** examination. She testified that she was aged 9 years and a standard IV pupil at K Academy. Apparently on the material day she was doing homework at home. Her mother had gone to school, her father had gone to Tabaka and her grandmother had gone to hospital. She was otherwise with her younger siblings who were playing outside.

The appellant entered the house where the complainant was and held her by the neck. As she resisted by calling out her siblings the appellant closed the door, took her on to the bed, removed her clothes and sexually assaulted her. When done, the appellant escaped through the window after PW1's grandmother called her out. The complainant knew the appellant as a neighbour. She used to see the appellant in the village but could not talk to him because he was deaf. She even knew his father who went by the name, **Onsare**.

After the ordeal, the complainant was taken to Tabaka hospital where she received treatment. The following day, she was taken to Rongo hospital and was later taken to Rongo Police Station by her mother, (PW2) where the incident was reported.

The complainant's mother PW2, testified that the complainant arrived home around 4.00 to 4.30p.m. from school. Shortly she left for the shopping centre leaving behind the complainant with her siblings. At around 6.00p.m. She returned with some Mangoes she had brought. She called out the complainant to clean them before they could eat but the complainant did not respond. It was then that her mother (PW3) informed her that the complainant had a problem. PW2 talked to the complainant who told her that the appellant had sexually assaulted her. PW2 noted some scratch marks on the complainant's face. PW2 then requested PW4, her mother, to take the complainant to Tabaka Hospital as she proceeded to Riosiri police post to report the incident. PW2 subsequently led the police to the home of the appellant where he was arrested. According to PW2 both the appellant and the complainant were taken to hospital and tested. The appellant was found with sexually transmitted infections while the complainant was found with yeast cells and were both treated. PW2 too knew the appellant for he used to work for her uncle as a farm hand. The uncle lived 800 metres away from PW2's home.

PW3, was **APC Geoffrey Laboso** was at the time, attached to Riosiri AP post. His evidence was to the effect that PW2 reported a case of defilement to their post on 19th December, 2008 and led them to the home of the appellant whom they arrested. PW4, **T.N**, was the complainant's grandmother. She worked as a nurse at Tabaka Mission Hospital. She had come home at around 5.00p.m. on the material day. On arrival she could hear the complainant crying inside the house. She asked her granddaughter why she was crying but she didn't answer. The door to the house was closed. She pushed the door open and saw the appellant buttoning his trousers and he then left the house. PW4 feared screaming because she thought the appellant could be lynched. When PW4 found the appellant buttoning his trousers she asked him what was happening using sign language but the appellant simply pushed her aside and went away.

Shortly after the appellant left, PW2 arrived and found both PW4 and PW1 crying. PW4 informed her what had transpired. PW4 knew the appellant as a neighbour who lived 5 plots away from their farm. Infact he used to work for her brother-in-law. PW5 was **PC Richard Okutu** a police officer attached to Etago police station. On 20th December, 2008 he was called from Rongo police station and told a prisoner from his area of jurisdiction was held there. He proceeded there and found the appellant whom he knew and took him to Etago police station. PW6 **Douglas Ombati**, a clinical officer attached to Rongo District Hospital testified that on 20th December, 2008 he was approached to fill the P3 form of the complainant whom he found to be aged 10 years. On examination he noted tenderness on the lateral aspect of the right thigh. The patient's external female genitalia was normal but with bruises on the vaginal opening and the hymen was not intact suggestive of penetration. He examined the appellant whom he found to be aged approximately 30 years. He was deaf. He took specimens and conducted an HIV test which turned out negative. The tissue samples had pus cells and epithelial cells suggestive of the presence of sexually transmitted disease. The complainant's urine contained epithelial cells and yeast cells suggestive that the complainant had contracted a sexual transmitted disease.

Put on his defence, the appellant elected to give an unsworn statement of defence and called no witnesses. He stated that he did not know the complainant and that he did not know anything regarding the case facing him.

The learned magistrate having carefully appraised the evidence on record was persuaded that the appellant had committed the offence. Accordingly he convicted him and sentenced him to life imprisonment. Aggrieved by the conviction and sentence, the appellant through **Messrs Bwondika & Co. Advocates** lodged the instant appeal. In the petition of appeal dated 11th December, 2009 and lodged in this court on the same day, the appellant faulted the learned magistrate's judgment on seven grounds to with:

"1.The learned trial magistrate erred in law and fact when he convicted the appellant without factual and/or legal basis whatsoever.

2. The learned trial magistrate erred in law and fact in convicting the appellant notwithstanding the material discrepancies and contradictions of prosecution witnesses discernible from the evidence on record.

3. The learned trial magistrate failed to properly or at all evaluate and/or analyse the submissions made on the part of the appellant and thus reached a wrong decision.

4. The learned trial magistrate failed to consider that the charge sheet was defective in the two counts the appellant was charged of could not stand as two main counts.

5. The conviction by the learned trial magistrate is contrary to the weight of the evidence adduced by the prosecution and hence manifestly unsafe.

6. The learned trial magistrate misdirected himself in law and fact as a flagrant contravention of the establishment principles of law and in the whole process of the trial.

7. The learned trial magistrate erred in law and fact by not considering that the prosecution witnesses were evasive in their evidence and thus keeping vital evidence from the court by not producing the alleged blood stained clothes of the complainant".

When the appeal came up for hearing before me on 22nd November, 2010, **Mr. Ondika**, learned counsel for the appellant submitted that the age of the complainant was not established as no age assessment was conducted on the complainant. Thus the appellant was convicted without any basis as the age of the victim was not proved. Counsel further submitted that there were contradictions in the evidence of the prosecution case which the learned magistrate overlooked to the detriment of the appellant. That blood stained dress and pant of the complainant were taken to the police station. However, the same were not tendered in evidence for no apparent reason. An adverse inference ought therefore to be drawn for such withholding of critical evidence. Finally counsel submitted that the complainant was a person whose evidence could not be believed since she claimed to have been defiled before but never informed anybody.

Mr. Mutuku, learned senior principal state counsel opposed the appeal. He submitted that the age of the complainant was adduced, the contradictions in the prosecution evidence were minor, the complainant being a child of tender years, the issue of her candidness does not arise and finally he submitted that the appellant was properly identified.

I have analyzed the evidence that was adduced in the trial court and evaluated it independently as I must do, this being a first appeal – See the case of **Okeno –vs- Republic (1972) E.A 32**. I do find, like the trial court that the offence of defilement contrary to section 8(1) as read with section 8(2) of the **Sexual Offences Act** was proved beyond reasonable doubt. There is therefore no basis to interfere with the conviction and sentence awarded by the trial court. I say so because the evidence on record against the appellant is simply overwhelming. The appellant was a person well known to both the complainant, her mother (PW2) and grandmother (PW4). The appellant could not therefore have been mistaken for someone else. The offence was apparently committed at about 5.00p.m. in broad daylight. The description of the events leading to, during and after the sexual assault are such that the complainant could not simply have made up the story. In any case, there is nothing on record to suggest any reason why the complainant, her mother and grandmother could have framed the appellant with the case. Apart from the evidence of the complainant, there was the evidence of the grandmother, who almost found the appellant in the act. She forced open the door and entered the house where the appellant and complainant were. She found the appellant zipping up his trouser. The complainant was crying. She saw a black pant of the complainant on the floor and there was also human faeces mixed with blood on the floor. When she confronted the appellant and demanded to know what had happened, the appellant simply pushed her aside and walked away. When Cross-examined by **Mr. Ondika** on the issue, the witness stated that there was blood on the complainant's private parts and the hymen was torn. There was a whitish discharge and lacerations. The whitish discharge was like pus. There was also stool on the complainant's private parts. It is instructive that the complainant's grandmother is a nurse by training and was easy for her to make such

observation. As correctly observed by the learned magistrate, the fact that the witness found the accused zipping his trousers having just completed defiling the complainant, the fresh human feaces seen on the complainant's vagina and on the floor and I may add the scratch marks as well blood seen attest to the excruciating pain that the complainant was subjected to during the ordeal by the appellant. Finally, I would observe that the evidence of the grandmother was not seriously challenged by the defence.

Besides the evidence of the grandmother, there was also the evidence of the mother. Her evidence as to the conduct of the complainant soon after she came home was consistent with someone who had just gone through a traumatic event. She also observed scratch marks on her face. She also observed mucus like substance on the sides of the vagina and signs of penetration. Then there was the evidence of the clinical officer who noted upon examination of the complainant tenderness on lateral thigh, bruises on the vaginal opening and the hymen was not intact suggestive of penetration. It is also worth noting that both the appellant and the complainant tested positive of sexually transmitted infection. It matters not who could have infected the other. Though it may well be that the two were independently infected, such possibility given the obtaining circumstances sounds remote to my mind. These observations and conclusions were made or reached so soon after the incident.

The appellant has raised the issue of the age of the complainant. Of course in the offences of this nature, the age of the complainant is paramount and has to be proved. However, it is not mandatory that age assessment be conducted as submitted by counsel for the appellant. The age of the complainant can be adduced through oral evidence as happened in the circumstances of this case. The appellant had opportunity to raise the issue of age with the complainant, her mother, grandmother and even with the clinical officer but failed to do so. As it were the oral evidence as regards the age of the complainant remained unchallenged. In any event, the clinical officer was categorical that the complainant was aged 10 years. That is the same age as indicated in the charge sheet.

Of course there were contradictions in the prosecution case. Such contradictions are not wholly unexpected in cases of this nature. Witnesses perceive events differently. As long as such contradictions are minor and do not go to the root of the prosecution case, they can be ignored. The contradictions alluded to by the appellant fall in this category. They were minor and inconsequential. In any event, the learned magistrate considered and appreciated them. He resolved the same by stating that ***"…. The minor contradictions do not go into the substance of the case and the same are explainable through the prevailing circumstances. The complainant was a child of 10 years and the issue of her not being candid because of her previous defilement does not arise…."***.

Finally, failure to tender in evidence, the blood stained dress and the pant of the complainant cannot be the basis for drawing adverse inference in favour of the appellant. Such evidence would only have been corroborative. Lack of such evidence notwithstanding, there was already enough evidence on record connecting the appellant to the offence.

This appeal lacks merit and is accordingly dismissed.

Judgment dated, signed and **delivered** at Kisii this 17th day of November, 2010.

ASIKE-MAKHANDIA
JUDGE