



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL APPEAL NO. 14 OF 2009
*(Appeal from conviction and sentence of the Senior Resident
Magistrate's Court at Butere in Criminal Case
No. 215 of 2009 [G. O. OYUGI ESQ., RM])*

ALFRED SHAMWATA
APPELLANT

VERSUS

REPUBLIC
RESPONDENT

JUDGEMENT

1. The Appellant, **Alfred Shamwata**, was charged with the offence of defilement contrary to **S.8 (1)** as read with **S.8 (3)** of the Penal Code. It was alleged that on “**diverse dates between 13th and 15th December, 2009**” in Khwisero District, he unlawfully had carnal knowledge of M.A., a girl aged ten (10) years. He denied the charge and after his trial, he was convicted and sentenced to serve imprisonment for life.
2. The evidence that led to his conviction was as follows;
3. According to PW1, M.A. aforesaid, the Appellant was a “brother” to her father, lived near their home and on 13.12.2009, at 1 p.m. the Appellant called her and told her to remove his clothing from the drying lines and take them to his house. She did so and while inside his house, the Appellant grabbed her and removed her underwear. He then inserted his penis into her vagina and according to her, “**the accused did not stay for long while on top of her.**” She then walked out, leaving her underwear behind and the Appellant warned her not to tell anyone about what had happened.
4. According to PW1, she did not bleed and when she went home, she found one P, M and W who are her step-sisters and brother but told them nothing about her ordeal. She allegedly then informed C. A, her step-mother, about the incident and she was taken to Khwisero Health Centre for treatment.
5. When PW1 was cross-examined, she stated that when her aunt, one M, asked her how she was walking, she said that she had a boil and that she had been grabbed and taken into a sugar cane plantation where she was defiled. Further, that her step-mother, C beat her for having sexual inter-course.
6. PW2, **C.A**, PW1’s step mother stated that the Appellant, was her brother-in-law and brother to her husband. She stated that when she returned to her home on 15.12.2009 from a trip to Nairobi, she found that PW1 was walking with legs apart. When asked what the problem was, she said that she had a boil in her buttocks. PW2 believed her and took no action. On 16.12.2009, after coming from a funeral, she again noticed that PW1 was still walking with legs apart. She demanded the truth and PW1 started crying. Her father came and on being interviewed, PW1 narrated how the Appellant had defiled her. When PW2 examined PW1, she noted a dirty, watery substance on her vagina and the latter was in pain at the pelvic bone. On 17.12.2009, she took her to Khwisero Health Centre and a report was made at Butere Police Post.
7. It was the evidence of PW2 that the Appellant disappeared from home after the incident and was arrested after PW1’s father caught sight of him on 22.12.2009.
8. PW3, **Robert Wanyonyi**, a Clinical Officer examined PW1 on 23.12.2009, assessed her age at 8

– 12 years and he noted that she had been referred to him at Butere District Hospital after initially being examined at Khwisero Health Centre on 16.12.2009. It was his evidence that she had evidence of a torn labia minora and majora which were healing, the hymen was broken and the genitalia was reddened. She also had lacerations at the clitoris and was not walking well. He was not able to recover any spermatozoa because of the period taken since the alleged injury and he concluded that there was evidence of penetration. He produced the P3 form as P.Exh.2 together with the laboratory notes and forms.

9. PW4, **Morine Vigendi**, an Enrolled Community Nurse was the one who examined PW1 at Khwisero Health Centre and found bruises on both labias, lacerations on the vagina and genitalia. She confirmed that injuries to the labias were indications of penetration. Like PW3, PW4 saw no bleeding in the injured regions of PW1's body.

10. PW5, **PC Japheth Okello** stated that he received the initial report on 20.12.2009 at Khwisero Police Station, visited the scene, begun investigations and on 23.12.2009, he was informed by PW1's father that the Appellant had been seen hiding in a house in the locality of his home. The witness and one PC Jared Obuya proceeded to the home but before they reached there, they saw the Appellant running away. He was pursued and apprehended. Later he was charged with the offence.

11. In his defence, the Appellant stated that he never committed the offence but added that although he had previously been left to look after PW1 and her siblings, nothing untoward had happened to them. Further, that he was framed up because the complainant had earlier stated that a person called "**Boy**" is the one who defiled her.

12. I have a duty to evaluate the above evidence and reach my own conclusion and my mind is tilted to believing the evidence that indeed PW1 was involved in some sexual activity prior to 15.12.2009 when PW2 returned and found her walking with legs apart. PW2, PW3 and PW4 all indicated the injuries to her sexual organ which are indicative of such activity.

13. Secondly, it is not in doubt that the Appellant is related to PW1 because she categorically stated that he was her uncle and her step-mother identified him as her "**brother-in-law**" and "**brother**" to her husband. The Appellant in his statement of defence stated that he was indeed known to PW1 and was often times left to take care of her and her siblings when her parents were away.

14. In any event, I note that PW1 was found to be under twelve years old and so the charge was proper under **S.8 (1)** as read with **S.8 (2)** of the Act. I will return to this issue at the end of this judgment.

15. On the evidence available, the Appellant has taken issue with the fact that the evidence of PW1 was inconsistent and uncorroborated noting that she reported the incident some days after the alleged act on his part. I will quickly dismiss that assertion because PW1 was very cogent in her evidence. She had known the Appellant as a relative and complied with his direction to pick his clothes from the drying lines. When she did so, he pounced on her inside his house and defiled her. That evidence was consistent with subsequent injuries to her genitalia.

16. The Appellant has also taken issue with the fact that PW1 took long to report the incident. His own evidence was incriminating in that regard. He admitted to have been the one left to take care of the children including PW1 when their parents were in Nairobi. No other adult person save himself was present and PW2 noticed that PW1 was walking with legs apart when she arrived on 15.12.2009. She enquired about that fact but PW1 lied to her. It is obvious that the child did so because she was scared of the threat made by the Appellant and it is instructive that PW2 actually later beat her up for having sexual intercourse. PW2 was her step-mother and it was upon her to take action but she only did so after PW1 had confessed to her sad ordeal.

17. Having so said, I am certain that it was the Appellant who defiled his niece in an unnecessary and reckless lustful action and he ought to have been charged under **S.20 (1)** of the **Sexual Offences Act, No. 3 of 2006**. It provides as follows;

"S.20 (1) Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, grand daughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years.:

Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person."

18. In the event, I will substitute the conviction under **S.8 (3)** of the Act and convict the Appellant under **S.20 (1)** aforesaid.

19. The sentence meted out is fair because the Appellant acted in almost beastly manner towards a ten (10) year old niece who had been left under his care. He deserves no mercy whatsoever.
20. In the end, the Appeal has no merit and is dismissed.
21. Orders accordingly.

Delivered, dated and signed at Kakamega this 4th day of November, 2010.

**ISAAC LENAOLA
J U D G E**