



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

Criminal Appeal 139 of 2007

TOM OCHIENG APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From original conviction and sentence of the Resident Magistrate's Court at Rongo Criminal case No.1175 of 2006 by D. KIMEI ESQ., RM)

JUDGMENT

The appellant was charged with defilement of a girl contrary to **section 145(1)** of the **Penal Code**. The particulars of the offence were that on the 16th day of July 2006 at Kb sub location in Migori District within Nyanza Province the appellant had unlawful carnal knowledge of **J. A.**, a girl aged under 16 years. The appellant also faced an alternative charge of indecent assault on a female contrary to **section 144(1)** of the **Penal Code**. The particulars thereof were that on the 16th day of July 2006 at K b sub location the appellant unlawfully and indecently assaulted the aforesaid girl by touching her private parts.

After a full trial the appellant was found guilty of committing the two offences as charged with, convicted and sentenced to serve 10 years' imprisonment on the 1st count and 5 years' imprisonment on the 2nd count. The sentences were to run concurrently.

The appellant was aggrieved by the said conviction and sentence and preferred an appeal to this court.

In the petition of appeal, he argued that there was insufficient evidence against him to justify a conviction. He added that there was a standing dispute between his family and the family of the complainant and that the same made the parents of the complainant frame him up.

The complainant, **J. A., PW1**, was a 6 year old girl at the material time. She testified that on the material day she was at her grandmother's house. The complainant was sent by her grandmother, PW2, to go and open the kitchen door so that their chicken could roost as dusk had fallen. As she headed to the kitchen, the appellant pounced on her, removed her underpants and defiled her. She tried to scream but the appellant blocked her mouth. He ordered her not to tell her grandmother what he had done to her. After the incident, the appellant disappeared for a period of nearly 5 months. The complainant knew the appellant very well as he had been working in their home. She reported that he had defiled her. PW2 rushed the complainant to Rongo Health centre for treatment. The incident was also reported at

Kamagambo Police station. **Eliza Owino, PW3**, a Clinical Officer at Rongo Hospital testified and produced a P3 form in respect of the complainant. Although the same was completed on 21st December, 2006, PW3 relied on a treatment card in respect of the complainant that was written at the hospital where she was taken for treatment immediately after occurrence of the said incident. The treatment card indicated that the complainant had been defiled. Urine microscopy revealed pus cells. The vaginal wall had also widened.

Police constable **Evans Rotich, PW4**, testified that on 17th December, 2006 the appellant was escorted to Kamagambo Police Station by members of the public after he re-surfaced from his hiding.

In his defence, the appellant denied having committed the offences as charged with. He stated that he had been employed by the complainant's father as a gardener and that he disagreed with him after he failed to pay him his salary. He claimed that he had been framed by the complainant's parents.

I have carefully considered the record of appeal. It is not in dispute that PW1 was defiled. She reported that it was the appellant who had defiled her. She knew him well as he had been working in their home. She described in details what the appellant did to her. Her evidence was corroborated by that of PW2, her grand mother. Immediately after the ordeal, PW2 saw bloodstains on the complainant's private parts. There was also medical evidence that corroborated the evidence of PW1 and PW2.

The appellant disappeared from his home for a period of nearly 5 months after the aforesaid incident. When he re-surfaced members of the public arrested him and took him to Kamagambo Police Station. No reason was advanced for his disappearance. The learned trial magistrate indicated that he found the complainant candid and truthful in her testimony. On the other hand, the trial court rejected the appellant's defence, and in my view, rightly so.

I am satisfied that the appellant's conviction was well merited. The sentence that was passed by the trial court cannot be faulted as same was not shown to be either harsh or excessive. Consequently, I dismiss this appeal.

DATED, SIGNED and DELIVERED at KISII this 13th day of June, 2008

D. MUSINGA

JUDGE

Delivered in open court in the presence of:

The appellant

and

Mr. Kemo, Senior Principal State Counsel for the Republic

D. MUSINGA

JUDGE