REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
Criminal Appeal Case 1 of 2008

GEORGE OCHIENG OWINO ……..…….. APPELLANT

-VERSUS-

REPUBLIC …….. RESPONDENT

JUDGMENT

Coram

Mwera Judge

Ms. Oundo for the State

Appellant in person present

CC. Raymond.

Before the lower court at Nyando, the appellant faced a charge under section 8(4) of the Sexual Offences Act, the Act, that on 5/1/2006 at South West Nyakach, Nyando, he unlawfully had carnal knowledge of BAN, a girl under the age of 16 years.

An alternative charge laid under section 11(1) of the same Act alleged that on the same date and place, the appellant unlawfully and indecently assaulted the same B A plea was taken on 8.6.2006. After trial, a conviction, with a 15 - year prison term followed – hence the present appeal. The petition contained grounds to the effect that the time between the commission of the alleged offence and arrest was so long that the appellant doubted his guilt. Two essential witnesses did not testify in the lower court and the evidence there was contradictory. There was no corroboration.

With the appellant electing to respond to the reply by the learned Senior State Counsel, Ms Oundo submitted that there was an opportunity for the appellant to commit the alleged offence when the complainant went to his home to bring back a cow which had strayed there. The appellant grabbed her and had unlawful carnal knowledge of her. She reported to her mother and medical evidence showed that she was defiled. There was sufficient proof and corroboration was not central to convict.

The appellant responded that his grandmother was not called to testify about the alleged incident and the screams by the complainant were not answered by her mother (PW2). That the medical evidence did not support what the complainant said and thus the whole prosecution case was weak.

The complainant, B, who was aged 17 years at time of her testimony, told the learned trial magistrate that on 5.1.2006 at about 7 pm., she went to drive back their cattle that had strayed in the appellant's compound. The appellant who was standing in a doorway grabbed PW1 and threatened to beat her for allowing their cows to wander into their compound. He pulled her into the house, removed her clothes and his and pushed her on a sofa set. The appellant held PW1 by the throat so that she could not scream. He inserted his male member into her female organ and had sex with her. All ended at 9 pm when the appellant escorted PW1 to her home. She found her mother and explained to her what had happened. The mother (PW2) directed her to take a bath. She washed her underwear and the following day she visited Kabati Health Centre – on 6.1.2006. On 7.1.2006 PW1 wrote her statement at Ogoro Police Post and got a P3 form. PW1 knew

the appellant as a neighbour but not a lover. The witness told the learned trial magistrate that also in the appellant's compound, but in a separate house, was his grandmother. She heard the commotion. PW1 was not implicating the appellant in the case because of a boundary dispute. Their two homes do not have a common border.

B's mother (PW2) had been at the local market on the material day, while she was at home. When PW2 returned at about 8 pm she did not find PW1 at home and her other daughter (B2) did not know where PW1 was. Cows were not at home either and so the witness went looking for them. She found them outside the appellant's house. Nobody was in attendance. PW2 drove them home. But while near the appellant's house she heard someone screaming as if in need. PW2 did not know whose screams they were. However, back in her own compound, B showed up. PW2 asked where she had been she just kept quiet. When pressed she disclosed that Ochieng, the appellant, had sexually assaulted her. PW2 returned to the appellant's home and met her grandmother who said that she had heard noises from the appellant's house. But when she knocked he refused to open. He even declined to meet PW2 with his grandmother. The following day PW2 escorted PW1 to a local hospital and also reported the incident at Ogoro Police Post. She knew the appellant, a villager and never PW1's lover. The two homes had no common boundary. Other 3 homes lay in between and the families had no grudges. PW2 produced a card to show that PW1 was born in 1990.

On 26.4.2006 P.C. Suleiman Mohamed (PW3) of Ogoro Police Patrol Base was on duty when the appellant brought some food to a relative in the cells there. He was wanted on a report of defilement as per a P3 form filled at the Base. He was arrested but he escaped the following day. He was later arrested again and charged.

Wilson Omariba (PW4) a clinical officer at Ahero sub-district hospital knew a colleague, Jack Were. The two had worked together before and so PW4 was familiar with Were's handwriting. PW4 produced a P3 form Were filled on 7.1.2006 (Exh. P2). The complainant (PW1) was aged about 16 years and her genitalia was normal – no bruises or tears. There was no discharge, blood or venereal disease. The hymen was not intact. Laboratory tests revealed some cells with spermatozoa but she was not pregnant.

In his defence the appellant told the learned trial magistrate that the complainant's cows came to his compound and damaged crops. He detained them. The complainant came and made to drive them away. The appellant took a stick and threatened to beat her. The animals somehow went back home and PW1's mother came. A quarrel ensued. She threatened to take action against the appellant. He was arrested on 26th April and was later charged.

In her judgment the learned trial magistrate considered all evidence and of the medical report, she noted that the complainant was almost an adult whose female organ could accommodate a male one without causing tears. Of course in the P3 form PW1 was given age 16 and a baptismal card showed that she was born on 1.3.90 (not so clear). Thus she fell in the bracket as per the law. The learned trial magistrate found that the appellant had a sexual encounter with PW1 and added:

"**I find that PW1 has given a firm and consistent account of how the accused just grabbed her when she was retrieving the cow that had strayed between the accused house and his kitchen. There is no evidence to indicate that PW1 could be implicating accused at all as there is even no evidence of bad blood between the two prior to the incident.**

I am hence inclined to believe that the accused committed the offence."

That was the opinion of the learned trial magistrate who saw and heard testimony by the witnesses, including the appellant. This court did not have such an opportunity and as it has been said many times over by this court and the Court of Appeal, such a firm finding on a matter of fact by a trial court should never be overturned by an appellate one unless on very strong grounds.

The learned trial magistrate believed the firm and consistent evidence of PW1 on what happened and she convicted and gave 15 years in jail under section 8(4) of the Act ***(See S. 124 Evidence Act – the proviso).***

It is noted that the learned trial magistrate drafted her judgment based on the earlier charge sheet which referred to the old section 145 (1) P.C. The record however shows that this was substituted with a charge under section 8(4) of the Sexual Offences Act on 17.7.2007. The appellant duly pleaded to the fresh charge sheet and hearing proceeded accordingly. In that case despite the oversight by the learned trial magistrate in her judgment the appellant was not prejudiced.

Section 8(4) of the Act gives a minimum sentence and that is what the learned trial magistrate handed down. This court has no room to alter it in anyway.

In sum, this appeal is dismissed.

Judgment accordingly.

Delivered on 13.10.2008.

J. W. MWERA

JUDGE

JM/hao