



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 93 OF 2016

MICHAEL OWINO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal from the original conviction in Criminal Case No. 1903 of 2015 in the Chief Magistrates Court at Eldoret by T. OLANDO, Resident Magistrate]

JUDGMENT

1. **MICHAEL OWINO** (*the accused*) was convicted on charge of defilement Contrary to Section **8(1)** as read with **8(2)** of the Sexual Offences Act, the particulars being that on **17th April 2015** at **TURBO** he intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of **VK***, a girl aged 11 years.

2. The appellant denied the charge but after trial in which 5 witnesses testified, he was convicted and sentenced to life imprisonment.

V.K (PW1) narrated to the trial court that on 17th April 2015, she was sent to go and look for his brother who had earlier on been sent and had not returned. On the way, she met the appellant who apparently was just standing outside the door, pulled her into his house. He told her not to make noise or else he would kill her.

She stated:

“He pulled me into the bed ad he removed my clothes and he removed his penis and he defiled me upto 3.00 am, and he threw me out of his house. The village elder was passing and he took me home.”

She told her mother what had happened and stated;

“I was able to see him because his house had light...”

3. The minor’s mother **BC** (PW2) produced the birth certificate showing the minor was born on 24th April 2004. She narrated, how at 7.00pm she had sent **VK** to look for her sibling who had been sent to bring food but had failed to return. However **V.K** also failed to return so PW2 began looking for her and even informed the village elder about her disappearance. **VK** was later on brought by the village elder (**ADRIANO**), while dressed in a white T-shirt which the minor said belonged to the appellant.

4. **DR. JANE YATICH** (PW3) who examined the minor noted that she appeared restless. The neck and chest were painful, and the hymen was torn and she had reddish swelling on her private parts. She also had a whitish discharge but there were no traces of spermatozoa although there was pus.

5. **APC MAURINE LIBASE NANDWA** (PW4) of **TAPSAGO AP Post** confirmed receiving a report from one village elder named **ADRIANO** and a child **VK** - that the child had been defiled the previous night.

Later the appellant was brought by the village elder and other elders and handed over to the police. Eventually appellant was transferred to **TURBO** Police Station where he was charged.

6. In his unsworn defence, the appellant stated that on 18th April, 2015 at about 8.30am, he sold bricks to a customer and made Ksh.525/-, so

he went and bought busaa. Later three people approached him saying they wanted bricks, and he accompanied them to the AP Post, where upon arrival he was arrested.

7. The trial magistrate in his judgment found that the medical evidence confirmed the minor was defiled and that the minor was able to identify her aggressor because there was light.

8. The appellant's defence was rejected and the trial magistrate stated that there was no reason to frame the appellant and stated;

“I find it difficult to believe the evidence of the accused which is full of falsehoods and mere denial. I see no reason why the girl could lie against the accused and I find her evidence corroborated...not challenged by he accused....”

The appellant contested these findings on grounds that the trial magistrate erred on holding that the appellant had failed to challenge the evidence presented yet there was extensive cross examination of the prosecution witnesses. Further that there was no basis for concluding that the minor was able to adequately identify the appellant as there was no evidence regarding the kind of light which was available.

It was also pointed out that a crucial witness, namely **ADRIAN**, who purportedly found her outside the appellant's residence at 3.00am, took her home and eventually accompanied her to make a report at the police station was not called as a witness, so that there was a possibility that **ADRIAN** was the culprit.

9. At the hearing of the appeal, **MR SAGASI**, on behalf of the appellant submitted that the investigating officer failed to cause the appellant to be examined and also failed to visit the scene of the incident to establish the veracity of the girl's evidence (especially the room where the incident purportedly took place) and confirm the type of light there was. Counsel emphasized that this was particularly important as the assailant was unknown to the girl before that night, and the issue regarding identification was crucial.

10. In response, Miss **ODUOR** on behalf of the **DPP** argued that the evidence placed the appellant at the scene and linked him the offence.

It was her contention that the complainant narrated how the appellant waylaid her and dragged her to his house, and she was able to see him because there was sufficient light. Further that there was close bodily contact which enabled her identify the perpetrator. Counsel also alluded to a T-shirt the girl was wearing and which purportedly belonged to the appellant, saying this was a definite give away, proving that indeed they were together.

11. From the evidence presented, there is no doubt that **VK** was defiled – the crucial issue was the identity of the perpetrator.

She had been sent out to look for her brother at 7.00pm – which would under ordinary circumstances be dark. Nowhere in the evidence was it suggested that she was able to see her aggressor outside at the place where she was waylaid.

Further, she did not claim to have known the appellant before that night. This then brought the issue of identity into sharp focus – how was she able to see him? She claimed there was light – but the source of light was not disclosed. Was it a candle, tin lamp, torch, electricity, bulb, natural light?

Then it was also not established what the position of this light was, in relation to the appellant [**See Charles O. Maitanyi V R 1986 Eklr.**]

Secondly was the issue of a crucial witness not called to testify whereas it is not mandatory that the prosecution calls a superfluous witness there is a category of key witnesses who when not called, may leave more questions regarding the veracity of the evidence presented by prosecution. **ADRIANO** was one such person – he was mentioned by all prosecution witnesses as the one who found PW1 standing outside the appellant's verandah at 3.00am and took her to her mother's house.

He later accompanied the minor and the mother to make a report to police, and eventually got to take the appellant to the police station. It was crucial that **ADRIAN** testifies to at least lend credibility to the claim that **VK** was outside the appellant's house at that odd hour of the night where was **ADRIANO** coming from at 3.00am to just happen on the girl? Could it be that he was the one who had all along been with the girl? Was the prosecution fearful that if he testified, his evidence would perhaps dent the minor's story? [**See ETYANG and 5 OTHERS Vs UGANDA**].

12. As a consequence of these two observations. I find that the conviction was unsafe and it is quashed.

The sentence be and is hereby set aside. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

Judgment read in open court.

DATED, SIGNED and DELIVERED at ELDORET this 1ST day of November 2019

H. A. OMONDI

JUDGE

In the Presence of; Mr Cheluget holding brief for Sagasi for Appellant.